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National Reporter System.—State Series.

THE  
PACIFIC REPORTER,  
VOLUME 77,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,  
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,  
UTAH, NEW MEXICO, OKLAHOMA, AND COURT  
OF APPEALS OF COLORADO.

PERMANENT EDITION.

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JULY 11—OCTOBER 17, 1904.

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ST. PAUL:  
WEST PUBLISHING CO.  
1904.

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**(77 PAGES.)**



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THE  
PACIFIC REPORTER.  
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**RICHARDSON & BOYNTON CO. v. UTAH  
STOVE & HARDWARE CO.**

(Supreme Court of Utah. June 17, 1904.)

**APPEARANCE—PROCEEDING CONSTITUTING AP-  
PEARANCE—JUDGMENT—COLLATERAL  
ATTACK.**

I. Under Rev. St. 1898, § 3334, providing that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, and which is substantially the provision of the Illinois statute, where a corporation domiciled in Utah and sued in Illinois appeared and filed a pleading asserting that it had been sued by a wrong name, without challenging the court's jurisdiction, it submitted to the jurisdiction of the Illinois court, precluding it from assailing the judgment in an action thereon in Utah.

Appeal from District Court, Salt Lake County: T. D. Lewis, Judge.

Action by the Richardson & Boynton Company against the Utah Stove & Hardware Company. From a judgment for defendant, plaintiff appeals. Reversed.

The admitted facts in this case are, in substance, as follows: Plaintiff is now, and has been for 10 years last past, a corporation, organized and existing under the laws of the state of New York, with its general office and principal place of business in the city of Chicago, state of Illinois. That defendant is now, and has been for 10 years last past, a corporation organized and existing under the laws of the state of Utah, with its general office and principal place of business in Salt Lake City, Utah, and is engaged in the stove and hardware business. "That for a period of three years prior to the 31st day of July, 1897, the defendant had been ordering by mail, and from plaintiff's agent at Salt Lake City, Utah, goods, wares, and merchandise from the plaintiff herein, and from other parties doing business in said city of Chicago, and also purchased goods in said city of Chicago by and through its officers and agents. That P. W. Madsen is now, and has been for more than ten years last past, the duly elected, qualified, and acting president and manager of the defendant corporation. That on various dates between July 31, 1897, and February 21, 1898, the

defendant purchased of and from the plaintiff various articles of goods, wares, and merchandise, which the plaintiff shipped to the defendant from Chicago, Illinois, and which the defendant received at Salt Lake City, Utah." It was further agreed as a fact that said Madsen, as president and manager of defendant corporation, was in Chicago, Ill., on August 31, 1898, for the purpose of attending to numerous business matters for and in behalf of the defendant corporation. On August 30, 1898, the plaintiff commenced an action in the circuit court of Cook county, Ill., against the defendant, under the name of the Utah Stone & Hardware Company, for \$2,000, balance alleged to be due plaintiff from defendant for goods, wares, and merchandise sold and delivered to defendant by plaintiff. On the same day summons was duly issued out of said circuit court, and on the next day, August 31, 1898, the sheriff of Cook county, Ill., served said summons on P. W. Madsen, president and manager of defendant corporation. Madsen was called as a witness in said case, and testified that he was in Chicago, Ill., on August 31, 1898, and that while there an officer served on him a paper which he understood to be a summons in a lawsuit against his company, the Utah Stove & Hardware Company. The defendant company appeared in the action by its attorney, and on October 20, 1898, filed the following plea: "And now comes the Utah Stove & Hardware Company, against whom the said Richardson & Boynton Company have sued out their said writ by the name of the Utah Stone & Hardware Company; says that said Utah Stove & Hardware Company is the correct and proper name by which it is known and called, and that the above name, to wit, the Utah Stove & Hardware Company, is the only name by which the said corporation has heretofore been named and called; that P. W. Madsen was not, is not, and never was, president, manager, or other officer of the Utah Stone & Hardware Company, as is by said writ supposed; and this the said Utah Stove & Hardware Company is ready to verify. Wherefore the said Utah Stove & Hard-

ware Company prays judgment on said writ, and that the same be quashed," etc. "Jacob J. Kern, Atty. for Utah Stove & Hardware Co." On May 2, 1900, plaintiff, by its attorney, served defendant's attorney with a written notice that on May 4, 1900, it would move the court in which the action was pending that "the summons and the sheriff's return thereon, and the declaration [complaint] in said cause, be amended by changing the letter 'n' to the letter 'v,' where the same occurs in the name of the said defendant, so as to make the name of the defendant in said cause the Utah Stove & Hardware Co." On said notice appears the following indorsement: "Received a copy of the above notice, together with a copy of the affidavit thereto attached, this 3rd day of May, A. D. 1900. Kern & Fullen, Attorneys for the Utah Stove & Hardware Company, Defendant." The affidavit referred to as being attached to the foregoing notice set forth the facts upon which the motion to amend was based, and alleged that the action was in fact against the Utah Stove & Hardware Company, and that there was no such corporation as the Utah Stone & Hardware Company. On the same day the motion and affidavit were filed, the court made and entered the following order: "On motion of plaintiff's attorney, it is ordered that all papers herein be, and the same are hereby, amended by changing name of defendant Utah Stone & Hardware Company to Utah Stove & Hardware Company." Thereupon plaintiff moved the court to strike defendant's plea from the files. Defendant's attorneys appeared in court and resisted the motion. The motion was sustained, and the plea stricken from the files. The defendant failing to plead further in the cause, a default in due time was entered, and judgment rendered against it, and in favor of plaintiff, for the amount shown to be due. The record contains the following entry: "Thereupon the defendant, having entered its exceptions herein, prays an appeal from the order heretofore entered herein striking the plea from the files to the Appellate Court in and for the First District of Illinois, which is allowed upon filing its appeal bond," etc. Plaintiff brought suit in the Third Judicial District Court of this state to recover on the judgment rendered against defendant in the Illinois court. The complaint is in the usual form, and contains the allegations necessary to a recovery in suits of this kind. The defendant answered, and, among other things, alleged "that it was and is a nonresident of the state of Illinois, and that it never was duly or regularly cited to appear, and did not appear; that the summons was directed against the Utah Stone & Hardware Company, and not against the defendant." The court, in its ninth finding of fact, found "that this defendant corporation was never duly and regularly cited to appear, and did not appear, in said action, and said court

never acquired jurisdiction over said defendant corporation therein, and said judgment rendered in said action against the defendant corporation was and is void." Judgment was accordingly entered in favor of defendant, dismissing the action. Plaintiff appeals.

Sutherland, Van Cott & Allison, for appellant. Whittemore & Cherrington, for respondent.

MCCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

Appellant contends that the respondent corporation voluntarily appeared in the action instituted in the Illinois court, and thereby consented to the jurisdiction over its person, and that the findings and judgment of the trial court are erroneous and not supported by the evidence. Respondent, on the other hand, insists that the appearance in the Illinois court was a special or limited appearance, and made only for the purpose of filing the plea set out in the foregoing statement of the case, and was not such as, under the law and practice of this state, which is admitted to be the same as in the state of Illinois, can be construed to be a general appearance for the purpose of giving the court jurisdiction to proceed to try the case and render a judgment. Section 3334, Rev. St. Utah 1898, provides as follows: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Under the foregoing provisions of the statute, which are admitted to be the same as the provisions of the Illinois statute, the question as to whether the appearance of respondent in the Illinois court was a general or special appearance depends somewhat upon the character of the paper filed by it in the Illinois court. At common law, when a defendant was sued by a wrong name, if he desired to take advantage of the error, he could do so only by filing a plea in abatement. If he failed to so plead, he waived the irregularity, and could not raise the question of misnomer in his plea to the merits: the rule being to dispose of all dilatory pleas before pleading to the merits. 1 Chitty, Plead. 440, 441. While there is no such pleading designated by our Code as a "plea in abatement," yet the several defenses that were permitted to be raised by this plea under the common-law practice still exist, and may be pleaded in the answer as new matter. Allison v. Chicago, etc., R. R., 42 Iowa, 274; Dutcher v. Dutcher, 39 Wis. 631; Plath v. Braunsdorff, 40 Wis. 107. Pomeroy, in his work on Code Remedies, § 698, says: "Defenses still exist of the same essential nature as those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of defendant does not forever bar the plaintiff from the further prosecution of his demand. They are governed,

however, by the same rules of procedure that regulate all the other defenses which may be relied upon by a defendant. There is no difference in the methods of pleading them or trying them, or of adjudicating upon them. The only difference is in respect to the conclusive effects of the judgments rendered upon them. In other words, so far as concerns the manner of alleging and of trial, all distinctions between these two classes of defenses have been abolished, and both have been placed in the same category." Phillips on Code Pleading, at section 238, says: "An answer in abatement sets up some matter of fact, the legal effect of which is to overthrow the pending action, without questioning the merits of the plaintiff's demand. Among the defenses that may be pleaded in abatement are misnomer. \* \* \* As at common law a plea in abatement was required to give the plaintiff a better writ of declaration, so under the new system such answer must furnish information—such as the true name of defendant, where misnomer is pleaded—that will enable the plaintiff to cure the defect by amendment, if it be a defect that can be so cured." Bliss on Code Pleading, § 345, says: "The Code requires the defendant either to demur or answer, and in his answer he is allowed to set up as many defenses as he may have. Only one answer is contemplated, and all the defenses which he elects to make must be embraced within it. Matter in abatement is as much a defense to the pending action as matter in bar." It will thus be observed that, whatever the pleading filed by the respondent in the Illinois court may be classed and denominated, it was in fact and in law an answer, and not a motion, as contended by respondent, and the filing of this answer constituted a general appearance.

Counsel for respondent have devoted much space in their brief to the discussion of the question of jurisdiction; claiming that the "defendant was not doing business in the state of Illinois, and hence not amenable to the process of its courts unless it voluntarily appeared in the action." As above stated, the appearance of defendant was, under the statute, a general appearance, and the court acquired jurisdiction of its person. And further, the respondent did not appear in the Illinois court for the purpose of raising the question of jurisdiction, nor did it at any time assail the jurisdiction of that court until after the bringing of this action. It is admitted that, at the time the action in the Illinois court was commenced, P. W. Madsen, as president and business manager of respondent company, was in the city of Chicago, state of Illinois, on business for and on behalf of respondent, and while there, as shown by the record, he was served with the summons referred to in the foregoing statement of the case. The defendant, in answer to the summons, appeared in court and filed the plea hereinbefore referred to, and which, it will be observed, in no way raised or challenged

the jurisdiction of the court, but merely asserted that respondent had been sued by the wrong name. The plaintiff admitted the error, and asked that the record be amended, and that the suit proceed against defendant company in its true name, which the court permitted to be done. The respondent, having thus submitted itself to the jurisdiction of the court, cannot now by a collateral attack be permitted to successfully assail the judgment therein rendered. 1 Black on Judgments (2d Ed.) 245, 246, and cases cited.

We are of the opinion that the judgment rendered against respondent in the Illinois court is a valid and binding judgment, and that the ninth finding of the trial court herein is erroneous and not supported by the evidence. The judgment is therefore reversed, with directions to said court to proceed in accordance with the views herein expressed; costs of this appeal to be taxed against respondent.

BASKIN, C. J., and BARTCH, J., concur.

#### STATE v. LA CHALL et al.

(Supreme Court of Utah. June 17, 1904.)

ROBBERY — INDICTMENT — SUFFICIENCY — CONSENT — VALUE OF PROPERTY — APPEAL.

1. Under Rev. St. 1898, § 4175, providing that robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear, an indictment not alleging the value of the money taken "in current United States silver coin" was sufficient, and an amendment inserting these words was not prejudicial to defendant.

2. The indictment having charged that the robbery was "from the person and immediate presence of one R., and by means of force and fear, and by threatening to shoot and kill him," and that defendants feloniously took a certain sum from the possession of said R., was sufficient, and the insertion of the words "and against his will" was unnecessary and not prejudicial.

3. Where, on appeal from conviction for crime, there was evidence which strongly tended to show the guilt of the accused, the appellate court cannot disturb the verdict.

Appeal from District Court, Box Elder County; C. H. Hart, Judge.

Albert La Chall and John Barry were convicted of robbery, and appeal. Affirmed.

Nels Jensen, for appellants. M. A. Breeden, Atty. Gen., and W. R. White, Dep. Atty. Gen., for the State.

BASKIN, C. J. The defendants, having been found guilty of the crime of robbery, were sentenced to three years' imprisonment in the penitentiary.

Section 4175, Rev. St. 1898, provides that "robbery is the felonious taking of personal property in the possession of another, from his person, or immediate presence, and against his will, accomplished by means of force or fear." The robbery for which the defendants were convicted was charged in

the information in the following terms: "That said Albert La Chall and John Barry on the 27th day of November, 1903, at Box Elder county, state of Utah, then and there willfully, unlawfully, and feloniously, from the person and immediate presence of one David Radcliff, and by means of force and fear, and by threatening to shoot and kill him, the said David Radcliff, they, the said Albert La Chall and John Barry, did feloniously take the sum of four and  $\frac{50}{100}$  (\$4.50) dollars, then and there in the possession and the property of said David Radcliff, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Utah." After the defendants had entered the plea of not guilty, and the jury had been impaneled and sworn, the district attorney, over the objection of the defendants, was permitted to amend the original information by substituting in place of the portion of the same above quoted the following: "That the said Albert La Chall and John Barry on the 27th day of November, 1903, at Box Elder county, state of Utah, did then and there willfully, unlawfully, and feloniously, from the person and immediate presence of one David Radcliff, and by means of force and fear, and by threatening to shoot and kill him, the said David Radcliff, *and against his will*, they, the said Albert La Chall and John Barry, did then and there feloniously take the sum of \$4.50, in current United States silver coin, then and there in the possession and the property of the said David Radcliff. \* \* \*

The appellants assign as error the insertion of each of the italicized phrases, on the ground that they embrace matters of substance, and not of form, and were not, therefore, admissible, under section 4694, Rev. St. 1898, as an amendment to the information, after the defendants had entered their pleas.

1. Under the statute of the state of Maine which provided that "whoever by force and violence, or by putting in fear, feloniously steals and takes from the person of another property that is the subject of larceny, is guilty of robbery" (Rev. St. c. 119, § 15), two persons were charged with having, in violation of said statute, taken from the person of one Emerson certain money and one silver watch and one watch chain. Upon conviction the accused made a motion in arrest of judgment on the ground "that the indictment contained no allegation that the money or watch and chain therein mentioned had any value. On appeal (State v. Perley, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564) it was held that the indictment was sufficient. In the opinion the court said: "It must be observed that there is no provision of this statute which makes the amount of property taken an essential element of the offense, and there is no statute in this state which creates degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken.

Nor is there anything in the nature of robbery, as defined by the common law, from which it appears that the value of the property has ever been deemed of the essence of the crime. \* \* \* Where the value is not essential to the punishment, it need not be distinctly alleged or proved. The jury must be satisfied, however, that the goods were of some value, and they may infer it without separate proof, either from the inspection of the articles, or from the description of them by the witnesses. 2 Bish. Cr. Prac. § 751; Com. v. Burke, 12 Allen, 182; Com. v. Lawless, 103 Mass. 425; State v. Gerrish, 78 Me. 20 [2 Atl. 129]." In the case of State v. Burke, 73 N. C. 83, it is held that it is not necessary to charge in an indictment for robbery the kind and value of the property taken. In the opinion the court said: "In robbery the kind and value of the property is not material, because force or fear is the main element of the offense. Thus, where a man was knocked down and his pocket rifled, but the robber found nothing except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. Rex v. Bingley, 5 C. & P. 002." In People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080, it is said: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear. Pen. Code, § 211. Robbery and grand larceny, when the property is taken from the person of another, or when the property taken is a horse, etc., do not depend upon the value of the property taken. Pen. Code, § 487. Hence it was unnecessary to specify the value of the personal property taken." People v. Townsley, 39 Cal. 405; State v. Burke, 73 N. C. 83; Williams v. State, 10 Tex. App. 8; State v. Howerton, 58 Mo. 581; McClain's Cr. Law, §§ 472, 481. There is no provision in section 4175 of the Revised Statutes of 1898 of Utah which makes the value of the property taken an essential element of the crime. As the value of the property alleged to have been taken was not of the essence of the crime charged, it was not necessary to allege it, and therefore the amendment of the original information by inserting the words "in current United States silver coin" was unnecessary and not prejudicial to the defendants.

2. Section 211 of the California Penal Code is the same as section 4175 of the Revised Statutes of 1898 of this state. In the case of People v. Riley, 75 Cal. 98, 16 Pac. 544, the indictment charging the defendant with the crime of robbery omitted the statutory words "and against his will." The Supreme Court of that state, in the opinion in that case, said: "The information charges that the defendants, on a day named, etc., did 'unlawfully, willfully, and feloniously, and by means of fraud and force, take from the person, possession,' etc. It is claimed the



judgment should have been arrested because the information is fatally defective, in that it omits the statutory words 'and against his will.' Pen. Code, § 211. But the information is sufficient. Pen. Code, § 960. A robbery 'accomplished by means of force and fear' must have been accomplished 'against the will' of the person robbed." *State v. Patterson*, 42 La. Ann. 934, 8 South. 529; *State v. Kegan*, 62 Iowa, 106, 17 N. W. 179; 1 *McClain's Cr. Law*, § 475. It is stated in 18 *Enc. Pl. & Pr.* 1227, that "it is generally held that an averment of force or intimidation implies that the property was taken against the will of the person robbed, and renders an express averment to that effect unnecessary." The original information sufficiently charged the defendants with the crime of robbery, and the insertion of the words "and against his will" was unnecessary, and not, therefore, prejudicial to the defendants.

3. The appellants contend that the verdict of the jury was not warranted by the evidence. There was evidence which strongly tended to show the guilt of the accused. Whenever this is so the appellate court has no authority to disturb the verdict.

The record fails to disclose any reversible error. It is ordered that the judgment be, and the same is hereby, affirmed.

BARTCH and McCARTY, JJ., concur.

#### DENVER PUBLIC WAREHOUSE CO. v. MUNGER.\*

(Court of Appeals of Colorado. May 9, 1904.)

WAREHOUSEMEN—BAILEES FOR HIRE—DUTIES—NEGLIGENCE—LIABILITY—LIMITATIONS—RECEIPTS—"OWNER'S RISK"—EFFECT—CONTRIBUTORY NEGLIGENCE.

1. In the absence of a special contract limiting their liability, warehousemen are ordinary bailees for hire, and are bound only for a want of ordinary care.

2. Where apples were stored with a public warehouseman for hire, the recital in a receipt given therefor that they were "at owner's risk" did not relieve the warehouseman from liability for injuries arising from his negligence in failing to protect them from unusually cold weather.

3. Where the owner of apples stored in defendant's warehouse had no reason to believe that the warehouse would not be properly managed and its temperature so kept that the apples would not be damaged by unusually cold weather, he was not guilty of contributory negligence in failing to protect the same.

Appeal from District Court, Arapahoe County.

Action by H. O. Munger against the Denver Public Warehouse Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. H. Hood, for appellant. Geo. F. Dunklee (O. E. Jackson, of counsel), for appellee.

\*Rehearing denied June 13, 1904.

GUNTER, J. December, 1898, appellee stored with appellant, who was conducting a public warehouse, a large number of boxes of apples. Certain of the apples were frozen during the February following, and for damages thus sustained appellee sued, had verdict and judgment, and therefrom is this appeal. The charge in the complaint was that appellant was negligent in caring for the apples, which charge there was evidence to support, and which charge the verdict of the jury sustained. For the purpose of discussion we are justified, therefore, in assuming that appellant was guilty of negligence as alleged.

1. The receipt given by the warehouseman, appellant, for the apples stored, had indorsed thereon "At owner's risk." It is contended by appellant that this provision of the receipt exempted it from liability for want of ordinary care in preserving the apples. In the absence of a special contract limiting their liability, warehousemen are ordinary bailees for hire, and as such bound only to common care and diligence, and liable only for want of such diligence and care. *Schmidt v. Blood*, 9 Wend. 268, 24 Am. Dec. 143, 145, and note. "As to warehousemen, it is also clear that they come within the general rule, and are bound only to take common and reasonable care of the commodity intrusted to their charge." *Story on Bailments* (8th Ed.) § 444. For loss or injury of a thing caused by the hired bailee's ordinary negligence or failure to bestow this ordinary or average care or diligence, he must respond. Such is the criterion in the absence of special modifying stipulations. *Schouler's Bailments and Carriers* (3d Ed.) § 101; *Van Zile, Bailments & Carriers*, §§ 203, 204. Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases such contracts should be construed strictly, with every intentment against the party seeking their protection. *Crew v. Bradstreet Co.*, 134 Pa. 161, 19 Atl. 500, 7 L. R. A. 661, 19 Am. St. Rep. 681, 682; *French v. Buffalo, N. Y. & Erie R. R. Co.*, \*43 N. Y. 108, 111, 112. Some of the authorities are that a contract cannot be made by the warehouseman absolving him from liability for the want of ordinary care. "But negligence in any degree being wrong, \* \* \* the better doctrine, supported by authority, would seem to be that a bailee cannot stipulate against liability for his own negligence." *Am. & Eng. Ency. of Law*, vol. 3 (2d Ed.) p. 750; *Lancaster County National Bank v. Smith*, 62 Pa. 47, 55. Some indication of the public policy of this commonwealth as to contracts of this nature is given by Const. art. 15, § 15 (section 505, *Mills' Ann. St.* 1891), making it unlawful for any person, company, or corporation to require of its employes, as a condition of their employment, any agreement releasing such person, company, or corporation

from liability on account of personal injuries received by reason of the negligence of such person, company, or corporation, and declaring such contracts null and void. In *Carr v. Schafer*, 15 Colo. 48, 55, 24 Pac. 873, 876, it was held that the law does not permit "a common carrier to contract against liability for his own negligence or that of his servants or employes." *Transportation Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757; *Union Pac. R. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986. The warehouse here maintained seems to have been a public warehouse as defined by our statute. 3 Mills' Ann. St. § 46401. In *Minnesota Butter & Cheese Company v. St. Paul Cold-Storage Warehouse Company*, 75 Minn. 445, 77 N. W. 977, 74 Am. St. Rep. 515, cheese was stored, and through the negligence of the warehouseman was injured. The receipt given by the warehouseman for the goods so stored contained, as a part thereof, "At owner's risk." It was contended that this provision of the receipt exempted the warehouseman from liability for the lack of ordinary care in the preservation of the cheese. It was held that such words did not protect against liability for the lack of ordinary care; that the law looked with disfavor upon a contract exempting the warehouseman from liability for the lack of ordinary care, and it would not so interpret the contract unless such were the express terms of the contract. The court, *inter alia*, said: "This receipt was issued by the defendant, and it is using it for its own benefit, and, if it is ambiguous, it must be construed against itself; and we think that an exception from a loss or damage through any particular cause will never be construed to cover a negligent loss of that character. \* \* \* This receipt does not in terms provide against the negligence of the defendant." It was held that the words "At owner's risk" did not exempt the defendant from liability. In the case we are ruling, appellee stored his apples with appellant for preservation. Appellant received them for that purpose. It was a bailee for hire for that purpose. In the absence of a special contract limiting its liability, it was its duty to use ordinary care. The jury found that it did not use such care. The receipt did not in terms provide against the negligence of the defendant. The words "At owner's risk" did not have the effect to release the defendant from the exercise of ordinary care. We do not go to the extent that a warehouseman cannot limit his liability. A ruling upon this question is not necessary to this decision. We do hold, however, that the words "At owner's risk" in this receipt do not operate to relieve appellant, the warehouseman, from the duty to exercise ordinary care in the preservation of the apples intrusted to his keeping. See, also, *Hunter v. Baltimore Packing & Cold-Storage Co.*, 75 Minn. 408, 78 N. W. 11.

2. It is said that appellee was guilty of

contributory negligence in storing his apples with appellant. The doctrine of contributory negligence applies to cases of this character. See note in *Schmidt v. Blood*, *supra*, and cases there cited; *Parker v. Union Ice & Salt Co.*, 59 Kan. 626, 54 Pac. 672, 68 Am. St. Rep. 383. But there is no proof of contributory negligence in this case. Appellee stored his apples in what appeared to be a warehouse suitable for the purpose sought. The negligence was in the management of the warehouse in not exercising ordinary care to protect the apples against the unusually cold weather. Facilities existed in oil stoves, but these, it seems, were not availed of. Appellee had no reason to suppose that the warehouse would not be so managed, and its temperature so kept, that his apples would not be damaged. In no degree did he contribute to the negligence which resulted in the loss of his apples.

3. Appellant complains of the rule laid down by the court for the admeasurement of damages. It would serve no useful purpose to discuss this instruction. If there be error in it, appellant sustained no damage from it, because if it be true, as the jury found, that appellant was guilty of negligence, appellee was entitled to damages in a larger sum than he recovered.

The judgment should be affirmed. Affirmed.

20 Colo.A. 74

#### ADAMS EXPRESS CO. v. ALDRIDGE.\*

(Court of Appeals of Colorado. May 9, 1904.)

LAW OF THE ROAD—NEGLIGENCE—COMPLAINT—SUFFICIENCY—DUTY OF TRAVELERS—ACTION BY MARRIED WOMAN FOR PERSONAL INJURIES—MEDICAL TREATMENT—EXPENSES—DAMAGES—INSTRUCTIONS—HARMLESS ERROR—EXCEPTIONS—ARGUMENT OF COUNSEL.

1. A complaint which alleges that defendant's servant, while driving along a street in the performance of his master's business, so negligently managed the horse and wagon that by reason thereof the wagon struck plaintiff while riding on her bicycle, causing bodily injuries, is a sufficient statement of the facts, within Mills' Ann. Code, § 49, as against a motion requiring plaintiff to state in what the negligence consisted, and in what manner the horse and wagon were negligently driven.

2. Evidence in an action by a traveler for injuries received by being struck by a wagon examined, and held to support a finding that the driver of the wagon was guilty of actionable negligence.

3. The duty imposed on travelers on a public highway requires each to so exercise the right to use the highway as not necessarily to injure the others traveling thereon.

4. When the law imposes and defines a duty, a complaint for a negligent breach thereof need not specifically plead it.

5. The giving of an instruction empowering three-fourths of the jury to render a verdict, as authorized by an unconstitutional enactment, is not prejudicial error, where the jury returned a unanimous verdict.

6. A general exception to an instruction containing good and bad law is insufficient.

\*Rehearing denied June 13, 1904.

7. A married woman suing for personal injuries received by reason of defendant's negligence is entitled to recover the expenses incurred for medical treatment charged against her, whether paid by her or not.

8. The argument of the counsel of a married woman, suing for personal injuries sustained by reason of being struck by defendant's wagon, negligently driven, inquiring of the jury how much they would take for having their wives run down in the public street, and made the spectacle of a crowd on the street, was not prejudicial.

9. In an action for personal injuries sustained by being struck by a wagon, there was evidence that defendant's driver attempted to pass plaintiff, riding a bicycle, on the street, and that, when the driver had reached a point about on the line with plaintiff, the hind wheels of the wagon swung toward her and knocked her down. *Held*, that an instruction that if the servant attempted to pass plaintiff, and plaintiff was struck by the wagon, the verdict should be for plaintiff, unless she was guilty of carelessness, was erroneous, as authorizing a verdict for plaintiff without a consideration of the circumstances of the case.

Appeal from District Court, Arapahoe County.

Action by Ina B. Aldridge against the Adams Express Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott, Valle & Waterman, W. W. Field, and T. J. Leftwich, for appellant. Yeaman & Gove, for appellee.

THOMSON, P. J. Action by appellee to recover for personal injuries received by her in consequence, as alleged, of the negligent conduct of a servant of the appellant. The plaintiff had judgment, and the defendant appealed.

The complaint alleged that on August 14, 1890, the plaintiff was riding a bicycle along a public highway in the city of Denver known as Fifteenth street; that at the same time a horse and wagon belonging to the defendant was being driven along that street by a servant of the defendant in the course and scope of defendant's business; that such servant, while thus engaged in the defendant's business, so carelessly and negligently managed the horse and wagon that by reason of his carelessness and negligence the wagon struck the plaintiff while riding on her bicycle, throwing her violently from the bicycle upon the street, bruising and wounding her, breaking her leg, and inflicting other serious injuries upon her. Before answering, the defendant interposed a motion for an order requiring the plaintiff to state clearly and specifically in what the alleged negligence of the defendant consisted, and particularly in what manner the horse and wagon were negligently driven or managed. The motion was denied, and the defendant excepted. It is contended that this ruling was erroneous, and that, while the general allegation in respect to negligence might be sufficient to

withstand a demurrer, it was not sufficient to withstand the motion interposed. Our Code provides that the complaint shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. Mills' Ann. Code, § 49. This is the only requirement of the Code respecting the manner in which the cause of action shall be set forth. The complaint should state the facts clearly and intelligibly, on which the plaintiff predicates his right to recover; and, when this is done, the pleading is sufficient. The facts to be pleaded, however, are ultimate, and not evidential, facts. The charge in the complaint before us is that the servant of the defendant, in the course of its business, while driving its horse and wagon over a public highway on which the plaintiff was riding her bicycle, so carelessly and negligently drove and managed the horse and wagon that by reason of his carelessness and negligence the wagon struck the plaintiff while on her bicycle, inflicting the injuries complained of. We have here a specific statement of the facts that the plaintiff was struck and injured by the defendant's wagon; that the horse was being driven, and the plaintiff was riding on a public highway; and that the horse and wagon were in charge of a servant of the defendant engaged in its business. These allegations are sufficiently definite and certain, but alone they would give the plaintiff no right of action. We have, however, an allegation of the further fact that the act producing the injury was carelessly and negligently done. While, from the mere fact of the collision, no presumption would arise, the act received character from the manner in which it was done, and in virtue of that character it was actionable. The allegation of negligence in the doing of an act is the statement of an ultimate and issuable fact, and, when the act is sufficiently described, the general characterization of it as negligent is enough. Bliss on Code Pleading, § 211a; 2 Thompson on Negligence, 1240; Palmer v. Railway Co., 76 Mo. 217; Railway Co. v. Jones, 86 Ind. 406, 44 Am. Rep. 334; Grinde v. M. & St. P. R. Co., 42 Iowa, 376; McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367.

However, the sufficiency of the complaint, as against a general demurrer, is practically conceded by defendant's counsel, but they vigorously insist that they were entitled to information as to the particulars constituting the negligence. They say that the plaintiff should have been required to show by her complaint in what respect the horse and wagon were negligently driven or negligently managed, in order that the defendant might be advised of what it had to meet. But unless the facts which the motion demanded were within the knowledge of the plaintiff, they could not have been stated, and to require their statement would have been to require an impossibility. The driver might have been asleep, or, instead of looking be-

¶ 7. See Husband and Wife, vol. 26, Cent. Dig. § 768.

fore him or observing what was in his way, his attention might have been fixed on some object in another direction, or he might have been heedless generally, and oblivious to his surroundings. Such things as these, and other possible elements of negligence on the part of the driver, if they existed, the plaintiff could not be supposed to know. Presumptively, it was not within her ability to furnish the specific facts for which the motion called, and any attempted explanation by her of the negligence would have been based on conjecture. But if she had undertaken to specify particular acts of negligence, she would have been confined in her proofs to those acts, so that, in case of mistake in her allegations, she would have been driven out of court, even if her cause was meritorious. *Ry. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948; *Wallace v. R. R. Co.* (Tex. Civ. App.) 42 S. W. 865. In the case of *Wilson v. R. R. Co.*, 7 Colo. 101, 2 Pac. 1, cited by defendant's counsel in support of their contention, there is an intimation that a plaintiff alleging negligence in general terms may be required to make his complaint more definite and certain, but it is expressly stated that the propriety of the requirement is dependent on the possession by him of the necessary information. And in *Orth v. R. R. Co.*, 43 Minn. 208, 45 N. W. 151, it was held that a motion to make the complaint, alleging negligence generally, more definite and certain, was properly denied, for the reason that it was not to be presumed that the plaintiff possessed the knowledge necessary to satisfy the motion. In *Grinde v. M. & St. P. R. R. Co.*, supra, negligence was charged in language similar to that employed in the complaint before us, and the denial of a motion to require greater definiteness and certainty in the statement was approved; the court saying that it was already sufficiently specific, and that to allege more would be to plead the evidence, which was not allowable. This case was cited with approval by our Supreme Court in *McGonigle v. Kane*, supra. In *Railway Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297, the charge was "that the defendant on the 31st day of May, 1889, without any fault or negligence on plaintiff's part, carelessly, negligently, and wrongfully ran its train over and upon the plaintiff's brown horse mule." A motion to make the complaint more specific, definite, and certain was overruled, and the ruling assigned for error. The following is from the opinion of the Appellate Court: "It will be seen at once that said language is not the general allegation of negligence, but it goes farther, and states the particular negligence, viz., the running of the train. This, we think, was sufficient, as the appellee could not be expected to know the exact manner the engineer or others in charge of said train operated the same. The language used in the complaint in this case is a sufficient allegation of the particular act

of negligence complained of, to withstand a motion to make more specific." A distinction is undertaken between the language of the complaint in that case and the language employed in the case before us. Counsel say: "There is no charge in the case at bar that the defendant's driver ran over the plaintiff. The charge is that the defendant 'so carelessly and negligently drove and managed said horse and wagon that by reason of said carelessness and negligence said wagon struck the plaintiff.' In the case cited from the Court of Appeals of Indiana there was a distinct charge that the defendant ran its train over the animal. Furthermore, that act, to wit, the act of running the train over the animal, was itself described to be and charged as negligent and wrongful. The distinction between the two cases is manifest." What reason for greater definiteness and certainty there was in the case at bar that did not exist in that case is not explained. The legal effect of the language employed in each is the same. A corporation can act only through its agents and servants. The negligence alleged against the railroad company was necessarily the negligence of its employes in charge of its train, and consisted in their operation and management of the train, so that the statement that the company negligently ran its train upon the mule was equivalent to a statement that its servants so carelessly and negligently managed its train that the train ran upon the mule. And we do not think that the case of *Railroad Co. v. Chester*, 57 Ind. 297, to which counsel refer us, lends support to their contention. The complaint there alleged that the plaintiff, his wife and children, were passengers on a car of the defendant, holding tickets entitling them to transportation from the city of Hamilton to the city of Connorsville, and that while on the car, to be carried between those points, without negligence on their part or on the part of any of them, the car was, by and through the fault, carelessness, and negligence of the defendants, their agents and employes, thrown from the railroad track over an embankment, causing injury to the plaintiff, his wife and children. The defendant had unsuccessfully moved below for an order requiring the plaintiff to make his complaint more specific, definite, and certain in regard to the charge of negligence and carelessness. The court, holding that the motion should have been allowed, said: "The general charge of the negligence and carelessness of the appellant was made and repeated again and again in appellee's complaint, but in no instance was this general charge predicated upon any alleged act of the appellant, either of commission or omission. What the appellant did, or omitted to do, of which it could be said that it was done, or omitted to be done, through the fault, negligence, and carelessness of the appellant, the appellee has failed to allege in

his complaint. Had the appellant negligently and carelessly constructed its line of railroad? Or had the appellant negligently and carelessly suffered its line of road to get and remain in bad repair and in an unsafe condition? Or, again, had the appellant's employes negligently and carelessly run its train of cars over its road? Or in what did the negligence and carelessness of the appellant consist, of which the appellee complained?" We think it clearly inferable from the foregoing extract that, if the complaint had alleged negligence and carelessness on the part of the defendant's employes in running its train of cars over its road, the allegation would have been held sufficient as against the motion, and such was the nature of the allegation in the complaint before us. See, also, *Scott v. Hogan*, 72 Iowa, 614, 34 N. W. 444. We think the motion was properly overruled.

After the overruling of the motion, the defendant answered, denying the allegations of the complaint, except as to the ownership of the wagon, and charging the accident to the plaintiff's own negligence. When the evidence was all in, the defendant moved the court to direct a verdict for the defendant. The request was refused, and counsel contend that the refusal was error. The grounds of the motion were that there was no proof of any duty, or the violation of any duty, owing by the defendant to the plaintiff, and that there was no proof of any specific negligent act. There was evidence that on the day of the occurrence of the accident the plaintiff was riding her bicycle westwardly on Wazee street, keeping well to the right of the street, and that the defendant's horse and wagon were proceeding rapidly on the same street behind her, and in the same direction with her; that the horse and wagon were driven by the regular driver of the defendant; that the wagon contained express matter to be delivered for the defendant at an outgoing train; that, when the plaintiff reached the crossing of Fifteenth street with Wazee street, she turned northwardly on Fifteenth street, and proceeded close to the curb on the right of the street; that the horse and wagon behind her also turned northwardly on Fifteenth street; that a street car was about the same time proceeding northwardly on Fifteenth street, about opposite to the horse and wagon; that there was ample room for the wagon to pass between the car and the plaintiff; that, when the plaintiff had gone to the distance of about 40 feet from the crossing, she was overtaken by the wagon, struck on the shoulder, knocked off her bicycle, and thrown to the ground by the right shaft of the wagon; and that while she was lying on the ground the right hind wheel of the wagon passed over her left leg, breaking it. Counsel's objection that no proof was made of any duty owing by the defendant to the plaintiff is fairly answered by themselves. In their

brief they say: "The plaintiff and defendant were each rightfully upon the public highway. Each had the same right of user as the other. Each owed the other the same duty." The duty devolving upon each was to so exercise the right to use the street as not unnecessarily to injure the other. The law imposes and defines the duty, and there was no necessity to plead it specially. There is some conflict between the statements of witnesses, but, if there was substantial evidence in favor of plaintiff's right to recover, to find what the real facts were belonged exclusively to the jury. Negligence is an inference from facts. If the driver was proceeding directly behind the plaintiff, presumptively he saw her; and if, seeing her, he unnecessarily drove to the side of the street which she was occupying, and so ran her down, the jury, from such facts, would be amply warranted in finding negligence. The driver, however, who was a witness for the defendant, testified that he did not see her. He also stated that he had a defect in his left eye. What the nature of the defect was, he did not say, but he said his right eye was sound. She was traveling to his right, so that, in so far as his ability to see the plaintiff was concerned, the condition of his left eye was not important. There may be negligence in a failure to see, and in this case it was for the jury to determine, from the relative situation of the parties, if they should believe that the driver did not in fact see the plaintiff, whether, in the exercise of ordinary care, he should have seen her, and was therefore chargeable with negligence in not seeing her. The failure of the driver of a horse to maintain a general observation of the road, so as to avoid collision with other travelers, has been held to be culpable negligence. See *Shearman & Redfield on Negligence*, § 645. We are clearly of the opinion that the evidence presented questions for the jury to pass upon, and that the direction of a verdict for the defendant would have been error.

The court, of its own motion, specially instructed the jury as follows: "It will be proper for nine of your panel to concur in a verdict in this case; and in case nine of you, or any number of over nine and less than twelve, should concur in a verdict, it will be the duty of each of the jurors so concurring to sign the verdict. In case all of you should agree on a verdict, then it will only be necessary for your foreman to sign the verdict." The following is the law followed by the court in the first portion of the instruction: "That hereafter in all civil cases in courts of record which shall be tried by a jury, not less than three-fourths of the number of jurors sitting in such case may concur in and return a verdict therein; and such verdict shall have the same force and effect as though found and returned by all of the jurors sitting in such case; but whenever such verdict is found and returned by less than the whole number of such jury, said verdict

shall be signed by each juror concurring therein." In *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403, that law was adjudged unconstitutional. But in this case the verdict which the jury returned was unanimous, and was signed by their foreman. It fulfilled all the requirements of the law as it existed independently of the unconstitutional enactment, and, if there had been no instruction on the subject at all, it would hardly have occurred to any one to question its validity, and certainly it could not have been successfully assailed. A lawful verdict having been rendered, we confess to an inability to understand how it may be invalidated by an instruction which authorized an erroneous verdict, but which the jury ignored. The instruction was not followed, but the law was; and surely the result of the jury's deliberations should not be set aside simply because, in reaching it, they acted lawfully, even though they disregarded an erroneous direction. Counsel seem to think that the instruction had the effect, in some way, of coercing the jury. They say there might have been three of the jurors who were opposed to a verdict in any amount against the defendant, but who, realizing the uselessness of opposition, might, for the sake of reducing the amount found by the other nine, have agreed with them in a compromise verdict. Why should the nine abandon their ground, when they were instructed that their finding would be just as good without the concurrence of the three as with it? And how could an instruction that the verdict need not be unanimous have a coercive effect to make it unanimous? While the instruction was erroneous, it evidently had no effect on the conduct of the jury, and was therefore harmless. But aside from all this, the question which the defendant asks us to determine is not properly before us. The instruction was partly good and partly bad. In authorizing three-fourths of the jury to sign and return a verdict, it was erroneous; but in directing a verdict, if unanimous, to be signed by the foreman, it was correct. It was met by one general exception, which was to the instruction as a whole. The exception did not distinguish the portion which was good from that which was bad, and was therefore wholly insufficient. *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Evidence was admitted over the defendant's objection of the expenses incurred for medical and nurse's services in consequence of the injury, and the court instructed the jury that they might take such expenses into consideration in estimating the plaintiff's damages. The defendant contends that the admission of the evidence and the giving of the instruction were erroneous. It appears that the charges for the services were against her, and that they were reasonable. Counsel say that her husband was liable for these bills, that they could have been collected from him, and that therefore they consti-

tuted no part of the damage she sustained. Under our laws a married woman may contract debts and incur liability in the same manner and with the same effect as if she were sole. Whether her husband might have been liable for these bills or not, the evidence warrants us in saying that she was; and, being liable, her liability was a legitimate constituent of the damage she sustained. Whether she had actually paid them is immaterial. They were nevertheless recoverable by her against the defendant. *D. & R. G. Co. v. Lorentzen*, 24 C. C. A. 592, 79 Fed. 291.

One of the grounds of the motion for a new trial was alleged improper remarks in argument on the part of one of the counsel for the plaintiff in his closing address to the jury. In the brief of counsel for the defendant the remarks are characterized as "inflammatory." The following is the language against which counsel protest, as contained in an affidavit filed in support of the motion: "Some of you, many of you, are married men and have families. How much would you take to have your wife run down in the public street, her leg broken, and her body covered with cruel bruises? How much would you take to have your wife run down in the public street and subjected to the curious gaze of the gaping crowd? How much would you take to have your wife knocked from her bicycle, rolled in the dirt in the public street, and humiliated and made the spectacle of a crowd on the public street?" Wide latitude is allowed an attorney in advocating his client's cause, and we are not prepared to say that by the language quoted the bounds of propriety were overstepped. The court had instructed the jury that in arriving at their verdict they might take into consideration the character and extent of the plaintiff's injuries, and the pain she suffered. Damages for personal torts are not measurable by fixed rules. The amount which may be recovered is left largely to the discretion of the jury. It is evident that, when counsel used the language complained of, the subject of his comment was the injury received by the plaintiff. There is nothing in this language denunciatory of the defendant, and we do not see that it was necessarily calculated to excite in the minds of the jury a feeling of hostility toward the defendant. Counsel was simply picturing the situation in such manner as to induce action by the jury favorable to his client in their estimate of the damages. But whatever might be said regarding the propriety of the remarks attributed to counsel, there was no objection interposed to them at the time they were made, nor was any instruction requested concerning them; and therefore, even if they might be the subject of censure, the defendant would not be entitled to a consideration here of the question respecting them which is now raised. *Schmidt v. Bank*, 10 Colo. App. 261, 50 Pac. 733; *Dry Goods Co. v. Martine*, 12 Colo. App. 299, 55 Pac. 743; *Cook v. Doud*, 14 Colo. 483,

23 Pac. 906; *Klink v. People*, 16 Colo. 467, 27 Pac. 1062.

With a single exception, to be now considered, the instructions which were given fully and fairly submitted to the jury all the questions of fact involved in the case. The law on the subject of negligence was clearly and correctly presented. But the court further instructed the jury as follows: "If the jury believe from the testimony in this case that while plaintiff was riding a bicycle on Fifteenth street, in the city of Denver, the servant or driver of the defendant in charge of defendant's horse and wagon, going in the same direction as the plaintiff, attempted to pass the plaintiff; that, in attempting to so pass, the plaintiff was struck by said wagon, and thereby injured, as alleged in the complaint—then the verdict of the jury must be for the plaintiff, unless, from the testimony in this case, they further believe that the accident to the plaintiff was the result of her own recklessness, carelessness, or want of ordinary care." An objection to the foregoing instruction is that there was no evidence that the driver was attempting to pass the plaintiff, or had any intention of doing so. A party's intentions are positively known only to himself. Others must infer them from his acts. The only method of disproving his statements as to what his intentions were is by what he actually did, and what he did may be so significant as to overcome his statements, even if given in the form of testimony. The driver denied that he was attempting to pass the plaintiff, but he did exactly what he would have done if it had been his deliberate purpose to pass her. He was an interested witness, and was endeavoring to exculpate himself. From his conduct, and all the circumstances surrounding the transaction, the jury might, notwithstanding his denial, believe that the collision occurred in an attempt by him to pass the plaintiff, and a finding that such was the fact would not be disturbed for want of evidence to support it.

But the instruction presents a much more serious difficulty. It made the defendant unqualifiedly responsible for the consequences of the attempt, if such attempt was made. According to it, liability for the injury followed the act, regardless of the circumstances under or the manner in which it was done. If the jury believed that there was such attempt, they had, under the instruction, but one thing to do, and that was to return a verdict for the plaintiff. They were not called upon to inquire further. It is true that undisputed facts may be such that the law affixes the stamp of negligence to an act, and it then becomes the duty of the court to so declare. Or, the state of the evidence being such that the controversy must be submitted to the jury, a finding may be warranted of special facts which in themselves, as a matter of law, would constitute negligence, and it then devolves upon the court

to so instruct the jury. The question arising upon this instruction, therefore, is whether the attempt to pass the plaintiff, if it was made, was, without more, conclusive upon the defendant of the negligence of its driver. It has been laid down in general terms that, when teams are passing along a public highway in the same direction, the rear team may pass the other, if there is ample room, but if, in attempting to pass, damage occurs without fault on the part of the advance team, the party causing the damage is liable for the consequences. *Knowles v. Crampton*, 55 Conn. 336, 11 Atl. 593. See, also, *Avegno v. Hart*, 25 La. Ann. 235, 13 Am. Rep. 133. An abstract legal statement occurring in a judicial decision must be interpreted by the connection in which it is found, and the facts to which it is applied. Ordinarily it would be a mistake to give it the effect of a hard and fast rule, to which all other considerations must yield. In *Knowles v. Crampton* the proposition was before the court as an integral part of the charge below to the jury, and the meaning it was intended to convey was determinable from the charge as a whole. The court dismissed the objection to it, which was that it dispensed with all necessity of proof of negligence, not because, as an independent proposition, it stated the law, but because it was part of a general charge, in which, to use the court's own language, "the jury were fully charged on the subject of negligence, and were distinctly told that negligence was essential to the defendant's liability." In *Avegno v. Hart* the defendant, driving recklessly, undertook to pass the plaintiff on the wrong side. The plaintiff, having the right to expect him to pass on the other side, pulled to the side taken by him, supposing that he was thus getting out of the defendant's way. The court said that the defendant was not in his proper place. It is by those facts that the statement in the opinion that, when a driver attempts to pass another on a public road, he does so at his peril, must be understood. The law of the road, as applicable to travelers proceeding in the same direction, is thus stated by Mr. Angell: "A traveler may use the middle or either side of the road at his pleasure, and without being bound to turn aside for another traveling in the same direction, provided there be sufficient room to pass on the one hand or on the other. If there be not sufficient room, it is the duty of the foremost traveler to afford it, on request made, by yielding an equal share of the road, if that be adequate and practicable. If not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment." Angell on Highways, § 340. See, also, *Bolton v. Colder*, 1 Watts, 360. The foregoing language would be meaningless if the amplest room for passing by the hindmost traveler, and the utmost care exercised by him in effecting it, would still fail

to exonerate him from liability for some accident resulting in injury to the person in advance. In *Burnham v. Butler*, 31 N. Y. 480, the liability of the defendants, as determined by the justice before whom the cause was first tried, was affirmed, not on the ground that an attempt of one to pass another on a public highway, of itself, renders him liable for the consequences, but on the ground that the defendants, in undertaking the passage, failed to use the precaution and care demanded of them under the circumstances. The opinion quotes the rule laid down by Mr. Angell, and distinctly recognizes the right, where conditions are favorable, of one traveler to pass another without risk of liability, if he exercise the proper caution in doing so.

We find some evidence in this record that, when the driver had reached a point about on a line with the plaintiff, the hind wheels of his wagon slued or swung toward her; that she was caught by the right hind wheel; and that all the injury she received was thus occasioned. The sole ground of the defendant's liability is the negligence of its driver. If there was sufficient room to pass the plaintiff with safety, it was not negligence to make the attempt. If the passage was conducted with such circumspection and care as existing conditions and circumstances required, and if the collision was the result of an accident which ordinary prudence could not have foreseen or prevented, the law affords the plaintiff no remedy.

The instruction complained of was complete within itself. It was not an abstract statement incorporated with a general charge in such manner that its meaning was controlled by the charge as a whole. The other instructions completely covered the question of negligence. But here was an additional one, independent of the others, by which it was undertaken to hold the defendant liable on a different ground. A belief formed by the jury that the collision was the result of an attempt by the driver to pass the plaintiff was, under that instruction, an end of the case. By its language it was wholly immaterial how careful the driver may have been, and it is impossible for us to say that in reaching their conclusion the jury looked farther than that instruction. Of course, if the plaintiff was knocked from her bicycle by the shaft of the wagon, the fact, if it was a fact, that the hind wheels slued, is of no manner of importance. That the sluing of the wheels may be of any avail to the defendant, it must not have been caused by carelessness in the manner in which the wagon was driven, and it must have been the sole cause of the injury. But all the facts were for the jury's consideration. Their attention should not have been diverted from any of them. The other instructions were amply sufficient to guide the jury in their investigation of all the questions properly

raised by the evidence, but this one authorized a verdict without any consideration of those questions.

The judgment must be reversed. Reversed.

20 Colo.A. 61

#### TINSLEY v. ATLANTIC MINES CO.

(Court of Appeals of Colorado. June 13, 1904.)

MORTGAGES — FORECLOSURE — PARTIES DEFENDANT—CLAIM OF PARAMOUNT TITLE.

1. Where, in an action for simple foreclosure of a mortgage, a party made defendant under an allegation that it held an interest subsequent and subject to the mortgage, disclaimed, saying that it claimed the mortgaged premises under a paramount title by tax lien, it could not be compelled, against its objection, to litigate its title in such action.

Appeal from District Court, Gilpin County.

Proceeding by Thomas Tinsley against the Atlantic Mines Company to foreclose a mortgage. From a judgment for defendant, plaintiff appeals. Affirmed.

F. J. Mott, for appellant. W. H. Davis, for appellee.

GUNTER, J. Appellant sued to foreclose a mortgage upon certain real estate, made appellee one of defendants to the action, and in his complaint therein, *inter alia*, alleged: "And the aforesaid defendants and the Atlantic Mines Company, a corporation, have, or claim to have, some interest or claim upon said property, or some part thereof, which interests or claims are subsequent and subject to the lien of plaintiff's mortgage." This is the only allegation of the complaint of any claim of appellee to the realty covered by the mortgage, and the only allegation therein showing any reason for making it a party defendant. Appellee answered separately, alleging that it owned certain of said real estate by virtue of a tax deed made August 29, 1893, based on a tax sale made July 11, 1890, for the delinquent taxes for 1889, concluding its answer with the prayer, "Wherefore this defendant asks to go hence without day." As appears from the complaint, the date of appellant's mortgage was November, 1889. The replication denies a tax sale at any time of said real estate, or that appellee has any interest therein under a tax deed. It attacks the validity of the alleged tax deed on account of certain infirmities in the procedure leading up to the tax deed, and because said real estate was not subject to taxation for the year 1889. It is not charged in the complaint or replication that the tax title of appellee was acquired by any fraud or collusion between it and the mortgagor, nor that the mortgagor has any interest whatever in the tax deed. The title of appellee claimed through its tax deed is independent, adverse, and paramount to the title of the mortgagor and the mortgagee. The alleged interest of appellee under the



tax deed is not derived from nor connected with the estate mortgaged, but is hostile to the claim of the mortgagor and mortgagee.

The effect of the answer of appellee was to disclaim that it had or claimed to have, any interest subsequent and subject to the lien of appellant's mortgage (*Roberts v. Wood*, 38 Wis. 68), and to aver that it had an interest paramount to the interest of the mortgagor and mortgagee, not derived from nor connected with the estate mortgaged. Its title to the property was deraigned through the tax procedure prescribed by our statute, which is a proceeding in rem. "A lien for taxes does not stand on the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the res without regard to individual ownership, and when it is enforced by sale pursuant to statute the purchaser takes a valid and unimpeachable title." *Osterberg v. Union Trust Co.*, 93 U. S. 428, 23 L. Ed. 964. "It may therefore be laid down as a rule that, when a tax is laid upon land as such, irrespective of separate estates, liens, or interests, and is collected by a valid tax sale, the purchaser will take a clean title liberated from the lien of a prior mortgagee." *Black on Tax Titles* (2d Ed.) § 425. "A tax title, from its very nature, has nothing to do with the previous chain of title; does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such titles, in proving it, goes no further than his tax deed. The former title can be of no service to him, nor can it prejudice him. It was well said by counsel in argument on this point that a tax sale operated on the property, not the title. In an ordinary case it matters not how many different interests may be connected with the title, what may be the particular interest of the party in whose name the property may be listed for taxation. It may be a mere equitable right. If the land be regularly sold for taxes, the property, accompanied with a legal title, goes to the purchaser, no matter how many estates, legal or equitable, may be connected with it." *Gwynne v. Niswanger*, 20 Ohio, 564; *Lebanon M. Co. v. Rogers*, 8 Colo. 34, 39, 5 Pac. 661. Upon the ground that its rights in the mortgaged premises as pleaded in its answer could not be determined in this action without its consent, appellee moved for an order of dismissal as to it. The order was made, and for its review the case is here.

The case presents but one question for determination; that is, whether the alleged paramount title of appellee against its timely objection made in the trial court could be litigated in this action. If it could not be, the ruling of the trial court dismissing the action as to appellee on its motion should be affirmed. In *Wells v. Francis*, 7 Colo. 396, 415, 4 Pac. 49, the court, among other questions, was considering whether certain par-

ties who claimed by title paramount to vendor and vendee were necessary parties to the proceeding to establish a vendor's lien. In holding that they were not, the court said: "The action of appellant against Francis for a vendor's lien was analogous to the proceedings for foreclosure of a mortgage. The equitable doctrine may be considered thoroughly established that the only necessary parties to the latter action are the mortgagor, mortgagee, and persons who have acquired rights or interests through them in the mortgaged premises. Sometimes, also, prior incumbrancers may be brought in for the purpose of liquidating their demands. But a person claiming adversely to the title mortgaged has no interest in the mortgage, cannot be affected thereby, and should not be made a party to the foreclosure suit. The rights of such a person cannot, except by consent, be litigated and settled in such proceeding. And a bill which undertakes to accomplish this object is bad on demurrer for misjoinder and multifariousness." As is seen from the excerpt, the reason upon which the ruling is made is that the party holding the paramount title has no interest in the mortgage, and cannot be affected by the foreclosure proceeding. The authorities cited in support of the decision are *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Croghan v. Minor*, 53 Cal. 15; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Chamberlain v. Lyell*, 3 Mich. 448, 459; *Roberts v. Wood*, 38 Wis. 68.

*Dial v. Reynolds* was an action to foreclose a trust deed, to quiet the title of the trustee, to remove the cloud cast upon it by one Reynolds, and to enjoin him from further prosecuting a certain action of ejectment. It was sought in the action to litigate the title of Reynolds which he claimed to be paramount to that of the trustor and trustee. The trial court sustained a demurrer by Reynolds for misjoinder and multifariousness, and dismissed the action. On appeal the judgment below was affirmed, the court, inter alia, saying: "It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case. *Barbour, Parties in Equity*, 493, and the cases there cited. This case was one of fatal misjoinder and multifariousness, and the proper course for Reynolds was to demur. *Story, Eq. Pl. § 284b.*" *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Chapin v. Walker* (C. C.) 6 Fed. 794, 2 McCrary, 175; *Farmers' L. & T. Co. v. San Diego St. Car Co.* (C. C.) 40 Fed. 105.

*Croghan v. Minor* was an action to foreclose a mortgage, and a defendant who claimed an interest in the mortgaged realty, not derived from nor connected with the estate mortgaged, but hostile to the claim of the mortgagor and mortgagee, was impleaded. Judgment below went against the mortgagor and this defendant. On appeal the court

said the action should have been dismissed as to this defendant, and reversed the case, with instructions to enter an order to such effect. Inter alia, the court said: "It is manifest that those claiming either legal or equitable estates adversely to that of the mortgagor are not proper parties to such proceeding, as they have no interest in the subject-matter of the action;" and as one authority for the ruling cited *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187. *San Francisco v. Lawton* (the opinion in which was written by Justice Stephen J. Field) was a suit to foreclose a mortgage, and it appeared in the course of the action that certain of the parties defendant claimed title under a patent from the Mexican government and a tax deed. The court said: "Adverse titles to the premises held by parties claiming by mortgage from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not subjects for determination in this suit;" and, speaking specially of the title claimed by the tax deed and patent, said: "Their validity is not the proper subject for determination in the present suit. \* \* \* If there were no other reasons than the assertion of these adverse titles for making them parties, the suit should have been dismissed as to them." The Supreme Court of California has adhered to the doctrine as announced in *Croghan v. Minor*, and has cited the case with approval in *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223; *Siehler v. Look*, 93 Cal. 608, 29 Pac. 220; and *Murray v. Etchepare*, 129 Cal. 318, 319, 61 Pac. 930.

In *Banning v. Bradford*—an action to foreclose a mortgage—the complaint alleged as to defendants other than the mortgagor that they "claim some estate or interest in said mortgaged premises accruing subsequent to the lien of said mortgage." One of these defendants set up a paramount title, and had a decree establishing such title. On appeal the case was reversed. The court, in the course of the opinion, said: "Such adverse claimant is a stranger to the mortgage and to the mortgaged estate, he has no interest in the subject-matter of the action. There is no privity between him and the plaintiff, and the plaintiff has no right to make him a party defendant for the purpose of trying his adverse title in the foreclosure suit. \* \* \* But the title set up by the respondents in their answer (the nature of which appears in the undisputed facts found by the court), being wholly adverse to that of the mortgagor, the appellant, when apprised that the respondents claimed nothing under the mortgage, that they had no interest in or lien upon the equity of redemption, and that, therefore, no action to foreclose such equity of redemption would lie against them, should have dismissed the action as to them." *Banning v. Bradford* has been cited with approval in *Churchill v. Proctor*, 31 Minn. 129;

16 N. W. 694; *Walton v. Perkins*, 33 Minn. 357, 23 N. W. 527; *Cheever v. Converse*, 35 Minn. 179, 181, 28 N. W. 217; *Wilson v. Jamison*, 36 Minn. 59, 61, 29 N. W. 887, 1 Am. St. Rep. 635.

*Chamberlain v. Lyell* was an action to foreclose a mortgage. Lyell, who claimed the mortgaged premises by title paramount, was made one of the parties defendant, and it was sought by allegations in the complaint to attack his title. He insisted that he had no interest in the subject of the action, as he claimed the mortgaged premises by title paramount, and asked that the action be dismissed as to him. This the trial court denied, and proceeded to try the action as to him. The plaintiff had judgment annulling Lyell's interest. The judgment was reversed, the court saying, inter alia: "So far as the mere legal rights are concerned upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interest under them subsequently to the mortgage; and the mortgagee has no right to make one who claims adversely to the title of the mortgagor a party defendant for the purpose of trying the validity of his adverse claim of title in this court." Cited with approval in *Summers v. Bromley*, 28 Mich. 125; *Ligare v. Semple*, 32 Mich. 439, 445.

In *Roberts v. Wood*—an action to foreclose a mortgage—Norton was made defendant, and answered, setting up title in himself subsequent to the mortgage, but paramount thereto under a tax deed. The lower court dismissed the action as to him, and in affirming its action in this respect the appellate court said: "The defendant Norton claimed under a title which, if valid, was paramount to the mortgage interest, although subsequent thereto in time. It is well settled that the validity of his title cannot properly be litigated in this action. \* \* \* It was said by Mr. Justice Paine in *Pelton v. Farmin* [18 Wis. 227], that, 'if the party alleged to claim some interest subsequent and subject to the mortgage claims none, he should disclaim, and the suit should be dismissed as to him.' Adverse claimants cannot be made parties to a foreclosure suit for the purpose of litigating their titles. The only proper parties are the mortgagor and mortgagee, and those who have acquired any interests from them subsequently to the mortgage. An adverse claimant is a stranger to the mortgage and the estate. His interest can in no way be affected by the suit, and he has no interest in it. There being no privity between him and the mortgagee, the latter cannot make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit." *Jones on Mortgages* (5th Ed.) vol. 2, § 1440. "It is not proper in a foreclosure suit to try a claim of title paramount to that of the mortgagor. The only proper object of the suit is to bar the mortgagor and those claiming under him." *Id.*

1445. See, also, Pom. Rem. & Remedial Rights, § 345; Maxwell on Code Pleading, p. 54. "It is almost the universal rule that questions of title cannot be litigated in the ordinary foreclosure suit, and hence that those claiming titles adverse or paramount to the mortgagor should not be made parties." Ency. of Pl. & Pr. vol. 9, p. 353. The doctrine that the question of paramount title cannot be litigated in a foreclosure suit has been applied in cases where the paramount title is through a tax deed issued subsequent to the giving of the mortgage sought to be foreclosed. *San Francisco v. Lawton*, supra; *Roberts v. Wood*, supra; *Pelton v. Farmin*, 18 Wis. 222; *Gage v. Perry*, 93 Ill. 176, 179; *Bozarth v. Landers*, 113 Ill. 181, 185; *Whittemore v. Shiell et al.*, 14 Ill. App. 414. One claiming under a tax deed as a paramount title is not a proper party to a proceeding for the foreclosure of a mortgage. See *Jones on Mortgages*, vol. 2, §§ 1440, 1445.

As we understand the authorities, they are that one who claims a title paramount to that of the mortgagor and mortgagee to the real estate covered by the mortgage, whether such title be by tax deed or otherwise, cannot be made a party defendant to the action to foreclose, and his paramount title therein be litigated, without his consent. He has no interest in the subject of the action, therefore is not a proper party thereto. The question before us is not whether a party who has voluntarily pleaded and voluntarily litigated his paramount title in a foreclosure suit would be bound by the judgment rendered therein. There is high authority that the parties would be concluded by such action as to all the rights litigated. The question here is whether this appellee could be compelled, against its consent, to litigate in this action its alleged paramount title to the mortgaged premises. After an exhaustive investigation of the question, aided by elaborate briefs of counsel, we are satisfied that appellee, under such conditions, could not be compelled to litigate its title, and that the trial court was right in dismissing upon its application the action as to it.

We will now consider cases cited by counsel as contra the conclusion we have reached.

*Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. Ed. 1012, was an action to foreclose a mortgage, and in the complaint it was charged that the mortgagor, by collusion with his brother, one Hall, had permitted the mortgaged realty to go to sale for delinquent taxes, and be purchased by Hall for the use and benefit of the mortgagor, with the purpose of defeating the mortgage. This attack upon the tax deed was a part of the relief sought in the complaint. The tax title thus sought to be attacked was not independent, adverse, and paramount, but subject to the mortgage, and properly a matter of investigation in the suit to foreclose the mortgage. The tax title there attacked was, in effect, one acquired

by the mortgagor subsequent to the mortgage with the intent to defeat it.

In *Hefner v. N. W. Mutual Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309, the facts were these: In an action to foreclose a mortgage the mortgagor and one Callanan were made defendants. By apt allegations in the complaint, any claim of Callanan to the mortgaged property was submitted for adjudication. Callanan, at the time, held a tax deed upon the mortgaged premises. Although served with process, he failed to appear to the action. A decree was entered, adjudging, inter alia, that Callanan had no claim or interest whatever in the mortgaged premises. Plaintiff, who deaigned title to the mortgaged premises through this decree, brought ejectment against certain defendants, claiming title through Callanan. It was contended by the defendants that the decree in the foreclosure suit could not and did not adjudicate the rights of Callanan held under the tax deed, because the title then so held by him was independent, adverse, and paramount to the title held by the mortgagor and mortgagee. This was a collateral attack upon the decree in the foreclosure suit. The court held that the complaint in the foreclosure suit by apt allegations made the claims of Callanan under the tax deed issues in the case; that the court had jurisdiction to determine the issues so presented; that by Callanan failing to object, on the ground of multifariousness, to his being made a party, he waived such objection, and the decree was binding upon him in any collateral attack thereon. The case differs from the one we are considering in two particulars. In the case before us the complaint contained no allegations attacking the tax title of appellee. Further, appellee objected in apt time to being made a party to the action. The court does not say that, if Callanan had objected, it could have compelled him to litigate his adverse title.

Illinois, where a tax title independent, adverse, and paramount to that of the mortgagor and mortgagee cannot be investigated against the will of the claimant in a suit to foreclose the mortgage, holds that a title under a tax deed procured by collusion between the mortgagor and its holder for the purpose of defeating the mortgage, being for the use and benefit of the mortgagor, is subject to the mortgage, and is a proper matter for investigation in a suit to foreclose the mortgage. This because such title, acquired by collusion between the mortgagor and mortgagee, subsequent to the giving of the mortgage, with intent to defeat the mortgage, is subject to the mortgage, and is not independent, paramount, and adverse to the estate of the mortgagor and mortgagee. The interest acquired by such tax deed is operated on by the mortgage, just as an estate in the mortgaged premises acquired by the mortgagor after the giving of the mortgage.

The complaint in such case attacks the tax title as subject and subsequent to the mortgage. *Churchill v. Proctor*, 31 Minn. 129, 18 N. W. 604, *Cummings v. Freer*, 26 Mich. 128, *Wilkinson v. Green*, 34 Mich. 221, and *Mendenhall v. Hall*, belong to this class of cases.

In *Kelsey v. Abbott*, 13 Cal. 609, 616, the adverse tax title was litigated under issues tendered by the pleadings and by consent of the parties.

In *Railroad v. Willard*, 61 Vt. 134, 17 Atl. 38, 21 L. R. A. 528, 15 Am. St. Rep. 886, the effect of a foreclosure decree arose in a collateral proceeding as to an adverse title that might have been litigated in the foreclosure proceeding. The question of the title was within the issues of the foreclosure proceeding. The court, in effect, held, as the question of such title might have been under the pleadings and by consent of the parties litigated in the foreclosure proceeding, the presumption would be that it had been adjudicated therein; and cites *Wilson v. Jamleson*, 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635. The latter case holds that in a proceeding to foreclose a mortgage a tax title may, if the question is within the issues, be litigated by consent of the parties.

*Railroad Company v. Willard*, belongs to the same class of cases as *Hefner v. N. W. Insurance Company*.

*Middletown Savings Bank v. Bacharach*, 46 Conn. 513, 522, falls within the same class of cases as *Mendenhall v. Hall*, *Cummings v. Freer*, *Wilkinson v. Green*, *R. R. Company v. Willard*, and *Churchill v. Proctor*. In each of these cases the interest claimed to be held by the third party was, according to the pleadings, not independent or paramount to that of the mortgagor, but subject to the interest acquired by the mortgagee from the mortgagor.

*Randle v. Boyd*, 73 Ala. 282, was an action to foreclose a mortgage, wherein the holder of a tax title by tax deed issued subsequent to the giving of the mortgage was made party defendant, and the legality of the tax title adjudicated. The holders of the tax title demurred for multifariousness, contending that the lower court had no right to adjudicate the validity of their claim under the tax deed. The demurrer was sustained, and the action dismissed as to them. The case was reversed, the appellate court ruling that the holders of the title under the tax deed were proper parties to the action. The case quoted approvingly *Banning v. Bradford*; *Dial v. Reynolds*; *Chamberlain v. Lyell*; 2d Jones on Mortgages, § 1440; and the following from such section in Jones on Mortgages: "The only proper parties are the mortgagor and mortgagee, and those who have acquired any interests from them subsequently to the mortgage. An adverse claimant is a stranger to the mortgage and the estate. His interests can in no way be affected by the suit, and he has no interest in it. There being no privity between him and the mortgagee, the latter

cannot make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit." The general principle is thus recognized, but the court concludes it inapplicable in the case before it, as we understand the case, for two reasons: Because the holder of the tax deed has a certain interest under the statutes of Alabama in the equity of redemption. This reason, under our statutes, would not apply because the holder of the title under the tax deed has no interest in the equity of redemption of the mortgagor, but, if his tax deed be valid, has an interest independent, adverse and paramount to any interest of the mortgagor. The second reason assigned by the court for permitting the tax title to be litigated was to avoid a multiplicity of suits. This reason, under the authorities, as we understand them, is not a sufficient one for departing the general rule. If it were sufficient to justify litigating an adverse tax title, it would seem to be sufficient for litigating any other adverse title in the foreclosure suit.

The foregoing are the principal cases cited by counsel for appellant.

To sum up, this action was one of simple foreclosure, appellee being made a defendant under the allegation that it held an interest subsequent and subject to the mortgage. It disclaimed such interest by the allegation that it claimed the mortgaged premises under a paramount title—that is, a tax deed—and objected to litigating such title under the foreclosure suit. The objection was sustained by the court dismissing the action as to it. We think the ruling of the court right, that appellee, under the facts, could not be compelled against its objection to litigate herein the title claimed by it under its tax deed.

Judgment affirmed. Affirmed.

20 Colo.A. 113

# BOWLING v. CHAMBERS et al.

(Court of Appeals of Colorado. June 13, 1904.)

NOTES—LIABILITY OF SURETY—REQUEST TO SUE MAKER — APPEAL—RECORD—AUTHENTICATION —DISMISSAL OF APPEAL —REDOCKETING AS PROCEEDING IN ERROR.

1. A record on appeal, authenticated by the judge instead of the clerk, is a nullity.

2. Where appellant fails to comply with Civ. Code, § 389, requiring the appellant to file in the office of the clerk of the Court of Appeals an authenticated copy of the record of the judgment appealed from by or before the third day of the next term of court, the appeal should be dismissed.

3. Under Mills' Ann. St. § 388a, providing that whenever the Supreme Court or Court of Appeals shall dismiss an appeal for lack of jurisdiction, and the court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk to enter the action as pending on writ of error, etc., the court may order a case wherein the appeal has been dismissed because of appellant's failure to file an authenticated copy of the record as required by Civ. Code, § 389, to be redocketed as a case pending on writ of error, although such a length of time has elapsed since the rendition of the

judgment that appellant could not sue out a writ of error.

4. Alleged error in dismissing a suit as to one defendant on the ground that summons had not been served upon him cannot be considered on appeal where the motion to dismiss, the affidavit in support thereof, and exception to the ruling of the court are not made a part of the record by bill of exceptions.

5. An agreement to extend time on a note, in order to have the effect of discharging the surety, must be supported by a sufficient consideration.

6. In an action on a note against the surety, testimony that defendant notified the payee after maturity that the maker had property which he was selling, and expected to leave the state, and that the surety wanted the note settled, or wanted the payee "to get it settled," was insufficient to show a request or demand that the payee sue the maker.

7. Instructions having no foundation in the evidence should not be given.

#### Error to Archuleta County Court.

Action by S. E. Bowling against C. W. Chambers and another. There was judgment for defendants, and plaintiff brings error. Reversed.

Chas. A. Johnson, for plaintiff in error.  
John F. Spickard (Calvin E. Reed, of counsel), for defendants in error.

MAXWELL, J. September 15, 1900, there was lodged in the office of the clerk of this court what purported to be an authenticated copy of the record in this case. Defendants in error, June 20, 1901, filed a motion to dismiss the appeal upon the ground that the record filed had been authenticated by the judge of the county court of Archuleta county, and not by the clerk, there being at the time of such authentication a duly appointed clerk. Plaintiff in error conceded this point to be well taken, and asked leave to withdraw the record for the purpose of having the same duly authenticated. This motion to dismiss was denied, and leave to withdraw the record granted. The record was withdrawn, and refiled November 7, 1901, authenticated by the clerk of the court below. November 29, 1901, defendants in error renewed their motion to dismiss, which motion was denied, with leave to renew and argue the same on final hearing.

The authentication of the transcript of the record is a clerical duty. In *McNevins v. McNevins*, 28 Colo. 247, 64 Pac. 200, the Supreme Court has said: "While the court may dispense with the services of the clerk and revoke the appointment, and then resume the power to perform clerical duties, yet so long as the appointment of the clerk, once made, is not revoked, the latter official alone, or by his deputy, has power to discharge the clerical duties of the office." The record filed herein, having been authenticated by the judge, was a nullity, and section 389 of the Civil Code, which requires the appellant to file in the office of the clerk of this court an

authenticated copy of the record of the judgment appealed from by or before the third day of the next term of the court, not having been complied with, the appeal should have been dismissed. *Perkins v. Boyd* (Colo. App.) 68 Pac. 1062, and *Moynahan v. Perkins*, Id., are in conflict with *Taylor v. Colorado Iron Works*, 29 Colo. 372, 68 Pac. 218, and the rule herein announced, and are hereby overruled.

Plaintiff in error invokes the aid of section 388a, Mills' Ann. Code, which provides: "Whenever the Supreme Court or the Court of Appeals shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appearing that the court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk, without additional fees, to enter the action as pending on writ of error, and thereupon all the proceedings shall be such as if the action had originally been brought to the court on writ of error." Defendants in error contend that, more than three years having elapsed since the rendition of the judgment herein, the court is as powerless to order the case redocketed on error as the plaintiff in error would be to now sue out a writ of error. We do not construe the above-quoted section of the Code to permit or command a redocketing of the case on error in a sense which would involve the issuance of a *scire facias* and proceedings incident to the commencement of a new suit by writ of error. The command is: "The court shall order the clerk \* \* \* to enter the action as pending on writ of error, and thereupon all the proceedings shall be such as if the action had originally been brought to the court on writ of error." The language indicates that it was the intention of the Legislature to provide a method to reach just such cases as this record presents; that the case should be considered as pending on error, and not on appeal, from the day when the record was filed; that it should not lose its place or number on the docket, and should be considered and determined, when reached, as if it had originally been brought here on writ of error.

The jurisdiction of this court to entertain this matter if it had come up on writ of error must be conceded, and we think that the case falls within the mandate of the above-quoted section of the Code. Such seems to have been the view taken by the Supreme Court in *D. & R. G. R. R. Co. v. Peterson*, 30 Colo. 77, 69 Pac. 578, where it is said: "The case was docketed as an appeal from the county court of El Paso county. This court has jurisdiction to review the judgment by writ of error, but not on appeal. In such circumstances our statute provides that the appeal shall be dismissed, and the case redocketed on error. Orders so providing are therefore entered. Mills' Ann. Code, § 388a." The motion to dismiss will be allowed, the clerk ordered to enter the action as pending

¶ See Principal and Surety, vol. 40, Cent. Dig. § 342.

on writ of error. Orders so providing are therefore entered.

This suit was commenced before a justice of the peace by plaintiff in error against C. W. Chambers and R. J. Chambers upon a promissory note. C. W. was not served with summons, did not appear, and suit was dismissed as to him by the justice of the peace. A jury trial resulted in a verdict and judgment in favor of R. J. On appeal to the county court, before the trial, the suit was again dismissed as to C. W., and a jury trial again resulted in a verdict and judgment in favor of R. J. Therefrom this writ of error is prosecuted. Twenty-five errors are assigned. Only those, however, relied upon by counsel in his brief will be considered, which challenge the action of the court in dismissing the suit as to C. W., the instructions to the jury given at the request of the defendant, and the sufficiency of the evidence to support the verdict.

C. W. entered a special appearance in the county court, moved a dismissal as to himself for the reason that summons had not been served upon him, which motion was supported by his affidavit. The motion to dismiss, the affidavit in support thereof, and exception to the ruling of the court thereon, are not made a part of the record by the bill of exceptions, and therefore the assignment of error based thereon cannot be considered. *Rudolph v. Smith* (Colo. App.) 72 Pac. 817.

There being no pleadings, we gain a knowledge of the facts from the evidence, from which it appears that the note sued on is for \$100, dated January 4, 1893, payable six months after date, to the order of S. E. Bowling, plaintiff in error, who is the wife of H. R. Bowling, who acted as plaintiff in error's agent throughout the transactions herein involved. It is conceded that R. J. signed the note as surety for C. W. R. J. defended upon the grounds: First, that after maturity of the note, without his knowledge or consent, the owner of the note granted an extension of time to the principal; second, that after the maturity of the note he notified the owner thereof that the principal was disposing of his property with a view of leaving the state, and that he wanted the matter settled up. With the general verdict in favor of defendant in error R. J. the jury returned answers to 12 questions submitted to them by the court at the request of counsel for plaintiff in error. These special findings were, substantially, that the note had not been paid; that there was due thereon \$185.93; that plaintiff agreed with the principal to extend the time of the payment of the note; that the principal did not pay, deliver, or give, or promise to pay, deliver, or give, to the owner of the note, anything of value, or any consideration whatever, for such extension. There is no conflict of authority as to the rule that an agreement to extend time, in order to have the effect of discharging the surety, must be supported by

a sufficient consideration. It must be a valid agreement between the maker and holder of the note. *Winne v. Colo. Springs Co.*, 3 Colo. 155; *Fisher v. Bank*, 22 Colo. 373, 45 Pac. 440; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685; *Brandt on Suretyship*, etc., § 342. The special findings clearly indicate that the general verdict in favor of the surety was not based upon the defense that the surety was discharged by reason of a valid agreement of extension, and it will not be necessary to consider the assignments of error based upon instructions to the jury upon this proposition.

No special findings were requested or made upon the second defense interposed by the surety. Upon this proposition the record discloses that R. J. testified that six months after the maturity of the note he had a conversation with Mr. Bowling, in the presence of his son, regarding the note. In this connection his testimony was: "Q. Will you state to the jury exactly what transpired at this conversation? A. Why, I notified Mr. Bowling that my brother had property, and that he was selling, and expected to settle up his business, as he was going to leave the state on account of his wife's health, and was able to pay it at that time, and I wanted it settled, and I told Mr. Bowling plainly that I wanted it settled." And on cross-examination: "Q. What was said about the note? A. I don't remember. I think I said, 'Mr. Bowling, I would like to have you present that note for payment, and settle it up.' Q. What else did you say? A. I told him that my brother was selling his property with the view of removing from the state, and I wanted him to get it settled." The foregoing is all his testimony upon this point. The son corroborated the above testimony. Mr. Bowling positively denies ever having had such conversation. At the request of defendant, over the objection of plaintiff, the court gave the jury the following instruction: "If you find from the evidence that R. J. Chambers was surety on said note, and was known as such at the time of the execution of said note to H. R. Bowling, agent for S. E. Bowling; and if you further find from the evidence that after the maturity of said note R. J. Chambers, the surety on said note, requested H. R. Bowling to proceed to collect the same, and that H. R. Bowling failed and neglected to do the same; that at said time C. W. Chambers, the principal maker of said note was in solvent circumstances; that afterwards he became insolvent—then you are instructed to find for defendant R. J. Chambers, and release him from all obligations under said note." It is said that authority for this instruction is found in *Martin v. Skehan*, 2 Colo. 615, wherein it was held that in an action in assumpsit upon a joint and several promissory note a plea by the surety to the effect that shortly after the maturity of the note he notified and requested the plaintiff to forthwith proceed and collect the

note of the principal, which was not done, that the principal afterwards became insolvent, and that the surety, through the defendant's laches, lost the indemnity which he would have had if the plaintiff had been diligent in the premises, was a good defense in law. We do not think the facts disclosed by the record bring this case within the rule laid down in *Martin v. Skehan*. There, it will be noted, the plaintiffs were notified and requested to forthwith proceed and collect the note. Here the surety said to the holder, "I want it settled, and told Mr. Bowling plainly that I wanted it settled." This comes far short of being a notice or request to forthwith proceed and collect the note, and may be said to be simply the expression of a wish or desire, which every honest man would entertain with reference to a pecuniary obligation resting upon him. In discussing this subject, Brandt, in his work on Suretyship, etc., § 240, says: "A notice to the creditor to sue, which will discharge the surety if not complied with, should be so clear and distinct that the meaning of the surety can be at once apprehended without explanation or argument." The Legislatures of many states have by statute provided that the surety may, by notice, require the creditor to proceed by suit against the principal, and a failure upon the part of the creditor so to do, and subsequent insolvency of the principal, discharges the surety. We have no such statute in this state. An examination of the authorities which support the rule laid down in *Martin v. Skehan*, *supra*, leads to the conclusion that the courts which have adopted the rule are not disposed to extend it; that it is not one to be applied with laxity; that to discharge a surety by reason of neglect to proceed against the solvent principal, on request, it must be shown that the creditor was requested to enforce the collection of the debt by "due process of law." A hint to sue is not sufficient. The request or notice must be clear and explicit, not liable to misapprehension or misunderstanding, and must be a positive direction to sue. *Goodwin v. Simonson*, 74 N. Y. 133; *Singer v. Troutman*, 49 Barb. 182; *Greenawalt v. Kreider*, 3 Pa. 264, 45 Am. Dec. 639. In the case under consideration, no request whatever was made by the surety upon the creditor to proceed in any manner to collect the note; simply an expression of the surety to the effect that he wanted the note settled. The instruction quoted above, under the facts disclosed by this record, was erroneous in that it assumes that there was evidence to support the contention that the surety had requested the creditor to proceed to collect the note. In *Fisk v. Greeley Electric Light Co.*, 3 Colo. App. 319, 324, 33 Pac. 70, 71, this court has said: "The instructions should in all cases be based upon the evidence, and an instruction, no matter how correct the principle which it may announce, that impliedly assumes the existence of evi-

dence which was not given, is erroneous. It is calculated to bewilder and mislead the jury by producing the impression that in the mind of the court some such state of facts as the instruction supposes may be inferred from the evidence given, or concealed within it. The authorities upon this proposition are numerous and uniform"—citing a number of cases.

For this error the judgment of the court below must be reversed. Reversed.

KROETCH et al. v. MORGAN, Judge.

(Supreme Court of Idaho. June 11, 1904.)

NONSUIT—WRIT OF MANDATE—REMAND FOR NEW TRIAL—DISMISSED ON OPENING STATEMENT—MANDAMUS FOR RETRIAL—ACTION.

1. At close of plaintiffs' evidence, court granted motion for nonsuit and entered judgment of dismissal, from which an appeal was taken. It was held on appeal that plaintiffs had made a *prima facie* case, and cause was remanded for a new trial. Cause came on for retrial before court with jury, and, after counsel for plaintiff had made his opening statement to jury, the court sustained a motion to dismiss the action and entered judgment of dismissal. Thereupon a writ of mandate was prayed for to require court to proceed and try said action as directed by decision of appellate court. *Held*, that the writ should issue.

(Syllabus by the Court.)

Application of Lawrence S. Kroetch and John B. Kroetch for a writ of mandamus to Ralph T. Morgan, judge of the district court of the First judicial district. Writ granted.

Charles L. Heitman, for plaintiffs.

SULLIVAN, C. J. This is an application for a writ of mandate to Hon. Ralph T. Morgan, judge of the district court of the First judicial district of the state of Idaho, and arises out of the suit of Kroetch Bros. et al. v. Empire Mill Company et al., reported in 74 Pac. 808. This case was tried in said district court by said judge in the year 1903; and after plaintiffs had introduced all of their evidence, on motion of the defendants, a judgment of nonsuit was entered. From that judgment the plaintiffs appealed to this court, and the opinion on that appeal is found as above stated. The judgment of nonsuit was reversed, and the cause remanded. The cause thereafter came on for trial before said court on the 16th day of March, 1904, sitting with the jury. After the jury had been impaneled the attorney for the plaintiffs made his opening statement to them, at the close of which counsel for the defendant interposed a motion for a judgment based on the opening statement of counsel, which motion was sustained by the court, and a judgment of dismissal entered, to all of which the plaintiff duly excepted. Thereupon an application was made for a writ of mandate to compel said judge to proceed and try said cause, on the ground that said court, by the dismissal of said ac-

tion, had failed to comply with the mandate of this court as expressed in the opinion aforesaid. In that opinion the court says: "Appellants assign 39 errors in the rulings of the court in this case, the last one of which is directed against the action of the court in granting a nonsuit. Without discussing the evidence introduced, suffice it to say that the court erred in taking the case from the jury. Plaintiffs had made at least a prima facie case. They had shown a purchase of the property and introduced a bill of sale therefor, and proved that they had taken possession of the property and its conversion by defendants. This court has held that it is reversible error to grant a nonsuit where the plaintiff has made a prima facie case. \* \* \* Since we have concluded that the judgment of nonsuit was erroneously entered, and that the case must go back for trial, it becomes our duty, under the law, to pass upon each of the 39 assignments of error. \* \* \* The judgment is reversed and the cause remanded."

It will be observed from the above quotation that the court held in that opinion that the plaintiff had made a prima facie case, and the cause was sent back to the district court for trial; and, as above stated, the court began the trial of said cause. After the impanelment of the jury counsel for appellant made his opening statement to the jury, which is before us; and, as we understand it, it covers and includes the facts presented by the evidence contained in the transcript on the former appeal. That being true, the court, in entering said judgment of dismissal at that time, failed to comply with the mandate of this court as expressed in said opinion. Upon that state of facts the peremptory writ of mandate must issue, directing said judge to proceed and try said cause. In the issuance of said writ the court does not intend to intimate that the trial judge intended to disobey the mandate of this court as expressed in said opinion, but had taken the view that, if every fact stated by counsel for plaintiff in his said opening statement to the jury were proved, the plaintiff would not be entitled to a judgment, and hence concluded that said statement contained other facts than those shown by the evidence presented on the former trial, and concluded that, if said statements were all established by competent evidence, plaintiffs would not be entitled to a verdict or judgment. But as this court had held, in its former opinion, that the plaintiffs' evidence established a prima facie case, it was the duty of the court to proceed and retry the cause.

It is suggested, under the provisions of section 4980, Rev. St. 1887, that this court should not issue the peremptory writ in the first instance on this application. The court considered that point, and concluded that by the terms of the former opinion of this court in said cause the trial court was directed to

proceed and try the same, and as it had failed to do so, and had entered a judgment of dismissal without trying the cause, the court concluded to issue the peremptory writ. The writ must be allowed, and it is so ordered. Costs of this proceeding are awarded to the plaintiffs.

AILSHIE, J., concurs.

STOCKSLAGER, J. With the facts as they exist in this case, I concur in the conclusion reached.

### RAUH v. OLIVER.

(Supreme Court of Idaho. May 11, 1904.)

APPEAL — QUESTIONS REVIEWABLE — PLEADING — STATEMENT OF CAUSE OF ACTION — NON-SUIT — PREMATURE ORDER.

1. The action of the court in overruling defendant's demurrer to a complaint cannot be reviewed on an appeal taken by the plaintiff.

2. Under the provisions of our Code of Civil Procedure, the technicalities of pleading, under the common law, have been dispensed with, and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass, or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when, upon his facts, he is entitled to no relief either at law or in equity.

3. Under the provisions of subdivision 5 of section 4354 of the Revised Statutes of 1887, it is error for the court to grant a nonsuit before the plaintiff has introduced his evidence, or offered to do so, and rested.

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Action by J. B. Rauh against E. W. Oliver. From a judgment for defendant, plaintiff appeals. Reversed.

James De Haven, Clay McNamee, and D. W. Bailey, for appellant. A. S. Hardy and Fogg & Nugent, for respondent.

SULLIVAN, C. J. This is an action to recover for carrying United States mail from Mt. Idaho to Florence, Idaho. It is alleged in the complaint that in December, 1898, one Holsclaw entered into a contract with the United States, wherein he contracted to carry the United States mail between Grangeville, Idaho, and Florence, Idaho, as a subcontractor under what was known as the Underwood mail contract, and that the respondent, Oliver, was one of said Holsclaw's sureties for the faithful performance of the duties imposed by said contract; that in August, 1899, said Holsclaw failed to comply with the conditions of said contract, and ceased to carry said mail on said route, and that the defendant, Oliver, as one of the sureties aforesaid, assumed the duties and conditions of said contract, and carried said mail from about August 1, 1899, to December 19, 1899; that on or about the last-named date respondent, Oliver, as surety as afore-



said, employed one A. G. Smith to carry said mail, and agreed to pay said Smith and his employes for such services the sum of \$2,200 per year, payable quarterly, and to pay the same out of the money received by him from the United States in payment for such services and expenses; that, immediately after making said contract and agreement, said Smith and plaintiff, relying on said promise, entered upon the duties of said contract, and began carrying said mail, and did carry the same for 92 days, and that during said time, and at the request of Smith, this appellant paid for and on account of expenses of said mail route the sum of \$175 in order to enable Smith to fill said contract; that said work and labor was reasonably worth, and the said Smith and said Oliver agreed to pay therefor, the sum of \$185, and on the 9th day of April, 1900, said Smith assigned to plaintiff \$360 of the money due on said contract, in two written instruments, which instruments are set forth in the complaint; that on or about the 10th day of July the said Oliver received from the United States in payment for carrying said mail on said route from December 19, 1899, to April 6, 1900, the sum of \$550, and that \$360 thereof was received to and for the use of plaintiff and belonged to plaintiff, and is now due him in payment for services rendered and money paid for expenses as hereinbefore alleged; that on or about the 6th day of April, 1900, and at divers times thereafter, plaintiff demanded payment of said sum from the defendant, and that on or about December 14, 1900, the defendant promised and agreed to pay the same in full; that Smith is now insolvent, and has been since September, 1900, and has resided outside of the state of Idaho. Then follows the prayer for judgment against the defendant for the sum of \$300 and costs of the action, and plaintiff waives any further sum due from the defendant. The waiver was made in order to bring the amount sued for within the jurisdiction of the justice's court where this suit was first instituted. To this complaint the respondent interposed a demurrer on numerous grounds, which demurrer was overruled by the court, and, as no appeal was taken from the order overruling the demurrer, the action of the court therein cannot be reviewed on this appeal. It appears from the record that said complaint was the second amended complaint filed in said action. After the overruling of said demurrer, the defendant answered, denying generally each and every allegation contained in the complaint, and set up four separate defenses. As a second defense, the appellant alleges that he received from said Holsclaw on or about July 10, 1900, on account of the mail contract mentioned in plaintiff's complaint, the sum of \$427.50; that he received no other or greater sum; that on or about December 19, 1899, said Smith contracted with the defendant to fur-

nish him with hay and grain to be used by him on the mail route mentioned in said complaint, and also hired from defendant horses to be used on said route, and agreed to pay the defendant the reasonable worth and value of such hay and grain as defendant should from time to time furnish him, and also the reasonable use and value of the services of said horses, and that said Smith agreed with defendant that he might and should retain the full value of said hay and grain and said horse hire for any amount that might become due Smith for services upon said mail contract, and deduct the same from any money that might come into the defendant's hands from the United States government from said contract; and it is alleged that under said contract he furnished Smith hay and grain of the value of \$272, and horse hire of the value of \$90, and hack hire of the value of \$155, which hack was furnished said Smith by said Holsclaw, and that said Smith agreed to pay said Holsclaw said sum, and authorized the defendant to pay it out of any money received on said mail contract, which sum defendant had paid. For a third defense, defendant sets up the claim of one Schwalbach of \$250 against said Smith, and alleges the assignment thereof to the defendant; and for a fourth defense the defendant sets up an assigned claim of one Pfeufer against said Smith of \$32. For a fifth and separate defense he sets up an assigned claim from one McKee against said Smith for the sum of \$35.60. To the third, fourth, and fifth separate defenses, plaintiff demurred on the grounds that said defenses did not constitute a defense or counterclaim to the plaintiff's cause of action. Said demurrer was overruled. On the issues thus made, a jury was impaneled to try said cause, and, before plaintiff had introduced his evidence and rested, on a motion of counsel for respondent a judgment of nonsuit and dismissal was entered. The appeal is from the judgment.

Several errors are assigned on which a reversal of the judgment is asked. The first we will consider is that the court erred in overruling the demurrer to the third, fourth, and fifth separate defenses. Those defenses are based on assignments of claims against said Smith, who is not a party to this action, and, under the allegations of the complaint, cannot be set up as a defense against the cause of action stated in the complaint. For that reason the court erred in overruling the said demurrer.

Considerable has been said in the argument of this case as to what kind of an action this is. It is contended that, in plaintiff's opening statement to the jury, counsel took the position that the action was for money had and received, and that the appellant in his complaint and in his brief has hopelessly jumbled his causes of action, and his ideas of the relief he is entitled to, and

of the grounds and means of securing relief. While we must admit that the complaint is not one that should be taken as a model, yet we think, under the provisions of Rev. St. 1887, § 4168, subd. 2, the complaint is sufficient. Said subdivision provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. Section 4020, Rev. St. 1887, provides that there is but one form of civil actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs. Under the provisions of our Code, the technicalities of pleading have been dispensed with, and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass, or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when, upon his facts, he is entitled to no relief either at law or in equity. See note to section 307, Code Civ. Proc. Cal.; Pomeroy's Remedies, § 65 et seq. We are clearly of the opinion that the complaint states a cause of action.

Counsel assigns as error the action of the court in granting a nonsuit and entering judgment of dismissal. It appears from the transcript that after the jury was impaneled the plaintiff introduced certain evidence. The defendant was sworn on behalf of the plaintiff, and testified, among other things, that he was a bondsman or surety for said Holsclaw, and that the defendant carried the mail something over about two months—November and December, 1899. The appellant was sworn as a witness in his own behalf, and testified that he carried said mail; that he was at Oliver's house, in Grangeville, and had an understanding with him in regard to this mail, and that said Smith was present; that the defendant "inquired into about how able they were to carry the mail"—whether they could fulfill the contract—and that "Mr. Oliver proved our sayings, and proved that we were able to do the carrying of the mail"; and that Oliver agreed to pay them \$2,200 per year for carrying the mail, and to pay every three months, and they then went to the post office and were sworn in, and went on the line, and he agreed that plaintiff should get his pay out of the first quarterly pay, and "that Smith should get his pay, and the mail should be carried on, and it should be paid the next quarter the same way." At this point in the examination the court suggested that that evidence showed that the contract was made with Oliver and Smith, and that the evidence proved a contract between Oliver and two other persons to carry the mail. Thereupon the witness testified that the defendant employed him to carry this mail on this mail route from Grangeville to Florence, Idaho. Thereupon the court said: "I can't go any farther with this case. No use to proceed." Thereupon the witness was

asked the following question: "What did you do, Mr. Rauh, from the 19th of December until the following April 6th, on the mail route, if anything?" Mr. Nugent: We object that is immaterial, and a class of evidence that cannot become material, because sought to be based upon a contract which they are not entitled to prove under the allegations of the complaint." The objection was sustained. Counsel for plaintiff then offered to prove that plaintiff worked on the mail route between Grangeville and Florence, and that A. G. Smith and the defendant agreed to pay him for such work and labor the sum of \$185; that plaintiff paid for and on account of expenses on said route \$175; that he received vouchers or duebills from said Smith for that amount, aggregating \$360, and that, after receiving these duebills or vouchers, the defendant agreed to pay them as soon as he received the pay from the government of the United States for the work performed; that defendant afterward received \$550, and that \$360 of it was due plaintiff, by reason of his 92 days' labor, and \$175 paid out in cash for expenses on the route, and that no part of said sum had been paid; and that when payment had been demanded the defendant denied that he had received the \$550, and, when shown letters from the United States Post-Office Department, he then admitted that he had received the money, and said he would pay plaintiff's claim in full, and offered to prove other matters in connection therewith, to which offer counsel for defendant interposed an objection. The court thereupon said: "There is no way, under the complaint, you can get this proof in. This is a contract between Smith and Oliver, and this contract now shown is between Rauh, Oliver, and Smith. The court will have to pass on this offer. The contract has been proven." Thereupon counsel for the plaintiff offered to prove other facts, which it is not necessary to state here. The court thereupon said: "I don't see how you can introduce the testimony. I don't see how the court could try the case upon this complaint for money had and received. In this case a nonsuit will be entered." Exception was thereupon taken by counsel for the plaintiff. Counsel for the respondent then suggested that he would like to have it appear that the plaintiff rested before the order of nonsuit was granted. The court thereupon said: "The court will sustain a motion, if you will make it, to dismiss the case and take it from the jury." Mr. Nugent, of counsel for defendant, said: "Do I understand the plaintiff has rested?" Counsel for the plaintiff replied: "The plaintiff has not rested. The Court: Have you anything further to offer? De Haven: We have, your honor." Mr. Fogg, counsel for defendant, then moved for a nonsuit and dismissal of the action upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and for other rea-

sons, and said motion was sustained by the court, and the jury was discharged. Thereafter certain conversation was had between counsel and the court, which it is not necessary to repeat here, as the jury had been discharged.

Section 4354, Rev. St. 1887, provides in what cases an action may be dismissed or a judgment of nonsuit entered, and is composed of five subdivisions. The dismissal of this case, if made under any of the provisions of said section, was under subdivision 5 thereof, which provides that nonsuit may be entered by the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury. That motion cannot be entertained by the court until all of the evidence of the plaintiff has been put in or offered, and the plaintiff rests his case. We think the evidence introduced and offered by the plaintiff made a prima facie case, and the court erred in granting a nonsuit and entering a judgment of dismissal. While we think the court understood that the plaintiff had rested, the record shows that he had not rested his case. Mr. De Haven said that the plaintiff had not rested. The court then said: "Have you anything further to offer?" Mr. De Haven replied: "We have, your honor." Thereupon counsel for defendant moved for a nonsuit and dismissal of the action, and the court thereupon granted the motion. Under the provisions of said section 4354, above referred to, a nonsuit should not be granted until the plaintiff rests his case, or fails to prove a sufficient case for the jury and rests.

The court also erred in not permitting the plaintiff to introduce evidence offered showing what he did on said mail route from December 19th, until the following April, and also erred in not permitting the plaintiff to prove that, after he had received the duebills referred to, the defendant agreed to pay them as soon as he received the pay from the government of the United States for the work performed, and that he did thereafter receive said pay from the government, and also to show that the \$175 advanced for expenses was spent with the consent and approval of the defendant, and that subsequent to the performance of said services the defendant had agreed to pay the full amount of the money so advanced, and for the work performed on said mail route.

For the reasons above given, the judgment must be reversed and set aside, and the cause remanded, with instructions to the trial court to sustain the demurrer of the defendant to the third, fourth, and fifth defenses set up in the answer, and for further proceedings in harmony with the views expressed in this opinion. The costs of this appeal are awarded to the appellant.

STOCKSLAGER, J., concurs. AILSHIE, J., took no part in the decision.

GATWARD et al. v. WHEELER et ux.  
(Supreme Court of Idaho, May 25, 1904.)

ATTACHMENT — WHAT AFFIDAVIT SHOULD CONTAIN.

1. An affidavit for an attachment must contain an allegation, in unequivocal language, that the debt sued on is due, before the writ of attachment should issue.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by W. H. Gatward and Thomas H. Follett, doing business as the Tekoa Meat Company, against E. W. Wheeler and Ella M. Wheeler. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. T. Stoll, for appellants. A. A. Crane and C. W. Beale, for respondents.

STOCKSLAGER, J. This case is here for review on two appeals from the district court of Shoshone county. December 14, 1903, plaintiffs filed their complaint in the district court, praying for a judgment against defendants for the sum of \$3,129.26. On the same day the clerk of the district court issued an attachment, and on the 29th day of December the sheriff returned the writ, with his service, showing he had levied on certain real estate in Shoshone county alleged to be the property of defendants. At the time of filing the complaint the plaintiffs caused to be filed an affidavit for attachment, to wit, "that the defendants are indebted to the plaintiffs in the sum of \$3,129.26, over and above all legal set-offs or counterclaims, upon an account for the reasonable value of goods, wares, and merchandise sold to defendants by the plaintiffs between January 1, 1903, and December 10, 1903, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property." On the same day the complaint and affidavit were filed, and undertaking in the sum of \$3,129.26 was also filed with the National Surety Company, a corporation of New York, as surety. The obligation in the undertaking is as follows: "The condition of the foregoing obligation is such that if the defendants above named recover judgment in said action, or if the attachment therein be wrongfully issued, the plaintiffs will pay all costs that may be awarded to defendants and all damages which they may sustain by reason of the attachment, not exceeding the sum specified in this undertaking." On the 4th day of January, 1904, counsel for defendants moved to set aside, dismiss, and quash the levy and service of the writ of attachment in said action, and to discharge the said writ of attachment heretofore issued herein, on the ground that the said writ of attachment was improperly and ir-

¶ 1. See Attachment, vol. 5, Cent. Dig. § 290.

regularly issued in said action, for the following reasons, to wit: "(1) That the complaint in said action does not state facts sufficient to constitute a cause of action against said defendants, or either of them. (2) That the affidavit for attachment filed in said action was defective and insufficient, in this: that it does not state that the indebtedness mentioned in said affidavit was due at the time of the execution or filing of said affidavit, or at the beginning of said action, or due at all. (3) That the undertaking on attachment filed in said action was defective, insufficient, and void, and not such an undertaking as required by the laws of the state of Idaho (the provisions of section 4304 of the Code of Civil Procedure of the state of Idaho, as amended by the act of the Legislature of said state approved on the 14th day of February, 1899 [Laws 1899, p. 250], and the act of February 23, 1899, regulating surety companies, found on pages 337, 338, 339, and 340 of the General Laws of the state of Idaho), \* \* \* and that said undertaking does not show, and was not accompanied with any evidence, documentary or otherwise, showing, *prima facie*, that the surety company mentioned in said undertaking had qualified to do business in the state of Idaho." On January 8th it is shown by the court proceedings that this case was placed on the calendar on motion of counsel for defendants, and the following order made: "At this day, on motion of C. W. Beale, Esq., of counsel for the defendants, this cause was ordered placed on the calendar, whereupon the demurrer of the defendants, and the motion of the defendants to discharge the attachment heretofore issued herein, came on to be heard before the court. \* \* \* After argument by counsel the said demurrer was sustained and the motion allowed." On the same day plaintiffs gave notice of their intention to appeal from the order dissolving the attachment, and filed their undertaking in the sum of \$6,300, being double the amount of the claim sued for, conditioned for the payment of all costs and damages that may be awarded against the plaintiffs. On the 9th day of January, 1904, the court made the following entry: "The motion of the defendants in the above-entitled action to discharge the writ of attachment issued in this action came on to be heard before said court on the 8th day of January, 1903, in open court counsel appearing for plaintiffs and defendants; and the court, being fully advised in the premises, makes its order granting said motion. Wherefore it is hereby ordered that the said writ of attachment heretofore issued in the above-entitled action be, and the same hereby is, discharged. Done in open court this 9th day of January, A. D. 1904. R. T. Morgan, District Judge." From this order an undertaking was filed in the sum of \$6,300, double the amount involved in the suit, to stay proceedings on the attachment. On the 9th day of January, 1904, the following

bill of exceptions was settled and allowed: "Be it remembered that on the 8th day of January, 1904, the above-entitled cause came on for hearing upon defendant's motion to discharge the writ of attachment herein, and after argument by counsel for respective parties the court granted said motion; that thereafter, and on the 9th day of January, 1904, the defendants presented to the court an order discharging said attachment, dated the 9th day of January, 1904. Thereupon the counsel for plaintiffs objected to the signing of said order as of date January 9, 1904, and requested the court to sign said order discharging said attachment as of date January 8, 1904, which said request the court refused, and signed said order as of January 9, 1904. To the refusal of the court to sign said order as of January 8, 1904, as requested, plaintiffs excepted, and the exception was allowed. The foregoing bill of exceptions is signed and settled by the court this 9th day of January, 1904. R. T. Morgan, Judge." On January 8, 1904, a certificate signed by John H. Meyer, Insurance Commissioner for the state of Idaho, was filed in the district court of Shoshone county, stating that the National Surety Company, 340 Broadway, New York, N. Y., is duly licensed to transact business in the state of Idaho until April 30, 1904.

From this record it will be seen that the only question before us for determination is the sufficiency of the various steps taken in aid of the attachment proceeding. It is urged by counsel for respondents in support of his motion that the affidavit is defective, in that it did not allege that the debt sued upon was due at the time of making and filing the affidavit, and in support of this contention he cites *Kerns v. McAulay* (Idaho) 69 Pac. 539. The above decision was rendered by this court June 4, 1902, and, in passing upon an affidavit similar in terms to the one under consideration, this court, speaking through Mr. Justice Sullivan, says: "Said statute, in terms, does not require the affidavit to state that the indebtedness is due, but by necessary implication it clearly requires it." We have carefully reviewed the authorities cited by counsel for appellant, to wit, *Drake on Attachment*, par. 97; *Drake on Attachment*, § 107; *Weaver v. Hayward*, 41 Cal. 117; section 4303, Rev. St. Idaho 1887, subd. 1; *Trobridge v. Sickler*, 42 Wis. 417, and cases there cited; 2 *Chitty's Pleadings*, 385; *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669, and cases cited; *Wilcox v. Jamieson* (Colo. Sup.) 36 Pac. 902. We find nothing in these authorities that we think would warrant us in changing our views expressed in *Kerns v. McAulay*. The attachment law is severe enough in its terms in this state, and we think the affidavit should state in unequivocal language that the debt is due, before the writ should issue. It certainly cannot be said that under the terms of the statute a writ of attachment can le-

gally issue until the debt is due, and, this being true, it was evidently the intention of the Legislature that such fact should be shown by the affidavit.

Other errors are assigned, but, as our views above expressed entirely dispose of the question of the sufficiency of the affidavit for attachment, we deem it unnecessary to pass upon them.

The order of the court appealed from is affirmed, with costs to respondents.

SULLIVAN, C. J., and AILSHIE, J., concur.

**BOISE CITY IRRIGATION & LAND CO. v. STEWART, Judge, et al.**

(Supreme Court of Idaho. May 21, 1904.)

CONSTITUTIONAL LAW—TITLE TO ACT—PUBLIC WATERS—REGULATION OF APPROPRIATION—OWNERSHIP IN WATER—LOCAL AND SPECIAL LAWS—STATE ENGINEER—HOW PAID—COSTS OF MAPS AND PLATS—STATE ENGINEER TO FURNISH MAPS AND PLATS—REGULATING PROCEDURE—VESTED RIGHT IN PROCEDURE—RETROSPECTIVE LAW—EVIDENCE IN WATER SUIT—APPOINTMENT OF REFEREE.

1. The title to an act entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of said waters and the priority of such rights," approved March 11, 1903 (Sess. Laws 1903, p. 223), held sufficient to include all of the provisions of said act particularly referred to in this proceeding, and not repugnant to the provisions of section 16 of article 3 of the Constitution of Idaho.

2. The term "public waters" as used in said act refers to all water running in the natural channel of the streams, and the state may by proper legislation regulate the appropriation and use thereof.

3. The private rights to the use of such waters are rights to use the same, and not an ownership of them while they are flowing in the natural channel of the streams.

4. The title of said act is sufficient to include provisions for the appropriation of such waters, and the settlement of the priorities of rights to the use thereof.

5. The provisions of sections 4 and 5 (pages 228, 229) of said act are not repugnant to the provisions of section 2 of article 5 of the state Constitution.

6. Said act is not a local or special law within the meaning of subdivision 3 of section 19 of the state Constitution, and is not repugnant to sections 2 and 26 of article 5 of the Constitution.

7. The work required to be done by the State Engineer under the provisions of section 33 (page 246) of said act must be paid for by the state, and that done under the provisions of section 37 (page 249) must be paid for by parties to the action.

8. In an action to determine the rights and priorities to the use of water, when the defendants file cross-complaints and ask for affirmative relief, the awarding of costs is in the sound discretion of the court.

9. Under the provisions of said section 37, the State Engineer is only entitled to recover his actual and necessary costs for the work performed by him, and any party to the action may contest his right to recover the amount claimed by him, and the court should only allow his actual and necessary costs.

10. That provision of said section which provides that the "judge of such court shall re-

quest the State Engineer to make," etc., is directory and not mandatory, and that matter is left in the sound legal discretion of the judge.

11. The state has the right to prescribe reasonable rules and regulations whereby the rights and priorities of appropriators to the use of water may be settled, and to require them to pay the necessary costs incurred therein.

12. If it is shown that such maps and plats are incorrect in any material particular as to the rights of any of the parties to the suit, the State Engineer is not entitled to recover such party's pro rata share of the cost of preparing the same.

13. No person has a vested right in any particular mode of procedure for the enforcement or defense of his rights, and if, before the trial of a cause, a new law as to procedure is enacted and goes into effect, it will from that time govern and regulate the proceedings, unless the statute provides to the contrary.

14. The Legislature has authority to provide by statute that the statements, maps, and plats referred to in section 37 of said act should be accepted as evidence on the trial of actions to establish rights to the use of water and the priority of such rights.

15. The law of evidence is a part of the remedy, and is within legislative control.

16. Under the provisions of section 4493, Ann. Code Civ. Proc. 1901 (Sess. Laws 1901, p. 132), the court or judge has authority to appoint a referee to take the testimony in an action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby.

Stockslager, J., dissenting.

(Syllabus by the Court.)

Application by the Boise City Irrigation & Land Company against George H. Stewart, judge, and Norman M. Ruick, referee, for a writ of prohibition. Writ denied.

Wood & Wilson and Hawley, Puckett & Hawley, for plaintiff. Rice & Thompson, Richards & Haga, Frank Smith, and Wyman & Wyman, for defendants. John A. Bagley, Atty. Gen., amicus curiae.

SULLIVAN, C. J. This is an original application in this court for a writ of prohibition to prohibit the district court of the Third Judicial District of the state of Idaho, in and for Canyon county, and Norman M. Ruick, Esq., master and referee appointed by said court, from proceeding to take the evidence in that certain cause in said court entitled "The Farmers Co-operative Ditch Company, a Corporation, Plaintiff, v. The Boise City Irrigation & Land Company et al., Defendants, and from determining said cause or rendering any judgment therein in any way based upon the report of the State Engineer, or the trial, findings, or conclusions of said referee and master, which action was commenced on the 20th day of August, 1902, for the purpose of adjudicating the priorities to the waters of Boise river. This proceeding is brought by the Boise City Irrigation & Land Company, a corporation, one of the defendants in the above-entitled suit. Many of the defendants have appeared in said suit and filed answers and cross-complaints,

[ 15. See Constitutional Law, vol. 10, Cent. Dig. § 260.

claiming the prior right to the use of the waters of said river to the extent of the capacity of their ditches and appropriations.

On the 23d day of May, 1903, that court made an order under the provisions of section 37 (page 249) of an act entitled "An act to regulate the appropriation and diversion of the public waters and establishing the rights to the use of such waters and the priorities of such rights," approved March 11, 1903 (Sess. Laws, 1903, p. 223), which order was made without any objection, and is as follows, to wit: "That the State Engineer shall make an examination of the Boise river, and of the canals and ditches diverting water therefrom, and of all the land being irrigated by said canals and ditches and other works, and the lands susceptible of reclamation therefrom, and prepare a map showing such river, canals, and ditches, and the lands thereunder, and a statement which shall give the condition of such works, their capacity, and the amount of land irrigated from each of such canals, ditches, and other works, and other essential features in relation to the reclamation of the lands tributary to such stream, for use upon the hearing of said cause, as provided in said act." And it was further ordered that the cost of making such examination and preparing such map or maps should be paid by the parties to said suit, as provided in said act.

Thereafter, on the 27th day of May, 1903, a certified copy of said order was served upon Wayne Darlington, Esq., State Engineer of the state of Idaho, together with the following notice signed by the judge of said court:

"To Wayne Darlington, Esq., State Engineer, Boise, Idaho—Dear Sir: You are hereby requested to make an examination of the Boise River and of the canals and ditches diverting water therefrom, in accordance with the order of this court made on the 23rd day of May, A. D. 1903, a copy of which is hereunto attached, for use upon the trial of the cause now pending in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, in which the Farmers Co-operative Ditch Company is plaintiff, and the Riverside Irrigating District et al. are defendants, said cause being a suit for the purpose of adjudicating the priorities of the rights to the use of water from said Boise River."

Thereafter, on the 20th day of June, 1903, the court made the following order: "This cause coming on further to be heard upon the pleadings, and the issues in this cause having this day been settled, and the cause now being ready for trial and the taking of evidence: Now, for the information of the court, and the court deeming it a proper case therefor, announces to the attorneys in said cause that he is about to appoint a referee and master in said cause to take the evidence therein and report the same to the court, with conclusions of fact and conclusions of law

therefrom. Whereupon the New York Canal Company filed its objection in writing to the appointment of a referee herein, which objections were by the court overruled, to which ruling counsel for the said New York Canal Company duly excepted, and were given five days to prepare and serve bill of exceptions. And there being no further objections made by any of the parties to said suit to the appointment of a referee herein, and there being no objections made to the qualifications of Norman M. Ruick as such referee, it is hereby ordered that Norman M. Ruick be, and he is hereby, appointed referee and master in said cause, to take the evidence and report his conclusions of fact and law therefrom to the court, for the information of the court. It is further ordered that said referee proceed to take and hear the evidence in said cause at Caldwell, Idaho, as soon after the State Engineer makes his report in said cause, as required by the order of this court made on May 23, 1903, as may be convenient to said referee and the parties to said suit, and that such referee is hereby given authority and power to adjourn said hearing to such other place and time as may be convenient to the parties and their attorneys in interest herein. That as soon as said evidence is completed, and said referee is advised as to the proper conclusions of fact and law therefrom, he shall report the same to this court for further trial herein and disposition thereof. That said referee shall give notice to the attorneys in said cause of the times and places where the evidence in said cause will be heard. It is further ordered and directed that the clerk of this court shall deliver to said referee a certified copy of this order as his authority for acting herein."

It is further shown that said State Engineer complied with the order of said court and filed his report with the clerk of the district court of Canyon county, and that the said Norman M. Ruick has qualified as such referee and master, and is about to proceed, under the direction of said court, to take the evidence in said cause.

On the 6th day of April, 1904, at the opening of the district court of said county, the Honorable George H. Stewart, judge of said court, announced from the bench that the report of the said engineer had been filed, and that he was about to enter an order directing said referee to proceed with the trial of said cause; and it is alleged that unless said court is prohibited from proceeding with said trial it will proceed and impose heavy costs, occasioned by the action of said State Engineer, upon the defendants in said cause, which costs amount to nearly \$11,000, a large portion of which will be prorated to and entered as a judgment against the plaintiff herein, the Boise City Irrigation & Land Company, without its consent, and over its protest and objection.

To said petition or complaint the defend-

ants filed a general demurrer on the ground, to wit, that said petition fails to state a cause of action entitling the petitioner to the relief prayed for. The case was submitted on the complaint and demurrer and the briefs and arguments of counsel. Counsel for the plaintiff specify numerous grounds for the issuance of the writ prayed for. The constitutionality of said act is questioned in several particulars.

It is contended that the subject of said act is not expressed in the title thereof, and for that reason is in contravention of the provisions of section 16 of article 3 of the state Constitution, which provides that: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." It is contended that the title of said act includes only "public waters," and that said act, by its provisions, includes private waters. It is also contended that the term "public waters" means only the waters the use of which is declared to be a "public use" by section 1, art. 15, of our state Constitution, and that, if the term "public waters" has any meaning in our law whatever, it applies only to waters of which section 1 of our Constitution declares that "the state may regulate and control in the manner prescribed by law." It has been the recognized law of this commonwealth for many years that the right to the use of waters may be acquired by appropriation. See section 3155, Rev. St. 1887. The evident idea of the Legislature was that the state owned the waters within its boundaries, and that the citizen might acquire by appropriation the right to the use of the same. It is clear that said act was intended to and does include all waters over which the state may exercise regulation or contro'.

If we take the view that the state owns the water while it is running in the natural channel, and has the power to regulate its use, and that the appropriator for irrigation can only acquire the right to the use of it, the title to said act is certainly broad enough to include the provisions of said act called in question by this proceeding. We have a number of provisions running through our irrigation law that provide for the regulation of the use of such water. It contains provisions providing the steps that must be taken to complete or perfect an appropriation. The law provides that a notice containing certain facts must be posted at the point where the water is to be diverted, and that such notice must be recorded in the office of the recorder of the county where such location is made; that within 60 days after posting such notice work must be begun in the construction of the canal or ditch, and that such work must be prosecuted with

reasonable diligence until the completion thereof; that the water must be applied to a beneficial use. The courts of the state may determine whether all those things have been done. It is further provided that it is a misdemeanor to waste water, and when the appropriator's necessities do not require its use he must let it run in the natural channel of the stream, and while it is so flowing it is in one sense "public water." Where water has been appropriated for agricultural purposes, it is not used for that purpose more than six or eight months in the year; the remaining part of the year the water is permitted to run in the natural channel of the stream, and may be used by others during the time that the prior appropriator does not need the use of the same. Thus it appears that the Legislature has and does exercise a certain control over all the waters of the state while they are flowing in the natural channel of the stream, and the law follows the water, after it is diverted therefrom, to see that it is applied to a beneficial use. The provisions of the act clearly show that that was the meaning intended by the Legislature to be applied to the term "public waters" as used in said title. The provisions of said act refer to the private use of water as well as the public use thereof.

We have under our law two classes of appropriations: (1) Appropriations for private use and (2) appropriations for public use. The act proceeds upon the theory that all waters in the state running in the natural channel of the stream are "public waters," and private rights authorized by the law are simply rights to the use of the "public waters," and not an ownership in them, at least while they are flowing in the natural channel. In that view of the matter, the title is sufficient to include provisions for the regulation of the appropriation, diversion, and use of such waters, and to provide for the settlement of the priorities of appropriators. Our attention has not been called to any section of our water-right law or to any provision of our Constitution where the term "public waters" has been used, except in the act under consideration. It seems to be well settled that, so long as water continues to flow in its natural channel, it is not and cannot be made the subject of private ownership, except in so far as it is regarded as a part of the land by or through which the stream flows. Under the decisions it would seem that there is no distinct and separate ownership in the corpus of the water itself. Long on Irrigation, § 72. We think that proposition is true, at least until the water is diverted from its natural channel into the ditch or canal of the appropriator. It was held in *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472, that running water, so long as it continues to flow in its natural course, cannot be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as

property, but the right carries with it no specific property in the water itself.

The ninth section of the first act of Congress in regard to the appropriation of water, passed on the 26th day of July, 1866, declares that: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. 253, c. 262 [U. S. Comp. St. 1901, p. 1467]. It will be observed from that act that the right to the use of water is granted. The legislation of this and other states upon that subject has been to the same effect, and has not given to the appropriator the ownership of the corpus of water itself, but only a right to the use of the water. As touching upon this proposition, see, also: *Atchison v. Peterson* (U. S.) 22 L. Ed. 414; *Broder v. The Natoma Water & Mining Co.*, 101 U. S. 274, 25 L. Ed. 790; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761. However, it is conceded by some courts that water taken from the natural channel by an appropriator and confined in his own works may be personal property. See section 72, Long on Irrigation, and authorities cited.

It is contended that said act is unconstitutional, because sections 4 and 5 (pages 228, 229) thereof contravene section 2 of article 5 of the state Constitution, in that it vests in the State Engineer judicial power. While the provisions of those sections authorize the State Engineer to pass upon and decide certain questions and matters in the first instance, they in no way conflict with the provisions of the said section of the Constitution. If any one is aggrieved by the decision of the State Engineer, he has the right to appeal to the district court.

It is also contended that said act is unconstitutional for the reason that it is antagonistic to subdivision 3 of section 19 of article 3, and of sections 2 and 26 of article 5, of the Constitution of Idaho. Said sections refer to the enactment of local and special laws, and provide that all laws relating to courts shall be general and of uniform operation throughout the state, and that the force and effect of the proceedings, judgments, and decrees of such courts severally shall be uniform. We are unable to see wherein any of the provisions referred to, since the decision of *Bear Lake County v. Budge* (Idaho) 75 Pac. 615, are repugnant to said provisions of the Constitution. It is stated in *Sutherland on Statutory Construction*, § 121, where the author, in discussing what is a special and what is a general law, says: "The state contains a great variety of subjects of legislation, each requiring provisions peculiar to itself. Generic subjects may be divided and subdivided into as many classes as require this peculiar legislation.

\* \* \* Nearly every matter of public concern is divisible, and division is necessary to methodical legislation. A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special." The term "general" is used as contradistinguished from "special," and then it means relating to all other classes, instead of to one or a part of that class. 26 Am. & Eng. Ency. L. 532. In *Brooks v. Hyde*, 37 Cal. 366, the court says: "The section of the Constitution which provides that all laws of a general nature shall have a uniform operation means that every law shall have the uniform operation upon all the citizens, persons, or things of any class upon which it purports to take effect, and that it shall not grant to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens." The act under consideration relates to all of a class; that is, to wit, the appropriators and owners of water rights from the natural streams of the state. This class is general, and at the same time peculiar in itself, and it is distinguished from all other classes, both as to persons and subject-matter, by peculiar conditions. It is to those conditions and that class that the Legislature has endeavored to apply the provisions of the act under consideration. A general rule has been laid down under which conflicting rights to the use of such water may be determined, and the rule there laid down is applicable to all alike in this peculiar class. The Legislature, no doubt, concluded that the procedure for determining such rights should be as simple, effective, and inexpensive as practicable under the conditions, and we think the rule laid down in said act is not in conflict with the above-cited sections of the Constitution.

The provisions of sections 33 and 37 (pages 246, 249) of said act are directly attacked. Said sections are as follows:

"Sec. 33. It shall be the duty of the State Engineer or some qualified assistant to proceed, as soon as may be after the passage of this act, to make an examination of the streams of the state (beginning with those whose waters have not yet been allotted), and the works diverting water therefrom, said examination to include the measurement of the discharge of said streams and the carrying capacity of the various ditches and canals diverting water therefrom; an examination of the irrigated lands, and an approximate measurement of the lands irrigated or susceptible of irrigation, from the various ditches and canals, which said observations and measurements shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made, a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy, the course of the stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of land



which have been irrigated, and shall also note on such map the lands which are susceptible of irrigation from the ditches and canals already constructed. And such examination shall be made as rapidly as possible to include all the streams used for irrigation in the state. And the State Engineer shall indicate on such maps the lands, the water rights for which have been adjudicated by the courts, noting on each tract the number of the priority of such rights, and whenever an application for a permit to appropriate water from a stream shown on such map shall be allowed, such engineer shall indicate on such map the line of such canal or ditch or other works, and indicate by appropriate colors the lands to be irrigated by such works, and shall note thereon the number of such permit. And whenever proof is made that water has been beneficially applied from such works to any of such lands, and license must be issued for the same as in this act provided, the number of such license so issued shall be at once noted on such map on the sub-division of such lands to which such license shall relate, and all these and other facts relating to the development of irrigation on such stream shall be carefully posted on such map."

"Sec. 37. Whenever suit shall be filed in the district court for the purpose of adjudicating the priorities of rights to the use of water from any stream in the state and before such adjudication is made, the judge of such court shall request the State Engineer to make an examination of such stream and the canals and ditches diverting water therefrom and of all the land being irrigated by such canals and ditches and other works and the lands susceptible of reclamation therefrom in the manner provided in section thirty-three (33) of this act, and such State Engineer shall prepare a map showing such stream, canal and ditches and the lands thereunder as provided in such section and a statement which shall give the condition of such works, their capacity and the amount of land irrigated from each of such canals, ditches or other works and other essential features in relation to the reclamation of the lands tributary to such stream. And such map and statement shall be accepted as evidence in the determination of such rights by such court, and a copy of such map and statement shall be placed on file in the office of the State Engineer.

"Whenever the State Engineer shall make such examination at the request of the court or the judge thereof, the actual cost of making such examination by the State Engineer or his assistant and of preparing such maps and statement as shown by sworn statement of such costs prepared by such State Engineer, shall be paid by the persons interested in such suit for the determination of such priorities, the amount of such costs to be pro rated by such court to the persons whose rights have been adjudicated by such

suit. In case the State Engineer has already made such examination as provided in section (33) of this act, he shall be requested by the court or the judge to furnish a certified copy of the records of the examination, which shall be brought up to date by a further examination on the ground by such engineer if need be, and such certified copies of such records shall be filed and received as evidence in such case as in this section provided."

By section 38 it is made the duty of the State Engineer, as soon as may be after the passage of said act, to make an examination of the streams of the state and the works diverting water therefrom, beginning with those streams the waters of which have not been allotted. The term "allotted," as there used, means decreed by the proper court. Under the provisions of that section the work required to be done by the State Engineer must be paid for by the state, and it is for the purpose, among others, of making a permanent record of the water appropriations and rights to the use thereof. We find no prohibition in the Constitution inhibiting the Legislature from enacting said section 38. If the cost of such work is more than the people desire to pay, the remedy is with the Legislature.

Section 37 provides, among other things, that, when suit shall be filed in the district court for adjudicating the priorities of the rights to the use of water from any stream, the judge shall request the State Engineer to make an examination of such stream, and the canals and ditches diverting water therefrom, and of all lands being irrigated by such canals and ditches and other works, and the lands susceptible of reclamation therefrom, in the manner provided by said section 38. The costs of making such survey, examinations, maps, statements, and reports are to be prorated as costs against the persons whose rights shall be adjudicated in such suit. It is also provided by section 37 that, if the State Engineer has already made an examination and prepared the necessary maps provided for in section 33, "he shall be requested by the court or judge to furnish a certified copy of the records for examination, \* \* \* and such certified copy of such records shall be filed and received in evidence in such case as in this section provided." It will be noted that the cost of making a survey and maps above referred to is only taxed as costs in those cases where the streams have not been examined by the State Engineer, and maps and plats made prior to the request for the evidence by the trial court. It will also be noted that said act provides that the State Engineer shall make such examination, maps, and surveys, beginning with those streams whose waters have not yet been allotted. In cases where the engineer has made such examinations and maps prior to the trial and the commencement of the action, the state pays the costs thereof; but

where such examinations and maps are made on the request of the judge, as provided in section 37, the parties to the action are required to pay such costs.

It is contended that section 4901 et seq. of the Revised Statutes of 1887 provide a general system for the apportionment of costs in civil actions, and there is nothing, so far as the determination of the rights to the use of water are concerned, that takes an action of this kind from under the general rules thus established for the apportionment of costs. It must not be forgotten that this is a suit in equity, and the apportionment of the costs would be, without a statute, largely in the discretion of the trial court. From past experience the Legislature no doubt concluded that it was necessary for the interests of the state and all concerned to have such examinations and maps made by the State Engineer, and we find no inhibition in the Constitution prohibiting the Legislature from providing for such examinations and maps and their use as evidence on the trial and authorizing the trial court to prorate the costs thereof among the several parties to the suit. It has been the custom of courts of equity in this state, in the trial of mining cases and litigations in regard to the dividing line between tracts of land, to appoint an engineer or surveyor to make the proper surveys, make plats thereof to be used in the trial of such cases, and to require the parties to such actions to pay the costs thereof; and we think a court of equity has authority to do that.

It is contended that said provisions of said act are special, and only apply to water cases. While the last contention is true, it certainly would not be contended that an examination of the streams of the state, and the making of plats of such streams and ditches, would be required in an action on a promissory note or to foreclose a mortgage, or an action to recover damages for defamation of character, or, in fact, in any action except in a water suit. So this act applies to all suits of a certain class, and is not violative of any provision of our state Constitution.

It is also contended that under this act a party may prove himself absolutely in the right so far as his claim to the right to the use of water is concerned, and may have been brought into litigation without his consent, and still be compelled to pay part of the heavy expenses necessarily incurred by reason of this suit, and for that reason it contravenes every part of our laws regulating suits in courts of justice, so far as the apportionment of costs is concerned. There is nothing in this contention, for the reason that it is a part of the history of the state that, where several persons have settled upon a stream and diverted water from it at different times and in different amounts for irrigation purposes, it is absolutely necessary to determine the priority of their rights,

and the amount of water to which each is entitled, by a decree of the proper court. That must be done on every stream in the state, and, of course, as long as there is ample water in the stream to supply the necessities of each appropriator, suits are not liable to be brought for the settlement of such priorities; but as soon as more water has been claimed than the stream supplies, the prior appropriators, if they live low down the stream, are required to bring an action to settle the rights of the respective appropriators from such stream, and it has been the custom of courts in this state to apportion the costs of such litigation to the respective parties, and, we think, properly so. The court in the suit in question had jurisdiction and power to so apportion such costs.

It is also contended that it is contrary to every principle of right and justice to compel parties who have already been to the expense of procuring surveys of their water canals and other appliances for diverting water to pay any part of the expenses for further services, as no benefit would accrue to them from it. It is a sufficient answer to this objection to say that the Legislature has concluded that it was better for all parties concerned to have such maps and plats made by the State Engineer or some disinterested person, and, if the maps and plats required by the provisions of said decisions are made as contemplated, they, no doubt, would save much to the litigants or parties to said action in witness fees, even more than their pro rata part of the cost of making the same.

It may be unfortunate for the parties to this suit that the State Engineer had not proceeded under the provisions of section 33 of said act and prepared the statement, maps, and plats in question before the trial of this action. The law contemplates that he shall proceed and perform the required work as rapidly as such work can be reasonably done, for, in case the work had been done, the parties to this action would only have to pay their proportional part as taxpayers of the state, whereas, under the present facts, they are required to pay the entire costs of such work. But we do not think this a sufficient cause for holding the act unconstitutional. As before suggested, the State Engineer is only entitled to recover the actual and necessary costs of such work, and any party to the suit may contest his right to recover the sum claimed by him. And, of course, if it should be made to appear in any particular case that the cost would result in a confiscation of the property included in the litigation, a judge would not be justified in having such maps and plats made. We find nothing in the decision of this court in the case of *Bear Lake County v. Budge*, supra, that conflicts in any way with our views expressed in this opinion. Said section 37 provides, *inter alia*, "that the judge of said court shall request the State Engineer to

make an examination of such stream," etc. That provision is directory, and it is left to the sound discretion of the judge whether such request shall be made or not.

It is also contended that there are no safeguards provided so far as costs are concerned, and that the matter is left absolutely in the hands of the State Engineer, without control by the court. We cannot agree with this contention. The State Engineer is entitled only to his actual and necessary costs for the work required to be done under the provisions of said sections 33 and 37, and any party to the suit may contest the amount claimed by him or any item thereof. It is the duty of the court to refuse to allow any costs to the State Engineer except such as are actually necessary for the performance of the duties required. In case it is shown that the maps and plats are incorrect as to the rights of any of the parties to the action, such parties should not be required to pay any part of such costs. In this case it is admitted that the claim of the State Engineer amounts to nearly \$11,000. It was also stated that such costs, if prorated, would be about 4 cents per acre for all of the lands under the ditches involved in this case. That being true, the pro rata share of the owner of each 160 acres of land would be \$6.40. The requirement of the payment of that amount as costs by the owner of 160 acres of land certainly would not result in confiscation of very much property, especially when such lands are reputed to be worth at least \$30 per acre. If said maps and plats have been made as contemplated by said act, in all probability the parties to the suit would need no further evidence in the establishment of their rights than said maps and plats and their own testimony. It would appear to me that in the end the litigants will save a great deal of costs and expenses on account of witnesses, which would otherwise be required to establish their rights. While \$11,000 seems a large sum to be paid as costs for such maps and plats, it must be remembered that nearly 200,000 acres of land, and water rights for the irrigation of the same, are to a large extent involved in this action, and the land without the water would be of very little value. If such land with the water right is worth \$30 per acre, the lands and water rights would be worth about \$6,000,000. Every person who appropriates water under the laws of this state must remember that it is sure to cost something for a final adjudication of such rights, and that they must pay the costs.

It is further contended that, as this action was commenced prior to the enactment of the law under consideration, its provisions are not applicable to this suit; that to apply them to this action would make said act retroactive and retrospective in its operation. The provisions of said section 37 prescribe certain procedure in suits for the settlement of water rights, and we think the general

rule is that rules of procedure, especially so far as costs are concerned, may be changed during the pendency of an action, and we think it well established that the litigant has no vested right therein. It is stated in *Sutherland on Statutory Construction*, § 482: "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings." It is also stated in 5 *Ency. P. & P.* p. 113, as follows: "At any time during the pendency of the suit, and before the right to costs has become vested, the Legislature may change the law previously enforced, either by totally repealing it, or by modification only, or, in the absence of any law, it may enact one." Even under penal statutes it was held, in *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262: "Alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged." We think that the provisions of said section relating to the point under consideration were intended to, and do, apply to suits begun before the enactment of said law, as well as those commenced after. We understand that statutes generally are to be construed as prospective, unless the language is such as to show that they were intended to be retrospective. But, even if the legislative intent was to have the provisions of said act apply to suits that should be commenced after its enactment, we think the court had jurisdiction in the case under consideration to order such plats and maps made, if it was convinced that it was necessary for the proper hearing and determination of said case to have such maps prepared.

It is contended that the provisions of said section 37 provide for a new kind of evidence, and that said act does not provide whether such evidence shall be conclusive or only presumptive, and that, if it is to be received as *prima facie* evidence only, then it would involve the party disputing it in double expenses and costs, because he would be required to have other surveys made at his own expense in order to show the errors committed by the State Engineer, and that

such provision is a radical innovation on the old form of evidence, something unheard of in legal procedure, and should be held invalid for that reason. I think it was the intent of the Legislature to authorize the court to accept such evidence just the same as any other evidence is accepted, and to consider it with all the other evidence in the case, and, if it is shown to be incorrect, to reject it; otherwise to give it such effect as under all the evidence the court might think it entitled to. I think the Legislature has the power to authorize such maps and plats to be introduced as evidence in a case, leaving it with the court to decide what effect should be given to the same. The Legislature has provided that certified copies of certain recorded instruments may be used as evidence, and that some of such instruments, when introduced, shall be prima facie evidence of what they contain. The Legislature has not declared what effect should be given to the statements and maps referred to, leaving it for the court to decide what effect should be given to them. Under the provisions of said section, statements and maps made by a sworn officer of the state are authorized to be used as evidence in such cases, and we think the Legislature had ample authority to do so. The provision referred to contemplates that the maps and statements of the State Engineer shall constitute a part of the public records, and also provides for using them, as well as certified copies thereof, as evidence in the trial of water cases. And, so far as evidence is concerned, it merely states a general rule of proceeding. The authorities hold that the Legislature has power to change by statute the rules of evidence at pleasure. In 11 Am. and Eng. Ency. of L. 550, it is stated: "The Legislature has general control over the rules of evidence, and may change them at pleasure." In *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403, it is said: "The Legislature of this state has the power by statute to provide that certain circumstances shall constitute prima facie evidence of the facts in issue. The law of evidence, being a part of the remedy, is within legislative control." And in *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, the court says: "It is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government."

It is further contended that the court exceeded its jurisdiction in appointing Norman M. Ruick, Esq., referee and master, and authorizing him to take the testimony in said case, and report his findings of fact and conclusions of law for the information of the court. Under the provisions of section 4493, Ann. Code Civ. Proc. 1901 (Sess. Laws 1901, p. 132), the court, or the judge at chambers, is authorized to appoint a referee to take the testimony in certain cases therein designat-

ed. The purpose and object of that act is expressed in the title, as follows: "An act to provide for taking testimony out of court upon an order of the court or the judge thereof," and was enacted for the purpose of taking testimony in certain cases where the parties to the action were numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. The Legislature, no doubt, had in mind in the enactment of that law the taking of testimony in water cases, where the parties and witnesses were very numerous and the convenience of the witnesses and the ends of justice would be promoted by the appointment of a referee to take the evidence. I think the court had full power and authority to appoint said referee. Of course, it is contemplated that a referee will not be appointed, and thus increase the costs of the suit, unless it is necessary to do so, for if the judge tries the case the costs of a referee are saved to the litigants. That part of the order which directs the referee to "report his conclusions of fact and law therefrom to the court for the information of the court," of course, is not binding on the court, and is only for the information of the court, and in no wise invalidates the order.

Under the provisions of section 2825, Rev. St. 1887, ditches and water rights are declared to be real property. A water right may be held and sold and transferred separate from land, and, until the act under consideration became a law, we had no law providing for a record of the title to water rights, as we have of a record of title to land. The Legislature, no doubt, considered that the time had come in this state when a record by maps, plats, etc., should be made of titles to ditches and water rights, as water rights have become very valuable property in this state. Said section 33 provides for plats and maps of all ditches and water rights, and thus lays the foundation for a record title to that class of property, to a certain extent at least. The provisions of that section make it the duty of the State Engineer and qualified assistants to proceed to make an examination of the streams of this state, beginning with those whose waters have not been allotted, and make maps and plats thereof, containing certain things mentioned in said section, and thereafter to indicate on such maps subsequent appropriations of water from the stream or streams covered by such maps. When such maps are completed, the state has a record that is of great value. While we have had a law for years providing for a record of water location notices, such record is of no value as to the quantity of water actually appropriated under such notices, and the maps and plats would furnish much information in regard to canals, ditches, and water rights.

I think the title to said act is sufficient to include the provisions of said act attacked in this proceeding as unconstitutional; that

the court had authority to request the State Engineer to make the maps and plats referred to, and appoint a referee to take the evidence in said case and report to the court for its information, and from said referee's findings of fact and conclusions of law contained in said report to prorate the costs among the parties.

The application for the writ is denied.

AILSHIE, J., concurs in the conclusion reached. STOCKSLAGER, J., dissents.

**STATE ex rel. FLAHERTY et al. v. SUPERIOR COURT OF KING COUNTY.**

(Supreme Court of Washington. June 9, 1904.)

**INJUNCTION—SUPERSEDEAS BOND.**

1. An injunction which is merely preventive cannot be rendered inoperative by a supersedeas.

Mandamus on the relation of one Flaherty and others to compel the superior court of King county to fix the amount of a supersedeas bond in a suit by Edward Van de Venter against relators. Application denied.

George McKay, for plaintiffs.

**PER CURIAM.** One Edward Van de Venter brought an action in the superior court of King county against the relators to enjoin them from fencing up or otherwise interfering with a certain road leading from his premises across the premises of the relators to a recognized public highway. In his complaint he alleged that the road in question was the only way leading from his premises to the public highway, and that the same had been used by him and his predecessors in interest without hindrance or interruption for more than 17 years last past; that the appellant had attempted to obstruct the way by means of fences, locking of gates, and other acts; and would close the same entirely unless restrained by the court. He prayed a temporary restraining order, which was granted, and continued in force until the final trial of the case, when a perpetual injunction was granted. The relators, desiring to appeal to this court, applied to the superior court to fix the amount of a supersedeas bond to be given in order to stay the judgment pending the appeal. That court declined to fix the amount of the bond, holding that the injunction granted was not such an injunction as could be superseded, and the relators apply here for a writ of mandate compelling it to fix the amount of such bond.

In *State ex rel. v. Stallcup*, 15 Wash. 263, 46 Pac. 251, we held, construing the statute now in force, that a supersedeas, from its nature, operated only upon orders or judgments commanding some act to be done, and does not reach a case where the relief granted merely forbids the doing of some act; in other

words, mandatory injunctions could be superseded, while those merely preventive could not. The injunction in the present case is of the latter kind. It is preventive merely, and cannot be rendered inoperative by a supersedeas.

The application is denied.

**STATE ex rel. CORBIN et al. v. SUPERIOR COURT OF LINCOLN COUNTY et al.**

(Supreme Court of Washington. June 9, 1904.)

**REVIEW—APPELLATE JURISDICTION—VOID JUDGMENT.**

1. Under the constitutional provisions making the superior court the court of last resort in civil actions for an amount not exceeding \$200, the Supreme Court will not grant a writ of review of a judgment in such an action, though the judgment be void.

Application by the state, on the relation of Austin Corbin, 2d, and another, against the superior court of Lincoln county and another, for a writ of review. Application denied.

Hamblen, Lund & Gilbert, for plaintiffs. Myers & Warren, for defendants.

**PER CURIAM.** This is an application for a writ of review. Briefly, the relators allege that the defendant the superior court, at the instance of its codefendant, entered a judgment against the relators and in favor of such codefendant for the sum of \$112, without authority, right, or jurisdiction; that the judgment is by reason thereof void, but that the relators have no right of appeal because the amount of the judgment is not sufficiently large to bring the cause within the appellate jurisdiction of this court, and have no other speedy or adequate remedy at law; wherefore they pray that this court cause the record to be brought before it by a writ of review, and on the hearing thereof declare void and set aside the judgment.

The relators concede that this court has held that it will not issue a writ of review in a cause not within its appellate jurisdiction, but argues that this case does not fall within the rule because here the judgment is void, while in the cases determined by this court the review was sought to correct mere error in the record of the superior court. But, in our judgment, the distinction sought to be made is not sound. As we have construed the Constitution, it makes the superior court the court of last resort in all civil actions at law when the original amount in controversy does not exceed the sum of \$200. In other words, it matters not whether that court decides that it has jurisdiction when it has not, or whether it erroneously decides some other matter of law, its judgment is final in all causes not within the appellate jurisdiction of this court.

The application is denied.

† 1. See *Appeal and Error*, vol. 2, Cent. Dig. § 2278.

## INGRAM v. WISHKAH BOOM CO.

(Supreme Court of Washington. June 9, 1904.)

WATER COURSES—RIPARIAN RIGHTS—OVERFLOW — BOOMS — DAMAGES — PLEADING—BILL OF PARTICULARS — HARMLESS ERROR — INSTRUCTIONS—EVIDENCE.

1. Where the petition alleged the ultimate facts that plaintiff was the owner of certain land lying along navigable streams; that defendant, being engaged in sluicing, driving, booming, and rafting of saw logs in said stream, employed dams, causing artificial freshets, injuring the plaintiff's land by producing erosions and causing water, logs, and debris to flow on said land—the petition was sufficient, and plaintiff could not be compelled to plead evidence by a motion to make more definite and certain.

2. Under Ballinger's Ann. Codes & St. § 4930, requiring a party to either plead or deliver to the adverse party a copy of the instrument or writing sued on or the items of an account, and providing that the court may order a further account, and may order a bill of particulars, a bill of particulars is not the remedy where discovery is sought of facts in possession of the plaintiff, material to the defense of the action, but the remedy is by interrogatories served and to be answered before trial, or by examination of the party as a witness at the trial.

3. A complaint for damages to plaintiff's land by erosions and overflow by defendant's misuse of a right of navigation of a river passing through the land was sufficient where it set out acts showing the abuse of the right of navigation, without alleging that said acts were negligently performed.

4. Where there was substantial evidence in support of all the issues necessary to be maintained by plaintiff, the verdict will not be disturbed on appeal unless the result of passion and prejudice.

5. Where the damages to plaintiff from a wrongful use of a navigable stream passing through his land was a depreciation in value of the land and a total destruction of certain personal property, he was entitled to testify to the value of the real property both before and after the injury, and to the value of the personalty at the time it was destroyed.

6. Error, if any, in permitting him to afterwards state the total of his loss, was harmless.

7. In an action against a corporation, error in admitting in evidence an answer filed by it in another action, without introducing in connection therewith the complaint in said action, was harmless, where the only part of the answer read to the jury as material was an allegation describing the corporate powers of the defendant.

8. In an action for damages to land by defendant's misuse of a river passing through the land the court instructed that, if there was any such use of the stream in the driving of logs as caused injury to plaintiff, for which he was entitled to recover, the question whether defendant or its employés made such use must be established by a fair preponderance of the evidence, and, if the evidence leave a condition of uncertainty as to who caused the damage, they could not find defendant liable; that if it could be said, from a fair preponderance of the evidence, that it was done by defendant, then plaintiff could recover; that, if defendant was not using the river at the time of the alleged injury, it was not liable. *Held*, that the instruction as a whole was not prejudicial to defendant.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by J. S. Ingram against the Wishkah Boom Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Greene & Griffiths and Sidney Moor Heath, for appellant. J. C. Cross, for respondent.

FULLERTON, C. J. In this action the respondent sued to recover damages for injuries to his real property, alleged to have been caused by the appellant in the operation of its sluice dams on the Wishkah river. After issue had been joined, a trial was had, resulting in a verdict and judgment for the respondent, from which this appeal is taken.

The appellant first complains that the trial court erred in overruling its motion to make the complaint more definite and certain, and in refusing to require the respondent to furnish it with a bill of particulars. The complaint alleged, in substance, that the appellant was a boom company organized under the laws of this state, owning and operating certain sluice dams on the Wishkah river, a stream navigable for the purpose of floating saw logs; that the respondent owned lands through which the Wishkah river ran, lying below the sluice dams of the appellant; that he used his lands for a home, and had improvements thereon consisting of cleared and cultivated lands, buildings, fencing, and certain other structures; and that the appellant "has never procured from the respondent, by condemnation or otherwise, any right to the use of his land whatsoever, as it might do by virtue of the statutes authorizing its incorporation." The paragraphs of the complaint containing the allegation of damage are as follows:

"That during all the times herein mentioned, and at the present time, the defendant, the Wishkah Boom Company, has been and is engaged in the sluicing, driving, booming, and rafting of saw logs in said river and through the lands of this plaintiff, hereinabove described; that in the driving of the said saw logs down the said river the said defendant has employed and is employing dams, whereby and by virtue of which great and large artificial freshets are made in said river through the lands of this plaintiff, and that by reason of such dams and such artificial freshets through the lands of the plaintiff aforesaid, and by reason of the driving of large boddies or quantities of saw logs, by virtue of such artificial freshets, through the lands of this plaintiff, and by reason of the creation of large jams of saw logs in said river and within the boundaries of plaintiff's lands by the said defendant in its endeavor to drive the said saw logs, by means of artificial freshets aforesaid, through the lands of this plaintiff aforesaid, and on account of each of the said reasons and uses the said defendant has greatly injured and damaged or damaged the lands of this plaintiff, such damages being primarily as follows, to wit:

"(1) By creating and producing great and lasting erosions of the banks of plaintiff's said lands.

"(2) By causing great quantities of water, logs, and debris and sediment to flow in and

upon and over the plaintiff's said lands, thereby destroying the crops upon the said lands.

"(3) By causing great quantities of water, logs, and debris to flow in and upon plaintiff's said lands, thereby destroying the improvements upon said lands."

"That by reason of the facts hereinbefore alleged this plaintiff has been and is damaged as follows:

"(1) On account of erosions, since March 1, 1900, as hereinbefore set forth, in the full and just sum of \$200.

"(2) On account of injury to the improvements, since March 1, 1900, as hereinbefore alleged, in the full and just sum of \$100.

"(3) On account of injury and damage to crops, since March 1, 1900, as hereinbefore alleged, in the full and just sum of \$200."

The motion of the appellant, which is too long to set out here in detail, practically called for the evidence on which the respondent relied to maintain his cause of action. But plainly these were not matters which the plaintiff was required to set out in his complaint. Only ultimate facts need be pleaded in order to state a cause of action. There is no requirement that evidence relied upon to support the facts need be set out. Nor was the matter demanded the subject for a bill of particulars. While a bill of particulars may be demanded in certain kinds of actions as a matter of right (Ballinger's Ann. Codes & St. § 4930), this was not such an action. A bill of particulars may be ordered when the demand is for particulars of the general items set out in the complaint, but it is not the remedy where discovery is sought of facts in possession of the plaintiff material to the defense of an action. For discovery of facts in the possession of the other party the Code provides a remedy by interrogatories served and to be answered before trial, or by an examination of the party as a witness at the trial, not by demanding a bill of particulars.

The appellant next contends that the court erred in overruling its demurrer to the complaint. It argues that, inasmuch as the stream was a navigable one, the appellant, along with the public generally, had the right to use it for the purpose of floating or driving logs, and that the rights of riparian owners are subordinate to this use, when reasonably exercised; hence the complaint, in order to state a cause of action, must contain an allegation to the effect that the damage was caused by the negligent use of the stream. Whether it be the rule that, had the appellant been using the stream for the purpose of floating and driving logs in the usual and ordinary manner, and in spite thereof had injured the respondent's property, no action would lie against it for such injury, it is not necessary here to determine. The complaint does not make that kind of a case. The appellant was not using the stream in the usual and ordinary manner. It not only

suffered and permitted the logs it was driving to jam and accumulate in the stream on the respondent's property, but it sought to remove them by artificial freshets, thereby causing the water to back up and overflow the respondent's land, washing away the banks of the stream, the fences protecting the land, destroying the crops growing thereon, and covering the land with logs and other debris that would have passed on without damage but for the acts of the appellant. As we said in *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245: "The right to float logs down a stream does not carry with it the right to boom logs in said stream, or to obstruct it in any way so that it will either interfere with the rights of other navigators, or cause damage to riparian proprietors." And we conclude here, as we concluded in that case, that it is not necessary, where the injury is caused by a misuse of the stream, or an abuse of the rights of navigation, to allege in the complaint that the acts were done negligently, in order to state a cause of action for damages arising from such misuse or abuse. It is sufficient to set out the acts showing the misuse or abuse of the right of navigation, as it is these acts that give rise to the cause of action. The acts themselves are wrongful. It is not a case of a rightful act negligently performed.

The appellant challenges the sufficiency of the evidence to justify the verdict, but we find no cause to interfere with the verdict on this ground. There was substantial evidence in support of all of the issues necessary to be maintained by the respondent, and, unless the verdict was the result of passion and prejudice, rather than a due consideration of the evidence, this is sufficient to sustain it in this court. Of passion and prejudice on the part of the jury, we find nothing in the record.

The court permitted the respondent to testify to the amount of his damages in money, and this is assigned as error by the appellant. We are of the opinion, however, that the evidence, if not strictly within the rule, was harmless. The damages consisted of a depreciation in value of the real property, and a total destruction of certain personal property. The respondent could properly testify to the value of the real property both before and after the injury, and to the value of the personalty at the time it was destroyed. This the respondent did do, and for him afterwards to state the sum total of his different losses could not be error, as the ascertainment of the total was a mere solution of an arithmetical problem the terms of which were stated when he testified to the different values. But it is said this court has announced a contrary view in *De Wald v. Ingle*, 31 Wash. 616, 72 Pac. 469. In that case we did hold that it was error to permit the plaintiff in an action for personal injuries to testify to the amount of his damages in money. The cases rest, how-

ever, on widely different principles. In a personal injury case the damages are not capable of anything like exact admeasurement, and cannot be made any more certain by the mere opinion of witnesses. In other words, the question is treated as one not capable of ascertainment by expert or peculiar knowledge, but one resting within the knowledge of the generality of mankind, which the jury alone are qualified to determine after being made acquainted with the nature and effect of the injury and the circumstances under which it was inflicted. But value, when applied to property, is capable of at least approximate admeasurement, and is a subject on which a person can acquire a knowledge not possessed by the generality of mankind, and is held everywhere to be a proper subject for opinion or expert evidence. Indeed, values could hardly be proved in any other way, and it would practically be a denial of the right to recover for injuries to property if witnesses were not permitted to give their opinion as to the amount a particular piece of property has depreciated from a given cause.

Many errors are assigned going to the admission and exclusion of evidence, but, as the appellant passes all of these, with one exception, without comment, we shall treat them in the same manner, saying merely that we have examined each of them, but find nothing that requires a reversal of the case. The exception mentioned is to the admission of an answer filed by the appellant in an action brought by one Hayes against the appellant and others for services performed in driving the logs the respondent contends caused the injury to his property. The answer was verified by a Mr. Emerson, and was introduced to contradict certain statements Mr. Emerson made while testifying for the appellant in this case. The appellant contends that the answer should not have been admitted without introducing in connection with it the complaint in the action it purported to answer, and assigns error on that ground. But the only part of the answer read to the jury as material was an allegation describing the corporate powers of the appellant, and the complaint could hardly have explained or aided in an understanding of that paragraph. It is somewhat difficult to discover from the record the materiality of the evidence, but its admission, if error at all, was harmless error.

Lastly, the appellant assigns that the court erred in giving and in refusing to give certain instructions to the jury. The exception taken to the instructions given was in the following words: "The defendant excepts to that part of the charge given by the court saying, in effect, that if the jury find that the defendant, or its officers, agents, or employes, assisted in breaking the jam, the company would be liable." A careful perusal of the charge as reported in the record fails to disclose any instruction to this effect,

unless it is found in the following: "If you find that there was any such use of this stream by any person in driving these logs or in the use of these dams as has caused the injury to the plaintiff for which he would be entitled to recover, then you should inquire whether it was done by these defendants, or this defendant company. When we speak of the defendant company we mean its acts through its employes or agents. And that fact must be established by a fair preponderance of the evidence also. If you cannot find that from the preponderance of the evidence, or if the evidence is such as to leave you in a condition of uncertainty as to who, among the drivers of these logs, did cause this damage, or in the operation of the dams, if it was caused in that way, and you cannot say from a fair preponderance of the evidence who did it, then you cannot find the defendant liable. If you can say from a fair preponderance of the evidence that it was done or caused by this defendant company or its employes, then the plaintiff would be entitled to recover from the company. If you cannot find from a preponderance of the evidence that the employes of the company were operating this dam, nor were driving these logs, nor were breaking this jam at the time this alleged injury was sustained, then they are not liable." There is nothing in this, when read as a whole, that can be said to be prejudicial to the appellant. The instructions requested and refused merely suggest the appellant's theory of the case, which we have discussed in passing upon its objection to the sufficiency of the complaint, and require no further discussion.

As we find no reversible error in the record, the judgment appealed from will stand affirmed.

DUNBAR, HADLEY, ANDERS, and MOUNT, JJ., concur.

#### FIRST NAT. BANK OF HENNESSEY v. HESSER, Sheriff.\*

(Supreme Court of Oklahoma. March 4, 1904.)

#### ATTACHMENT—CHATTEL MORTGAGE—LIEN—PROBATE COURT—JURISDICTION—VENUE.

1. Where a sheriff is in the legal possession of personal property by force of an order of attachment rightfully issued, he is entitled to continue such possession until the lien acquired thereby is lost, or the property disposed of by force of it, or the lien is satisfied.

2. A mortgage upon chattel property must be recorded or filed in the county where the property is located, in order to become a lien thereon as against creditors and innocent purchasers and incumbrancers for value.

3. Actions for the recovery of specific personal property in the probate courts of this territory are governed by the procedure applicable to justice of the peace courts where the value of the property sought to be recovered is less than \$100.

\*Rehearing denied June 8, 1904.



4. Action brought against two joint obligors is properly brought in any county where one of them may be summoned, and in such case summons may properly be issued to and served upon the other in any county of the territory, and in such case the court has jurisdiction of the persons of both defendants.

5. Where an attachment is properly issued upon filing with the court a sufficient affidavit and bond, and property is taken thereunder, the lien of the attachment is not lost by a failure on the part of probate or justice of the peace court to make proper docket entries of the issuance of such order of attachment.

6. Under the provisions of section 10 of the organic act of the territory (Act May 2, 1890, c. 182; 26 Stat. 87), which provides, among other things, "All civil actions shall be instituted in the county in which the defendants or either of them reside or may be found," it is requisite that all personal actions shall be brought in the county where the defendants, or one of them, resides or may be found, and the court cannot acquire jurisdiction in such case by the issuance of summons to another county, or by publication notice.

(Syllabus by the Court.)

Error from District Court, Payne County; before Justice Burford.

Action by the First National Bank of Hennessey against J. P. Hesser, sheriff. Judgment for defendant, and plaintiff brings error. Modified.

This is an action brought by the First National Bank of Hennessey, Kingfisher county, Okl., against the defendant, J. P. Hesser, sheriff of Payne county, Okl. The plaintiff brings action in replevin, basing title upon a chattel mortgage executed to it by one G. W. Baker, for an actual loan of \$360, at Hennessey, Okl., where said mortgage was executed and delivered, on April 13, 1901; the property mortgaged being at the time at Stillwater, in Payne county, Okl. Said mortgage was not at the times herein-after mentioned filed or recorded in Payne county. The mortgagor, G. W. Baker, prior and up to the 24th day of March, 1901, was a resident of Stillwater, Payne county, where he had an office and law library, and prior to the 24th day of March, to wit, February 13, 1901, he had mortgaged this library to the First National Bank of Stillwater, including in said mortgage a span of horses, harness, and buggy. On the 24th day of March, 1901, Baker went to Hennessey, driving the horses, harness, and buggy so mortgaged to the First National Bank of Stillwater. At that time he and one Pink Taylor were jointly indebted to one W. L. Dix, in Stillwater, in the sum of \$47 and he (Baker) was also indebted to the National Bank of Commerce of Stillwater in the sum of \$65.50 on two promissory notes executed to said bank, with one Millikan as surety thereon. It seems that Baker, after going to Hennessey, determined to locate there in business, and the First National Bank of Stillwater, becoming alarmed for the security of its claim against Baker, sent the deputy sheriff and an attorney to Hennessey after him. Upon their arrival there, Baker, on the 13th of

April, went to the First National Bank of Hennessey and borrowed the \$360 hereinbefore mentioned, executing the mortgage in question as security therefor. With this money the mortgage of the First National Bank of Stillwater was paid off and released. Thereupon, and on the 16th day of April, the said W. L. Dix brought suit against Baker in the probate court of Payne county to recover the amount claimed to be due him on the note of Baker & Taylor, of \$47, and caused a writ of attachment to be issued out of said probate court, which was immediately levied upon a portion of the library of Baker, yet in Stillwater; and, because of this attachment the defendant, Sheriff Hesser, refused to deliver on demand the possession of the mortgaged property to the Bank of Hennessey. Afterwards, on the 23d day of April, the National Bank of Commerce assigned the note of Baker above mentioned to the surety thereon, one Millikan, who on that date also instituted suit for the amount of that debt against Baker, causing an attachment also to be issued and levied upon the balance of Baker's library not levied on by the Dix attachment. On the 13th day of May following, the First National Bank of Hennessey brought suit against Hesser, sheriff of Payne county, to recover possession under its mortgage of the library of Baker thus attached in the Dix and Millikan cases. From the evidence taken upon the trial, and from the facts and circumstances detailed in the evidence, it is evident that Baker's residence at the time he was sued in the probate court of Payne county was in Oklahoma, and was known to be in Hennessey, Kingfisher county. In fact, one of the attorneys who brought these suits against him in the probate court was the attorney who went to Hennessey to settle the mortgage of the First National Bank of Stillwater against him. His name also appears as a witness to the mortgage of Baker to the Hennessey Bank, sued on herein. The record nowhere questions the fact of Baker's residence in the territory, and there is no pretense that his residence and whereabouts were secret or not generally known. Baker did not appear in the probate court in defense to the actions there brought. The sheriff, after levy of the attachments, returned the summons, "Not found in my county." Defendant sheriff made an affidavit that he was unable to find Baker in Payne county, and, upon the making of same, the probate judge continued the cause for service by publication, which was accordingly made. The trial in the district court of Payne county resulted in a judgment for the defendant, Hesser, holding that his title under the probate court attachment was a first and better lien than that of the plaintiff under its mortgage, and ordering the return of the property for a failure to pay to defendant \$140, the amount found due by the judgment of the probate court in the two cases, from which judgment and holding

the plaintiff brings the case to this court upon errors assigned.

George P. Uhl, for plaintiff in error. F. C. Hunt, for defendant in error.

GILLETTE, J. (after stating the facts). No question is raised in the record touching the validity of plaintiff's mortgage, or of plaintiff's right of possession thereunder of the property sought to be taken in replevin, so far as the owner and mortgagor, G. W. Baker, is concerned. This action was replevin, brought by the plaintiff to recover from the defendant the property mortgaged by Baker to plaintiff. The case presents a question of right of possession as between plaintiff and defendant, Hesser, who was at the time sheriff of Payne county, Okl., and claimed the right of possession by force of two orders of attachment against the property of Baker issued out of the probate court of said county. The cause was tried in the district court of Payne county in December, 1902, resulting in a judgment for the defendant, Hesser; requiring the plaintiff to return to defendant all the property of G. W. Baker taken under the two attachments in default of payment to him of \$140, the amount found by the probate court to be due in the two actions against him in that court. If the defendant at the time of bringing this action, May 13, 1901, was legally holding the property covered by plaintiff's mortgage under valid process issued by the probate court, he was entitled to continue the possession until the lien acquired thereby was lost, or the property was disposed of by force of it, or the lien secured thereby was satisfied, for the reason that plaintiff's mortgage was executed in Kingfisher county, Okl., where the mortgagor, Baker, then resided, upon property then located in Payne county, and which said mortgage had not, at the time the property was taken on attachment, been filed for record in Payne county. Such mortgage, for want of record in Payne county, was at the time void as to creditors and innocent purchasers. *Greenville National Bank v. Evans Co.*, 9 Okl. 353, 60 Pac. 249.

The correctness of the determination of the district court is challenged first upon the ground that no valid process is by the record shown to have been in the sheriff's hands at the time the plaintiff demanded the property under and by virtue of its mortgage. Such process was issued by the probate judge of Payne county in two cases, viz., *Dix v. G. W. Baker* and *Pink Taylor*, and, second, *Millikan v. G. W. Baker*, each of which was brought to recover a sum less than \$100, and in each of which cases an attachment was issued against the property of defendant therein, G. W. Baker, under and by force of which the defendant herein, Hesser, sheriff, claimed the right of possession. In such cases the probate judge acts with the jurisdiction of a justice of the peace, and is gov-

erned by the procedure applicable to such jurisdiction. See section 2, art. 15, c. 18, St. 1893. The actions in the probate court against Baker at the time they were brought were actions in personam, and in the *Dix* case being rightfully brought against G. W. Baker and Pink Taylor, Taylor being a resident of Payne county, service first had upon him in that county authorized service against Baker in Kingfisher county. The action in this case was therefore rightfully brought in Payne county, and the probate judge had jurisdiction to issue the order of attachment in that case upon the filing of the necessary affidavit and proper bond.

It is contended by the plaintiff that the transcript from the probate court offered in evidence in this (the *Dix*) case, does not show such a compliance with the law governing justice of the peace procedure as to give the act of the probate judge issuing the process relied upon in this (*Dix*) case any validity whatever. It is true that section 4835, St. 1893, requires a justice of the peace to keep a docket in which he must enter at the time of its occurrence the title of the case, the date of the writ, the time of the return, and, if an attachment issued, that fact should be stated, together with the affidavit upon which such order was made, etc., all of which requirements were by the probate court disregarded and not complied with. It is unquestionably true that cases may arise wherein the existence of such record becomes necessary to be shown, but is this that kind of a case? The issue here is the question of the lien of the attachment, and the date such lien went into effect as against the property in question. It was therefore only necessary to show a valid lien that the attachment was issued from a court having jurisdiction, and that the same, when issued, was based upon sufficient authority filed with the court in compliance with the law in such cases to justify its issuance; and, if so issued, the person securing it, and a levy thereunder, would not lose the lien secured thereby upon the property attached because of the fact that the justice of the peace or the probate judge failed to make satisfactory docket entries of the proceedings before him. In this case it is shown that Mr. Dix on the morning of April 10, 1901, procured from the probate court of Payne county an order of attachment against the property of G. W. Baker, and secured the same by filing in said court the affidavit and bond required by the law, and such attachment was immediately levied upon a portion of the property involved herein. Afterwards, on the same day, the plaintiff herein demanded possession from the sheriff of all of Baker's property, including the portion so levied upon; the sheriff having the key to the room in which all of the property was situated. The plaintiff, the Hennessey Bank, had a right to such possession at the time of this demand as against the mortgagor, Baker, but not as against the

defendant, Hesser, to the extent of the property so attached by him. We cannot agree with the contention of counsel for plaintiff that the lien so acquired was lost by a failure on the part of the probate judge to make the necessary docket entries of this transaction. Enough is shown to satisfactorily establish the fact that the plaintiff in that case, Dix, had at that time secured a legally authorized attachment to issue, which, in the hands of the sheriff, Hesser, had ripened into a valid, subsisting lien as against the right of the plaintiff bank under its unrecorded mortgage. In the Dix case only a small portion of the property covered by plaintiff's mortgage was levied upon by the sheriff, some 27 volumes of books and a desk and three chairs, leaving a large number of law-books in the office at the time the sheriff made the Dix levy—not covered thereby—and these the plaintiff was entitled to the possession of by virtue of its mortgage thereon.

There are other questions presented by the brief of plaintiff which seem to have had some consideration in the trial of the case, but they are each of them questions which do not go to the jurisdiction of the probate court in the attachment relied upon, but tend, rather, to present a question of error in the probate court in the procedure in that tribunal resulting in a judgment against Baker in that court. With such questions this court has no concern. Errors of procedure in the probate court resulting in a judgment against Baker, for the enforcement of which an order of sale might issue to sell the attached property, are not questions which can come to this court for review in the manner here presented. Such errors can only be corrected in this court by a direct appeal from the decision of the probate court.

There yet remains for consideration in this case one other important question, which applies to the conclusion reached in the trial court in its determination that defendant, Hesser, was entitled to the possession of the property taken on the attachment in the case of *Millikan v. Baker*. We have already noticed that in the case of *Dix v. Baker* there were two defendants, one of whom, Taylor, was rightfully summoned in Payne county, and this fact authorized process against the other defendant, Baker, in any other county of the territory. The court in such cases has jurisdiction of the subject-matter and of the parties. But this does not seem to have been the condition in the case of *Millikan v. Baker*. In this case Baker was the only defendant, and he was at the time of commencing the action residing in Kingfisher county, having moved there from Payne county about six weeks previous to the bringing of the suit by *Millikan*. His residence in Kingfisher county was open and notorious. The action against him was an action in personam. When suit was brought, the attachment being levied, and summons returned, "Not found in Payne county," the case was

by order of the probate court continued pending service by publication upon Baker, which was accordingly made, and was the only service made in that case. There was no appearance made by Baker in the probate court.

The correctness of the determination of the trial court holding the attachment in this case of *Millikan v. Baker* to be a first lien upon the property attached is challenged upon the ground that said attachment, when issued, was void for want of jurisdiction in the probate court to issue the same. In support of this contention, plaintiff in error cites section 10 of the organic act of the territory (Act May 2, 1890, c. 182, 26 Stat. 87), which, among other things, provides, "And all civil actions shall be instituted in the county in which the defendant or either of them reside, or may be found." If it may rightfully be contended that the action of *Millikan v. Baker* was an action in rem, numerous authorities might be cited in support of the jurisdiction of the probate court—among them the Supreme Court of the United States—*Central Loan & Trust Co. v. Campbell*, 173 U. S. 97, 19 Sup. Ct. 346, 48 L. Ed. 623, where that court construes this provision of the organic act in the following language: "It is insisted that under the organic act of the territory the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without his consent. The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action in rem, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached. It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued—that of proceeding against the property of nonresidents in the place of the territory where the property of such nonresidents is found." This determination of the Supreme Court of the United States is cited by the defendant in error in support of his contention that the action of *Millikan v. Baker* in the probate court was a proceeding in rem, or quasi in rem. We think the authority not applicable. There is no parallel between the cases, unless it may be said that an action is rightfully a proceeding in rem when brought in a county where a defendant resident of the territory may not be summoned, with the purpose of appropriating his personal property, by attachment, to the satisfaction of a debt. This is not the law, and such proceedings are barred by the organic act above cited, in that jurisdiction is not, and cannot be, authorized by statute over the person or property of a defendant resident of the territory, in a county where such defendant does not reside or may not be sum-

moned. There are no qualifications to the provisions of the organic act, and its language is mandatory that "all civil actions shall be instituted where the defendant resides," etc. An action which has for its purpose the subjection of property to the payment of a debt, and is commenced by attachment for that purpose, is a civil action, and must be brought "in the county where the defendant resides or may be found." If not so brought, the court entertaining the proceeding is without jurisdiction, and its action is void. This we find to have been the condition in the case of *Millikan v. Baker* in the probate court of Payne county. Such court therefore had no jurisdiction to issue the order of attachment relied upon by the defendant, Sheriff Hesser, in the district court. It follows that the conclusions reached by the court below were erroneous to the extent here indicated. See *Foster v. Cimarron Valley Bank* (decided at this term of court) 76 Pac. 145.

The judgment of the district court sustaining the attachment of *W. L. Dix v. Baker & Taylor* for the satisfaction of his debt, amounting to \$42.60, is affirmed, and the sheriff of Payne county is hereby awarded possession of the attached property in that case for the satisfaction of such sum and the costs of the probate court therein. The plaintiff is hereby adjudged to be rightfully in possession of the property attached in the case of *Millikan v. Baker*. The costs in the district court and in this court will be equally divided between the plaintiff and defendant. All the Justices concurring, except *BURFORD, C. J.*, who presided in the court below, not sitting.

#### BAUMHOFF v. OKLAHOMA CITY ELECTRIC & GAS & POWER CO. et al.\*

(Supreme Court of Oklahoma. March 4, 1904.)

CONTRACT—WAR REVENUE STAMPS—MUTUALITY—SPECIFIC PERFORMANCE—PETITION—PUBLIC POLICY.

1. It is not necessary to a sufficiency of a cause of action upon contract to show or set out the fact of the instrument having been stamped as required by Act March 2, 1901, c. 806, § 8, Schedule A, subd. 1, 31 Stat. 942 [U. S. Comp. St. 1901, p. 2300].

2. There may be said to be mutuality of contract where the agreement entered into between the parties is binding alike upon each, touching its ultimate performance. Both parties must be bound, or neither are bound.

3. A petition praying for the enforcement of a contract, which by its terms provides for the sale of certain properties named within 10 days after a mayor and council of a city shall have passed an ordinance amending certain franchise rights, which amendments were to be agreed upon by the parties, and which petition alleges the satisfactory passage of such amendments to such ordinance, is not demurrable upon the ground that the petition is indefinite and uncertain and does not state facts which are sufficient to constitute a cause of action.

4. A contract which provides for the sale of certain municipal franchises after such franchises have been amended by the mayor and council of the municipality, and which contract contains no provision requiring the action of either party, further than to agree upon the amendment desired before the same was introduced for the consideration of the mayor and council, is not void as against public policy.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice Burwell.

Action by George W. Baumhoff against the Oklahoma City Electric & Gas & Power Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

H. H. Howard and Flynn & Ames, for plaintiff in error. Shartel, Keaton & Wells, C. Porter Johnson, and R. G. Hays, for defendants in error.

GILLETTE, J. This was an action brought in the district court of Oklahoma county against the Oklahoma City Electric & Gas & Power Company et al. by George Baumhoff to recover upon a contract for the sale of 1,500 shares of the capital stock of the defendant company. The amended petition of plaintiff is as follows:

"Territory of Oklahoma, Oklahoma County—ss.: In the District Court of Said Territory, within and for Said County, in the Third Judicial District. George W. Baumhoff, Plaintiff, v. Oklahoma City Electric & Gas & Power Company, E. H. Cooke, G. W. Wheeler, and G. N. Beebe, Defendants. Petition. The said plaintiff, complaining of the said defendants, alleges and says:

"(1) At all the times herein mentioned the said Oklahoma City Electric & Gas & Power Company was a corporation organized and existing under the laws of the said territory.

"(2) That said company had its place of business at Oklahoma City, said county, where it was the owner of certain franchises, contracts, real estate, machinery, poles, wires, and other apparatus, and was operating the same as an electric light power plant; and it was also the owner of certain gas pipe, machinery, and fixtures.

"(3) The capital stock of said corporation was \$150,000, divided into 1,500 shares, of the par value of \$100 each, all of which stock was at the times herein mentioned owned by the defendants E. H. Cooke, G. W. Wheeler, and G. N. Beebe.

"(4) That on December 10, 1901, the plaintiff and defendants made and entered into a contract, memorandum, and agreement in writing, a true copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof, by the terms of which the defendants agreed to sell, and the plaintiff to buy, all of said capital stock, and to pay therefor the sum of \$120,000, and further agreed to pay a sum not exceeding \$2,000 for eight-inch gas pipe then on the ground and in transit, and also to pay for an electric generator not to

\*Rehearing denied June 8, 1904.

exceed \$2,200; the defendants to pay all the other debts of said company.

"(5) The plaintiff alleges that the capital stock and property covered by said contract, and which the defendants promised and agreed to so sell and deliver to him, were, ever since have been, and are of the reasonable market value of more than \$175,000, exclusive of the said sums he so agreed to pay on the debts of said corporation, and that on account of said contract, and in pursuance thereof, and relying upon the performance of the same, he has expended time and money, the extent and value of which exceed \$5,000.

"(6) The plaintiff says further that he has at all times been ready, able, and willing to perform said contract on his part, and is now ready, able, and willing to do so; that on December 30, 1901, he requested the defendants to proceed to perform said contract on their part, which they refused to do, and refused to talk concerning such performance, and that he renewed said demand on December 31, 1901, and was then advised by them that they would not perform such contract; and that he has at all times been ready, able, and willing to pay said \$4,200 of the debts of said company, and has offered to do so, and demanded a performance on the part of defendants.

"(7) That on or about the 15th day of February, 1902, in pursuance of the terms and in the performance of said contract, the defendants entered into agreements or ordinances with said city amending and extending the franchises of said corporation (such ordinances being numbered 283, 284, and 285); that the same were entirely satisfactory to plaintiff, and, as soon as he learned of their existence, he made known his satisfaction therewith to defendants; that plaintiff is a resident of St. Louis, in the state of Missouri, and, at the time said ordinances were passed, was absent from Oklahoma City; that defendants purposely concealed from him the fact that said ordinances had become effective for the fraudulent purpose of preventing him from demanding a performance of the terms of said contract, and making tender of the sum he was to pay thereunder, within thirty days after the passage thereof; that, promptly upon learning of the existence of said ordinance, he came to Oklahoma City, prepared to perform without delay all the terms of said contract; that he immediately offered to do so, and defendants refused.

"(8) That at the time of making such offer and demand the defendants were unable to perform the terms of said contract, for the reason that they had already sold and delivered said property to other persons, unknown to plaintiff; that the defendants concealed the passage of said ordinances from plaintiff because at the time they had received an offer from said other parties for said property of \$140,000, or \$20,000 more than plaintiff was to pay, of which fact plaintiff was igno-

rant, and before, after learning of the existence of said ordinance, he was able to renew his demand for a performance of said contract, the defendants had put it out of their power to perform the terms of said contract, by the sale and delivery of said property to such other persons, and thereby violated the terms of said contract of plaintiff; that plaintiff did not know of the violation of said contract by the sale and transfer of said property to such other persons until after his demand and tender of performance of the terms of the same, and the refusal of defendants to perform such contract, and the defendants fraudulently concealed such sale and delivery from him in order to prevent him from interfering therewith and enforcing his said contract.

"(9) That plaintiff says further that the defendants have often refused, and still refuse, to perform said contract; that he has often offered to perform said contract, and is now ready, able, and willing to do so, and to pay said \$120,000, and said \$4,200, and any other sum he may be obligated to pay, and to accept said ordinances and the transfer of said stock and property discharged from the debts of said corporation, according to the terms of said contract, and defendants are unwilling and have wholly failed and refused to perform said contract on their part, and have violated said agreement, to his damage in the sum of sixty thousand dollars. Wherefore the plaintiff prays judgment against the defendants for the sum of sixty thousand dollars, with interest thereon at the rate of seven per centum per annum from and after December 30, 1901, and costs of suit.

"Geo. W. Baumhoff, Plaintiff,

"By Howard & Ames, His Attorneys."

Exhibit A: "Oklahoma City, Dec. 10th, 1901. In consideration of the sum of one dollar received from Geo. W. Baumhoff, we hereby agree to sell to said Geo. W. Baumhoff, his successors or assigns, fifteen hundred shares, constituting all of the shares of the capital stock of the Oklahoma City Electric and Gas and Power Company of Oklahoma City, Oklahoma Territory, of the par value of One Hundred Dollars each, for the sum of One Hundred and Twenty Thousand Dollars, to be paid in cash. This sale is to be consummated within ten days after an amendment duly passed by ordinance enacted by the City Council of the City of Oklahoma City, O. T., such amendment to said ordinance to be mutually agreed upon between the President and Secretary of said Company and the purchaser before the same is introduced into the Council. The above shares of stock shall convey all the property, rights, privileges, grants and franchises of said Oklahoma City Electric Gas and Power Co., free of debts of all kinds excepting a sum not exceeding \$2,000.00 for eight-inch gas pipe now on the grounds and en route as billed from the Dimmick Pipe Co. of Birmingham, Ala., and our Electric Generator from

the Western Electric Supply Co. of St. Louis, at not exceeding \$2,200—which the purchaser assumes and is to pay for within ten days after the passage of an ordinance by the City Council and approved by the Mayor of Oklahoma City, O. T. satisfactory to the purchaser. The sum of One Hundred and Twenty Thousand Dollars in cash to be paid by the purchaser within thirty days after such ordinance amending the franchise of said company satisfactory to the purchaser is adopted. The purchaser to take possession of the property at once upon the payment of the entire consideration of the property. It is further agreed that any betterments which may be required, such as lamps, meters or wire bought before Dec. 30th, 1901, shall be paid by the purchaser. Oklahoma City Electric and Gas and Power Co. By G. W. Wheeler, President. E. H. Cooke, Secretary. E. H. Cooke. G. W. Wheeler. G. N. Beebe. Accepted. Geo. W. Baumhoff."

The defendant demurred to the petition as amended by a general demurrer, charging that the petition as amended did not state facts constituting a cause of action against these defendants, or either of them, and on the further ground that the petition is indefinite and uncertain. The district court, after a hearing upon said demurrer, and upon due consideration thereof, sustained the same, whereupon the plaintiff announced that he would stand upon said amended petition, and now brings the case to this court for review.

The defendants in error, in support of the determination of the court below, present four propositions for the consideration of the court, each of which raises a question as to the validity of the contract sued on, and which are as follows: First. "That it is not stamped as required by law." Second. "For want of mutuality." Third. "That it is void for indefiniteness." Fourth. "That it is void as against public policy." These objections will be considered in their order.

The allegations of the petition do not charge that the contract sued on was or has been stamped with internal revenue stamps as required by Act March 2, 1901, c. 806, § 8, Schedule A, subd. 1, 31 Stat. 942 [U. S. Comp. St. 1901, p. 2300], which provides: "On all sales or agreements, shares of certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company or corporation, or by an assignment in blank, or by any delivery, or by any paper or agreement or memorandum, or other evidence of transfer or sale, or to secure the future payment of money, or for the future transfer of any stock, on each one hundred dollars of face value, or fraction thereof, two cents." Section 13 of the same act provides "that any instrument required to be stamped and which has not been properly stamped, shall be deemed invalid and of no effect." Section 14 of the original war revenue act (Act June 13, 1898, c. 448, 30 Stat. 455 [U. S. Comp. St.

1901, p. 2296]) provides "that no such instrument shall be admitted in evidence in any court." The statutes of Oklahoma (section 124 of the Code of Procedure) provide that in actions on contracts, etc., "a copy thereof must be attached to and filed with the pleading." Are the revenue stamps required by the act above quoted any part of the contract required to be shown under the terms of this statute? We think not. The written contract signed by the parties shows the agreement entered into, and is by the statutes required to be set out by a copy thereof. If anything further is wanting to its validity, such as revenue stamps, such defect should be taken advantage of by answer or special plea. The question whether the original instrument was stamped or not is a matter of evidence, and not of pleading. The revenue act referred to is highly penal, and provides for the penalty where the omission to properly stamp the instrument is with intent to evade the provisions of the act, and it is further provided in section 13 of that act that an oversight of this kind may be cured by a subsequent compliance with the law. Whether the original instrument, a copy of which is set out, was stamped or not, the fact was not before the court upon demurrer. Nor was the intent of the parties with reference to stamping or not stamping the instrument so pleaded or shown as to enable the court to determine the invalidity of the contract. We are of the opinion that it was not and is not necessary to a sufficiency of a cause of action upon a contract to show or set out the fact of the instrument having been stamped as required by the revenue act referred to. The author of 8 Cyc., at page 142, cites many authorities in support of the proposition, and in the text says: "A revenue stamp is no part of a note or bill, and, in declaring on such an instrument, it need not be alleged that it was properly stamped, nor need a copy of the stamp be set out." There is no difference between a piece of commercial paper and the instrument here sued on, with reference to its validity as a stamped or unstamped instrument. There is no difference between the act of Congress referred to and act of July, 1866 (12 Stat. c. 184, p. 98). Mr. Justice Field, of the Supreme Court of the United States, passing upon a question almost identical with this, in *Campbell v. Wilcox*, 10 Wall. 422, 19 L. Ed. 973, under said act of 1866, where a demurrer had been presented to a declaration upon four promissory notes aggregating \$10,805, said: "To the objection there are several answers. In the first place, the act of Congress which requires promissory notes and other instruments to be stamped only declare that they 'shall be deemed invalid and of no effect' when the stamp is omitted 'with intent to evade the provisions' of the act—that is, with intent to defraud the government of the stamp duty. It is a fraudulent and not an accidental omission at which the penalty of the statute is

leveled. Such fraudulent omission, if available at all to the maker of the note, can only be set up by special plea or urged on the trial. It cannot be taken advantage of on demurrer. In the second place, if a stamp were essential to the validity of paper of this kind, the averment in the declaration that the defendants had made and delivered to the plaintiff their promissory notes would imply that the instruments were at the time in the form and condition required by law." We are therefore of the opinion that the demurrer of the defendant to the petition of plaintiff, in so far as the same is based upon the absence of proper revenue stamps from the copy of the contract set out in the petition, or any allegations of the same being upon the original contract, is not well taken.

The second contention of defendant in error, that the contract sued on is void for want of mutuality, cannot, we think, be sustained upon the authorities. There may be said to be mutuality of contract where the agreement entered into between the parties is binding alike upon each touching its ultimate performance. Both parties must be bound, or neither are bound. Squared by this rule, is the contract under consideration wanting in mutuality? What is to be sold is by the terms of the agreement plainly stated. The amount to be paid therefor is equally definite. The time in which the conveyance should be made, and the time of payment therefor, are also fixed. It is true that the contract provides that the sale is to take place after the passage of an ordinance by the mayor and council of Oklahoma City satisfactory to the purchaser, which ordinance at the time of its passage has been mutually agreed upon by the plaintiff and president and secretary of the defendant corporation; but this condition in the contract does not, we think, render the same void for want of mutuality. This latter provision attaches to the contract a condition precedent, which, if not ultimately consummated, may defeat the sale provided for in the contract, but we do not understand that contracts containing such a condition are for that reason void for want of mutuality. It is a provision mutually agreed to, and affects both parties alike. The contract may not be capable of enforcement for some other reason, but it cannot be said that it is lacking in mutuality, because it is manifest that both parties alike. The contract may not be capable of enforcement for some other reason, condition happens as contemplated by the contract. This case is easily distinguished from *American Cotton Oil Co. v. Kirk et al.*, 68 Fed. 791, 15 C. C. A. 540, cited in support of the contention that the contract is void for want of mutuality. That case was founded upon a contract to sell and deliver 10,000 barrels of oil at a stipulated price, in such quantities per week as the buyer may desire, to be paid for as delivered, but which contained no agreement on the part of the

buyer to purchase and receive any particular quantity of oil. This was a one-sided contract, which compelled the oil company to sell, but left it to the option of Kirk as to whether he would purchase or not. The same distinguishing feature is found in *M., K. & T. Ry. Co. v. Bagley* (Kan. Sup.) 56 Pac. 759, and *Woolsey et al. v. Ryan* (Kan. Sup.) 51 Pac. 664, also cited in support of said contention. In each of these cases the contract or agreement sued on is so drawn as to make the same binding only upon one of the parties thereto, and the court holds in each case that the contract will not support a cause of action for want of mutuality. In the case at bar a cause of action under the contract, for its enforcement, is open to either party, because each party, according to the terms of it, has agreed to perform the conditions and obligations stipulated for. The contract is equally binding upon each party, and there is not, therefore, a want of mutuality.

The third ground of objection to the contract sued on is that it is void for indefiniteness. The contract provides that the sale stipulated for is to be consummated within 10 days after an amendment has been duly passed by the mayor and council of Oklahoma City, Okl., amending the franchise of the defendant corporation satisfactory to the purchaser, which amendment by the terms of the agreement was to be mutually agreed upon between the president and secretary of said company and plaintiff. The contract is not indefinite in its provisions, except as to this condition, and with reference thereto it may be said that the character of the ordinance to be agreed upon is not stated, or what its provisions must be in order to be satisfactory to the plaintiff; and it is urged that the agreement is not a sale—is not a complete contract—with these essential and important elements not definitely fixed by its terms. For the purpose of considering the demurrer here presented, it may be admitted that this is true, and still we are unable to see how the defendants may avail themselves of it. The demurrer is to the petition, which distinctly avers the fact to be that the ordinances stipulated for in the contract have been by the mayor and council of Oklahoma City passed, and that the same were satisfactory to the plaintiff, and that the plaintiff has tendered a compliance on his part with the terms and requirements of the contract. It therefore appears that what was indefinite and uncertain in the conditions of the agreement has been made definite and certain. The petition charges the existence of a contract, the provisions and condition of which were, at the time of commencing this action, settled and determined, and charges an obligation on the part of the defendant to perform that contract. These allegations, we think, are sufficient to take the subject-matter beyond the reach of a demurrer upon the ground of indefiniteness.

The fourth and last ground of objection is that it was void as against public policy, and upon this subject it is urged that it is void because of the fact that, by its terms, before the appellant is bound or required to do anything towards the purchase of the plant in question, an ordinance must be agreed upon, and its passage secured by the mayor and council of Oklahoma City. The language of the contract in this respect is as follows: "This sale is to be consummated within ten days after an amendment duly passed by ordinance enacted by the City Council of the City of Oklahoma City, O. T., such amendment to such ordinance to be mutually agreed upon between the President and Secretary of said Company and the purchaser before the same is introduced into the Council." It is plain that by this provision the appellant would not and did not agree to pay \$120,000 for the plant without the ordinance contemplated in the contract being passed. It is also plain that the appellee did not expect and could not demand such payment except upon the passage of such ordinance. Did this condition of the contract render the same void, upon the ground that these provisions of the agreement are against public policy? The contract is made dependent for its enforcement upon legislative action. Such action must be had, or the contract becomes binding upon neither party. It is a condition precedent. The contract, however, does not require that either party shall take any particular steps in the matter of securing this legislation, other than that the parties shall agree upon the legislation desired before bills are introduced in the legislative body, by the passage of which the desired result is to be accomplished. It is not pretended that the result to be accomplished is in any way subversive of sound morals or the public welfare, or that the object to be attained is against public policy, other than that the contract is made to depend for its validity upon the happening of a condition which can only happen by and through legislative action. Was the contract void at its inception for these reasons? It cannot be said that the contract here sued on is void because of the fact that it tends to corrupt legislative action, without reading into it more than is there written, for the contract does not stipulate for any act on the part of either party, other than a presentation to the city council of a bill or ordinance which contained the provisions desired to be enacted into a law. The Supreme Court of the United States, in *Marshall v. B. & O. R. R.*, 57 U. S. 314, 14 L. Ed. 953, say: "All persons whose interests may in any way be affected by any public or private act of a Legislature have an undoubted right to urge their claims and argument, either in person, or by counsel professing to act for them, before legislative committees, as well as in courts of justice." Can it be

rightfully said that, because the validity of this contract depended upon legislative action, there was in it, therefore, an inducement to corrupt the city council by improper means, and it is therefore void? We think not. If such a rule could be applied in this instance, then improper motives could be charged to every application for a franchise right. The plaintiff has not here imposed upon the defendant a requirement to do anything of the kind. He has simply said, "I will take your property at a given price if your franchises are amended in a manner to be agreed upon." Such a contract of purchase and sale does not contain the elements which the courts have held to be illegitimate, because subversive of sound morals. To be so subversive requires something more than such an agreement. As said in *Houlton v. Nichol*, 67 N. W. 715, 33 L. R. A. 169, 57 Am. St. Rep. 928: "It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence, rather than of guilt, and that such rule applies in testing such a contract as the one we have here by the principles of sound morals." Citing several cases. And further on in the same case, in commenting on the case of *Burke v. Child*, 88 U. S. 441, 22 L. Ed. 623, the court say: "The court held the contract void, and there clearly pointed out the distinction between agreements for services that may, and such as may not, properly be entered into, to obtain legislative or executive action, and, in effect, said that the preparation of petitions, taking of testimony, collecting of facts, preparing of arguments, and submitting them, orally or in writing, to committees or other proper authority, and services of like character, which are intended to reach only the reason of those to be influenced, are legitimate. They are not to be classed with contracts for personal solicitation or the means customarily resorted to by the lobbyist. It is upon the latter that the law puts the seal of condemnation, not upon the former." This proposition of the defendants to sell their plant with franchises amended so as to satisfy the plaintiff as a purchaser—the amendments being a condition precedent to the plaintiff's liability in accepting the defendant's proposition—was a legitimate subject of contract and agreement, and does not, on the face of it, import corrupt or illegal action by either party.

From the conclusions here reached, it was error for the district court to sustain the demurrer to plaintiff's petition. The judgment of the court must therefore be reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings therein as the parties may desire to take. All the Justices concurring, except BURWELL, J., who presided in the court below, not sitting, and BURFORD, C. J., absent.



## EXENDINE v. GOLDSTINE.\*

(Supreme Court of Oklahoma. March 4, 1904.)

APPEAL—RECORD—SUFFICIENCY—JUDGE'S  
CERTIFICATE.

1. Where the record in this court in a case on appeal does not show that it contains all the evidence presented at the hearing below, it presents no error that can be reviewed by this court arising upon a question of evidence.

2. The certificate of the trial judge in settling a case-made imports the truthfulness of the statements contained in the case, and nothing more.

3. What is contained in the case-made must be ascertained from the statements therein, and not from the certificate of the trial judge appended thereto.

4. A statement in the certificate of the trial judge, made when settling the case, that it contains all the evidence introduced at the trial, is not sufficient to show that the record does contain all of the evidence.

(Syllabus by the Court.)

Error from District Court, Payne County; before Justice Jno. H. Burford.

Action by A. H. Goldstine against C. O. Taylor and others. Jasper Exendine was allowed to interplead. Judgment for plaintiff, and Exendine brings error. Affirmed.

E. M. Clark and C. H. Stewart, for plaintiff in error. F. C. Hunt, for defendant in error.

PANCOAST, J. This was an action brought in the district court of Payne county by A. H. Goldstine against C. O. Taylor et al., upon an open account, to recover the sum of \$458.08, with interest. Service was had upon the defendant Taylor by publication. An attachment was issued and levied upon the southwest quarter of section 32, in township 19 north, of range 3 east of the Indian meridian, as the property of the defendant Taylor. Other persons were made defendants, whose names do not appear in the record in this court. The plaintiff in error, Jasper Exendine, made application to the court below to interplead in the case, claiming to hold a mortgage upon the attached real estate described. He was allowed to interplead, and did so, setting up his note and mortgage, claiming the same to be a prior lien to the attachment of the plaintiff in the action. There was no attempt to have the mortgage foreclosed, and the only object of the interplea seems to have been to have the attachment lien adjudged to be subject and junior to the mortgage lien of the interpleader. The plaintiff answered the interplea, and a trial was had before the court, which seems to have been principally upon the theory on the part of the plaintiff that the transfer of the real estate from Andrew and wife to Taylor was in fact made in payment of the indebtedness secured by the mortgage, and that the note and mortgage by means of this transfer had been canceled;

while on the part of the interpleader it was claimed that he had purchased the note and mortgage from Taylor, and that he was the sole owner and holder thereof. Just why the plaintiff in error should have deemed it necessary to interplead in such an action does not clearly appear, inasmuch as a judgment in the attachment case, he not being a party, would not in any way have affected his mortgage lien. However, the case was tried, and the court found the issues joined in favor of the plaintiff and against the interpleader, and, as a conclusion of law, found that the attachment was a prior lien to the mortgage lien of the interpleader. A motion for a new trial was made and overruled, and the case appealed to this court.

The only error complained of is that the judgment of the trial court is not sustained by the evidence. The argument of plaintiff in error is based entirely upon this one assignment of error. It is contended by defendant in error that this proposition cannot be determined by this court for the reason that the case-made does not affirmatively show that it contains all of the evidence introduced on the trial of the case. From an examination of the case-made, it does not appear that it contains all of the evidence introduced at the trial of the cause. For this reason the error complained of cannot be determined in this case from the record before us. The practice is so well and thoroughly settled that a case-made which does not show affirmatively that it contains all of the evidence adduced at the trial presents no error to this court arising upon a question of evidence that it is unnecessary to cite authorities to sustain the proposition. In the brief of plaintiff in error submitted in opposition to the motion to dismiss it is argued that the certificate of the trial judge in settling the case states that the record contains all of the evidence, and that this statement in the certificate is sufficient to show that the record does contain all of the evidence. A statement in the certificate of the trial judge, when settling a case, that it contains all of the evidence, is not sufficient. The fact must affirmatively appear in the case-made itself. The certificate of the judge imports the truthfulness of the statements contained in the case, and nothing more. What the case-made contains must be ascertained from the statements therein. All presumptions are in favor of the correctness of the findings and judgment of the trial court. *School District v. Susie Trotter*, 10 Okl. 625, 64 Pac. 9; *Board of Commissioners v. Hubble*, 8 Okl. 169, 56 Pac. 1058; *Devine v. Silvers*, 8 Okl. 700, 58 Pac. 781.

There being no error presented by the record which can be reviewed by this court, the judgment of the court below is affirmed. All of the Justices concurring, except BURFORD, C. J., who tried the case below, not sitting.

\*Rehearing denied March 8, 1904.

**KERFOOT et al. v. STATE BANK OF  
WATERLOO, ILL., et al.\***

(Supreme Court of Oklahoma. March 4, 1904.)

**REPLEVIN — FOREIGN CHATTEL MORTGAGE — AS-  
SIGNMENT — NEGOTIABLE NOTE.**

1. The burden is on the plaintiff in a replevin action to establish his right to recover by a preponderance of the evidence.

2. Where one is in possession of facts from which he must, as a person of ordinary intelligence, know that certain cattle are included in a chattel mortgage, the fact that one of the brands is described as being on the left hip, instead of on the right hip, is immaterial, and he must use reasonable care to avoid loss.

3. In Kansas the transfer by indorsement of a negotiable promissory note carries with it the assignment of a chattel mortgage given to secure it, and, there being no law requiring an assignment of a chattel mortgage to be filed or recorded, one who purchases such note for value before maturity will be protected in his security, without filing or recording an assignment of such mortgage, against all subsequent purchasers and incumbrancers, regardless of their good faith.

4. As a general rule, a mortgagee and his assignee acquire only a lien on the interest of the mortgagor in the property mortgaged.

5. Where a chattel mortgage is executed on property in Kansas, and duly filed for record, it will be binding on the property after it is removed to this territory.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Hainer.

Action by the State Bank of Waterloo, Ill., and J. W. Lynch against J. B. Kerfoot and the City National Bank of Kansas City. Judgment for plaintiffs, and defendants bring error. Reversed.

J. F. King and Milton Moore, for plaintiffs in error. W. L. Barnum, J. E. Burns, and John Martin, for defendants in error.

BURWELL, J. N. J. Walden was the owner of something over 500 head of cattle, and on October 17, 1900, he executed a note to the Siegel-Sanders Commission Company for \$15,810.53, and at the same time gave it a chattel mortgage of these cattle, which were located on his farm in Clark county, Kan. The mortgage was duly filed for record on October 22, 1900, and thereafter, on October 26, 1900, the Siegel-Sanders Commission Company sold and assigned the note to the City National Bank of Kansas City, Mo., for \$15,183.38. The original mortgage was attached to the note; a copy having been filed with the register of deeds of Clark county, Kan. On November 15, 1900, Frank Prudom and John A. Malone, in company with the agent of the Siegel-Sanders Commission Company, went to the farm of Walden, and, at the request of this agent, and upon his promise that the Siegel-Sanders Commission Company would give him credit therefor on his mortgage (they stating that the Siegel-Sanders Commission Company had sent them there), he turned over to them 300

cattle; and, in turning over to Prudom and Malone these cattle, the entire bunch of 500 were driven to town, and the 300 were cut out from the others, and in these 300 were cattle branded W on the right hip, and others with W on the left hip; and all of these cattle had other brands, some of which were described in the mortgage. Prudom and Malone shipped these 300 cattle to Oklahoma, and a chattel mortgage was executed by them to the Siegel-Sanders Commission Company for \$5,130.63 on the 150 cattle in question, and the Siegel-Sanders Commission Company, before maturity, sold the note and mortgage to the State Bank of Waterloo, Ill. The City National Bank of Kansas City got possession of the cattle, and the State Bank of Waterloo brought this action of replevin. Both banks apparently acted in good faith. The jury found for the plaintiff, and the Kansas City bank appeals.

It is insisted by the appellee that the fact that the mortgage assigned to the City National Bank describes the cattle as being branded W on the left hip, when in fact they were branded W on the right hip, was not a sufficient description to put Prudom and Malone upon inquiry. We have read the entire record in this case, and from it have become fully satisfied that Prudom and Malone not only were in possession of sufficient facts to put them upon inquiry, which, if pursued, would have disclosed the facts, but that they knew that the cattle which they bought from Walden were covered by the mortgage under which the Kansas City bank claims. Let us see, briefly: The Siegel-Sanders Company sent Prudom and Malone to Walden's place, in Clark county, Kan., with its own agent; and they told Walden, if he would turn over 300 of the cattle, he would be given credit for them on his mortgage. They saw all of the cattle there together in a bunch, some branded W on the right hip, and others W on the left hip. They did not pay Walden one cent for the cattle. In fact, it is not shown that they paid anybody anything for them, but, if anything was paid, it was to the Siegel-Sanders Company. Of course, Siegel said that he had given Walden credit for the 300 cattle, but, if he did, in the rush of business he forgot to send the money to the bank to whom it belonged. In addition to this, Prudom and Malone were bound to take notice of the public record of Clark county, Kan., where Walden lived. The mortgage assigned to the Kansas City bank was a matter of public record, and it described these cattle as "western" cattle, and also described other brands on them. Prudom and Malone, as reasonable men, must have known that these were the cattle described in the mortgage of October 17, 1900, and we are at a loss to understand how the jury arrived at any other conclusion. The court's instructions were fair, but, when a verdict was returned for the plaintiff, it should have been set aside.

\*Rehearing denied March 8, 1904.

As to the mortgage executed by Walden to the Siegel-Sanders Company, dated December 6, 1899, we have not considered it, as the Kansas City bank admits that it never bought that mortgage. It is possible that Prudom and Malone thought that the Siegel-Sanders Company still owned the mortgage at the time they bought the cattle and executed this mortgage to it, but it did not. It had sold the mortgage to the City National Bank. The note and mortgage were not yet due, and Prudom and Malone bought at their peril; and the suggestion that the City National Bank had not filed any assignment of the mortgage in the office of the register of deeds in Clark county, Kan., is without force, as this court held at this term, in the case of First National Bank of Geneseo, Ill., v. National Live Stock Bank of Chicago, Ill., 76 Pac. 130, that under the law of Kansas an assignee of a chattel mortgage is not required to file his assignment of record in order to protect his rights against subsequent purchasers and incumbrancers in good faith, as there is no statute requiring such assignment to be filed or recorded. The Kansas City bank's mortgage being good in Kansas, it was also valid and binding in Oklahoma. *Greenville National Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249. The Siegel-Sanders Company knew that it was perpetrating a fraud upon the Kansas City bank when it took a mortgage from Prudom and Malone and assigned it to the State Bank of Waterloo, and, no matter how innocent the Bank of Waterloo was, it could acquire no greater rights than were owned by Prudom and Malone and the Siegel-Sanders Company, and the fact that its mortgage was executed in Oklahoma gave it no greater right.

The judgment of the trial court is hereby reversed, and a new trial granted, at the cost of the appellee. All of the Justices concurring, except HAINER, J., who presided in the lower court, not sitting, and BURFORD, C. J., absent.

#### ALLEN v. AJAX MIN. CO. et al.

(Supreme Court of Montana. June 13, 1904.)

#### CORPORATIONS—SALE OF PROPERTY—AUTHORIZATION BY STATUTE—IMPAIRING OBLIGATION OF CONTRACT—CONSTITUTIONALITY OF STATUTE.

1. *Seas. Laws 1899*, p. 113, authorizes corporations to dispose of all their property on a vote of two-thirds of the capital stock; *Comp. Laws 1887*, c. 25, § 406, provides that the Legislature might at any time alter, amend, or repeal any of the provisions of the chapter, which was relative to the organization of corporations; *Civ. Code 1895*, div. 1, pt. 4, relative to corporations, by section 394, provides that every grant of corporate power is subject to alteration, suspension, or repeal, in the discretion of the Legislative Assembly, and by section 550 provides that the Legislature may at any time amend or repeal part 4, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; and *Const. art. 15, § 2*, provides that no charter of incorporations shall be

granted or changed by special law, but that the Legislature shall provide general laws, and that any such laws shall be subject to future repeal or alteration. *Held*, in a suit by a minority stockholder to restrain the sale of the corporate property, that, as to a corporation organized between 1889 and 1898, the authority conferred on the corporation to sell its property by *Laws 1899*, p. 113, was not violative of the federal Constitution (article 1, § 10) and the state Constitution (article 3, § 11), as impairing the obligation of contracts, as to such stockholder.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Suit by Otis R. Allen against the Ajax Mining Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

H. G. & S. H. McIntire, for appellants.  
Wm. Wallace, Jr., for respondent.

HOLLOWAY, J. On May 3, 1904, the respondent, as plaintiff, commenced an action in the district court of Lewis and Clarke county, the object of which was to secure an injunction restraining the defendants from disposing of certain mining property belonging to the defendant, Ajax Mining Company, a Montana corporation, to the National Prospecting & Development Company, a New Jersey corporation. The defendants Babcock, Marlow, Larson, Tracy, and Smith own and control 81,900 shares of the outstanding capital stock of the Ajax Mining Company; that being all the capital stock outstanding, except 100 shares owned by the plaintiff. This mining company is a prosperous, going concern, operating certain properties in Broadwater county, Mont. The defendants Babcock, Marlow, Larson, Tracy, and the plaintiff are the directors of the company, which was organized and empowered to "carry on the business of mining, purchasing, selling, and dealing in mining property, running tunnels, appropriating ground for other necessary mining purposes; and the mining, smelting, reduction, and shipment and selling ores, building mining improvements, constructing mills, and all other purposes incident to the business of mining or connected therewith." In April, 1904, the National Prospecting & Development Company made a proposal to purchase all the property of the Ajax Mining Company, paying therefor 40 per cent. of the capital stock in the New Jersey company. After consideration of this proposal, the defendant directors passed a resolution calling a meeting of the stockholders of the Ajax Mining Company for the purpose of considering the question of accepting such proposal to purchase and acquire all the property and assets of every kind belonging to that company upon the terms proposed, and directing notice of such meeting to be given as required by law. Pursuant to this resolution the defendant directors caused a notice of such stockholders' meeting to be published, but, before this meeting was held, this action was commenced by the plaintiff, who did not consent to such sale. The

plaintiff alleged that the defendant stockholders intended to accept the offers of the National Prospecting & Development Company, and intended to sell and convey to it all the property of the Ajax Mining Company, and would do so unless restrained by the court. Upon the filing of this complaint and the issuance of summons, the district court, on the application of the plaintiff, issued a temporary injunction restraining the defendants from voting or allowing to be voted any of the capital stock of the Ajax Mining Company in favor of the sale of the property, and from taking any steps or proceedings preparatory to, or looking towards, the consummation of such sale. From the order granting this injunction, the defendants appealed.

It is conceded that the only question involved is the constitutionality of an act of the Sixth Legislative Assembly entitled "An act to enlarge the powers of mining corporations to dispose of, sell, lease, mortgage, exchange, or otherwise convey, all or any part of the property of such corporations, and to authorize and empower such corporations to dispose of, sell, lease, mortgage, or otherwise convey, the whole or any part of the property of such corporations, and to protect stockholders dissenting from such action of such corporations," passed over the Governor's veto February 28, 1899 (Sess. Laws 1899, p. 113), and commonly known as "House Bill 132." That act, in substance, provides that the board of directors or trustees of any mining corporation organized under the laws of either the territory or state of Montana, whether before or after the passage of the act, and whether the same is solvent or insolvent, or is a going or prosperous concern, or otherwise, shall have the power, and, upon request of stockholders representing at least one-half of the outstanding capital stock, it shall be their duty, to call a meeting of the stockholders for the purpose of considering the question of selling, leasing, mortgaging, exchanging, or disposing of the whole or any part of the property of such corporation for other property, or of the whole or part of the capital stock of any other corporation, whether domestic or foreign. Provision is then made for the method of calling such stockholders' meeting, and, upon the concurring vote of holders representing two-thirds of the outstanding capital stock, the directors shall have full power and authority to carry out the sale, lease, mortgage, or exchange or other disposition or conveyance of the whole or any part of the property of said corporation, to the same extent as if all the stockholders of the corporation had consented thereto. Section 2 provides that, if a disposition of all the property of the corporation shall be made, the corporation shall thereby be dissolved. Section 3 provides for the protection of dissenting stockholders by payment of the appraised value of their stock; the appraisers thereof to be appointed by the

district court of the county wherein is situated the principal place of business of the corporation; all expenses to be borne by the corporation, its grantee or vendee. Section 4 provides for an appeal to the district court from such award, and the ascertainment of the value of the stock by a jury, as in condemnation proceedings provided for by law, and for the rendition of judgment and execution in favor of the dissenting stockholder for the award and expense and cost of the proceedings, which judgment shall be a lien upon all the real property so disposed of, superior to the rights of the grantee or vendee; the claims of dissenting stockholders being equal liens upon the property. Upon the payment of the claims, the dissenting stockholder shall cease to have any further interest in the corporation, and his stock shall become the property of the party satisfying the judgment or appraisal.

If this act is valid, the district court erred in issuing the injunction. It is contended by respondent that the act is invalid, for the reason that its enforcement would impair the obligation of corporation contracts, and therefore the act violates section 10, art. 1, of the Constitution of the United States, and section II, art. 3, of the Constitution of Montana.

By the decision of the Supreme Court of the United States in the Dartmouth College Case in 1819 (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629), it was finally determined in this country that a charter granted by a state to a corporation became, when accepted by the corporation, a contract, within the meaning of the federal Constitution, and that any legislative enactment which attempts to alter or amend it in any substantial particular impairs the obligation of that contract, and is void, unless the power or authority to alter or amend such charter is reserved by the state which granted it. In his concurring opinion in that case, Mr. Justice Story, after citing with approval *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39, to the effect that the Legislature cannot modify the charter of a corporation unless the power is reserved in the act of incorporation, emphasizes his approval of that doctrine by saying: "If the Legislature mean to claim such authority, it must be reserved in the grant." It is a part of the history of our jurisprudence that the states were quick to seize upon the suggestion of Mr. Justice Story, and have, with singular unanimity, adopted constitutional and statutory provisions reserving to themselves the right and authority to alter or amend all corporation charters. Prior to the adoption of the Constitution, the territory of Montana had made such reservation as early as 1871, and a like provision was carried forward in the revision of 1879, in which is comprised a comprehensive article containing all the then existing laws with reference to the organization of corporations for industrial and productive purposes, and

in which is found this provision: "Sec. 264. The Legislature may at any time alter, amend, or repeal this article. \* \* \*" This remained in force until the compilation of 1887. Chapter 25, div. 5, Comp. St., was then adopted, embracing the laws then in force respecting the organization of such corporations; and this included section 466, which reads as follows: "Sec. 466. The Legislature may at any time alter, amend or repeal this chapter. \* \* \*" This chapter remained in force until superseded by part 4, div. 1, of our Civil Code of 1895, which furnishes a complete system of laws relating to the formation of corporations in this state. Sections 394 and 550 of that part of the Civil Code read as follows:

"Sec. 394. Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the Legislative Assembly."

"Sec. 550. The Legislative Assembly may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder. \* \* \*"

That there might not be any question as to the authority of the Legislature to make such reservations, the Constitution (article 15, § 2) provides: "Sec. 2. No charter of incorporation shall be granted, extended, changed or amended by special law, \* \* \* but the Legislative Assembly shall provide by general law for the organization of corporations hereafter to be created; provided, that any such laws shall be subject to future repeal or alterations by the Legislative Assembly."

It is apparent, then, that when the Ajax Mining Company was organized, some time between 1880 and 1898, there existed and was read into and made a part of its charter the then existing statute, which gave notice to all concerned that the Legislature of Montana, acting under the constitutional provision above, might at any time alter, amend, or repeal the law under which it existed.

Respondent contends that the contractual relation respecting a corporation is of a threefold character, namely, first, a contract between the state and the corporation; second, a contract between the corporation and its stockholders; and, third, a contract between the stockholders inter sese—and that, while the state might properly reserve to itself the right and the authority to change the contract between itself and the corporation, it cannot, and it was never intended that it should, in any manner interfere with or impair the obligation of the contract existing among the stockholders themselves, and that any attempt to do so is a violation of the federal Constitution, and authorities are cited in support of this position. But it is to be observed that in all these legislative enactments the state did reserve to itself the right to repeal the law under which this corporation was organized, and,

had it done so, the corporation would have been destroyed, except for the purpose of winding up its business. Yet it cannot be said that the state did not have this power, for the statute authorizing it was in existence when the corporation was organized, and was read into and became as much a part of the charter as if expressed in terms in that instrument itself. And if the state reserved the right and power by a repeal of the law creating the corporation to destroy it, it certainly did less when, instead of repealing the law, it amended it by House Bill 132.

It is true that at the time of the formation of the Ajax Mining Company, and for several years thereafter, the majority stockholders of a corporation could not dispose of all the property of a prosperous going concern without the consent of the minority. *Forrester v. B. & M. C. C. & S. M. Co.*, 21 Mont. 544, 55 Pac. 229. But that doctrine prevailed only because the state had not seen fit to exercise the right which it possessed to call into activity this dormant power theretofore reserved to itself. And it is likewise true that the plaintiff, Allen, when he subscribed for stock in this company, did so, charged with the full knowledge of the constitutional and statutory provisions then existing, under which the Legislature might at any time alter, amend, or repeal the provisions of the law which was made a part of its charter; and he must therefore be treated as having given his tacit consent that such changes might be made at any time as in the wisdom of the Legislature might be necessary, and this as fully as if he had signified such consent by a writing duly subscribed by himself.

It cannot be said, then, that the enforcement of the provisions of House Bill 132 will impair the obligation of any contract which the plaintiff entered into when he became a stockholder of this company, for the reason that the reservation of this authority to alter, amend, or repeal the law under which the company was organized became as much a part of the law of its creation as any other provision respecting it, and became a part of the charter, modifying what would otherwise have been an absolute grant. 4 *Thompson on Corporations*, 5408.

It is to be understood, too, that this reservation possesses equal vigor, whether contained in the charter of the particular corporation itself, or in the Constitution or general laws of the state under which the corporation is organized. While there may be some slight conflict in the authorities, the great weight of authority clearly and unequivocally sustains such statutes. *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, and cases cited; *Northern Central Railroad Co. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167; *Venuer Co. v. Steel Corporation (C. C.)* 116 Fed. 1012.

The theory upon which these statutes are upheld is that whatever rules or regulations for the management, operation, or control of a corporation which the Legislature might have incorporated in the law under which the corporation was organized may afterwards properly be ingrafted on its charter by virtue of this reserved power existent at the time of the formation of the corporation. *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Spring Valley Water W. v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Market Street Ry. Co. v. Hellman*, above; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; *Williams v. Nall* (Ky.) 55 S. W. 706. A review of the authorities citing numerous instances of the enforcement of such statutes is found in 4 *Thompson on Corporations*, § 5411.

We are therefore of the opinion that the statute is not open to the attacks made upon it, and that the district court erred in granting an injunction. The order is reversed and the cause remanded. Reversed and remanded.

BRANTLY, C. J., concurs. MILBURN, J., not having heard the argument, takes no part in this decision.

#### In re WEED.

(Supreme Court of Montana. June 3, 1904.)

##### ATTORNEYS—DISBARMENT—REINSTATEMENT.

1. Where an attorney was suspended for a specified time, with a provision that he might at the expiration of that time be restored to the privileges of an attorney, on proper petition, supported by satisfactory evidence of good conduct meantime, and at the expiration of that time he petitioned for reinstatement, filing a certificate, signed by nearly every member of the bar of the city where he resided, to the effect that he had conducted himself as, and was, a man of good moral character, he will be reinstated.

Petition by Elbert D. Weed for reinstatement as a member of the bar. Petitioner reinstated.

Henry C. Smith, for petitioner.

MILBURN, J. This matter is before us upon the petition of Elbert D. Weed for his reinstatement as a member of the bar of this court; he having been suspended for two years by the court's order made and entered May 26, 1902, at the expiration of which time, it was provided, he might be restored to the privileges of an attorney and counselor upon proper petition, supported by satisfactory evidence of good conduct meantime. 26 Mont. 241, 67 Pac. 308. At the expiration of one year of the time fixed in the order, Mr. Weed, by formal request, supported by petitions signed by many members of the bar and by numerous others, prayed that he be reinstated at that time. This request was denied. 28 Mont. 204, 72

Pac. 653. The present petition is accompanied by a certificate in writing, signed by nearly every member of the bar of the city of Helena, where the applicant has resided for many years; the signers being 61 in number. They include among them four ex justices of this court, as well as the two district judges residing in Helena. All of the gentlemen referred to as signing the certificate, which was filed with the petition herein, certify "that during all of the time since the 26th day of May, 1902, the said Elbert D. Weed has conducted himself as, and is now, a man of good moral character." The petition of the applicant, unlike the one presented a year ago, refers to the true reason why he was suspended, for that it refers specially to the files and records in the case.

Considering now the proper attitude of the petitioner, and the fact that his conduct since the date of his suspension, as appears from the certificate of the gentlemen referred to, has been such as to cause us to conclude that his conduct hereafter will be such as it should be as an attorney and counselor of this court, it is ordered that Elbert D. Weed be restored to the privileges of an attorney and counselor of this court upon his taking the usual oath of office.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### STATE v. HOWARD.

(Supreme Court of Montana. June 18, 1904.)

##### ROBBERY — INFORMATION—CHARGING ONE UNDER ALIASES — EVIDENCE — ADMISSIBILITY—LETTERS — JURORS — COMPETENCY — OWNERSHIP OF STOLEN PROPERTY—INSANITY.

1. Pen. Code, § 1832, provides that an information must contain the name of the party charged; and section 1834 provides that an information must be direct and certain as regards the party charged. Section 1841 provides that the information is sufficient if it can be understood therefrom that the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with the statement that his true name is unknown. *Held*, that where an information was against one as George Howard, alias James Howard, alias Joe Kirby, a contention that the information did not conform to the requirements of sections 1832 and 1834 was without merit; the information having charged his prior conviction, and the different names being for the purpose of identifying him as the person previously convicted.

2. An information on a prosecution for robbery which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession and from the immediate presence of a specified person, did not charge more than one offense.

3. The granting or refusing of a motion for a continuance in a criminal case is within the sound discretion of the trial court.

4. The action of the trial court in refusing or allowing a continuance will not be interfered with on appeal unless there has been an abuse of discretion.

5. Where a venireman in a criminal case stated on his voir dire that he had read the newspaper accounts of the alleged robbery, and had

formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent; Pen. Code, § 2051, declaring that no one shall be disqualified as a juror because of having formed an opinion if he can act fairly and impartially on the matter notwithstanding such opinion.

6. Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, on a prosecution for the robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train, and a conspiracy therefor.

7. Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.

8. On a prosecution for robbery, the state introduced a letter written by defendant which stated that, while the writer had been informed that the person addressed had caused the writer's arrest, no one would ever have any occasion to say that the writer "ditched" any one. *Held*, that the letter was irrelevant.

9. Where a letter improperly admitted was immaterial, and the only defense made in the case was insanity, the admission of the letter was harmless error.

10. Where the warden of the penitentiary testified that defendant had been confined in the penitentiary, and there was admitted in evidence a commitment against him, and it appeared that the date of his commitment and release corresponded with the requirements of the commitment, and other witnesses testified that they knew defendant when he was in the penitentiary, an objection that defendant was not identified as the man to whom the commitment referred was of no merit.

11. The proper manner of proving a prior conviction is not by the introduction of the commitment, but by the record of the judgment. Code Civ. Proc. § 3193.

12. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about 15 months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination.

13. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross-examination as to whether he was not in jail on a charge of holding up a saloon was not erroneous, as tending to degrade the witness.

14. The question was not prejudicial, as not proper cross-examination.

15. On a prosecution for robbery, the fact that the money taken was in prosecutor's possession is sufficient evidence of ownership to sustain a conviction.

16. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was raised by a plea of not guilty.

17. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was a question of fact for the jury.

18. Pen. Code, § 2521, provides that when an action is called for trial, or at any time during

a trial, or when the defendant is brought up for judgment, if a doubt arises as to the sanity of defendant, the court must order the question as to his sanity to be submitted to a jury. *Held*, that the doubt mentioned in the statute is one arising in the mind of the judge, and one which he must determine.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

George Howard, alias James Howard, alias Joe Kirby, was convicted of robbery, and he appeals. Affirmed.

Alexander Mackel and Wm. Meyer, for appellant. Jas. Donovan, for the State.

CALLAWAY, C. The defendant was convicted upon an information accusing him of the crime of robbery, and charging his prior conviction of a like offense as the ground for a heavier punishment. He was sentenced to imprisonment at hard labor for 30 years. This appeal is from the judgment and an order denying a new trial.

1. He was informed against as George Howard, alias James Howard, alias Joe Kirby. He makes the point that the information does not sufficiently conform to the requirements of sections 1832-1834, Pen. Code, in that there is no certainty as to the party charged, or as to the name of the party charged. Section 1832 of the Penal Code provides that the information must contain the name of the party. Section 1841 provides that the information is sufficient if it can be understood therefrom that the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with the statement that his true name is to the county attorney unknown. A man's name is simply the sound or sounds by which he is commonly designated by his fellows, and by which they distinguish him. It is a mere means of description. Sometimes a man is known by several different names, and it was formerly the custom, in drawing indictments, to charge him under all the names by which he was known; connecting them with the words "alias dictus," or with simply "alias." These words mean "otherwise called" or "otherwise." The county attorney attempted to be more certain than the statute requires. He charged the defendant, evidently, by three names by which the latter had been known. Had he charged the defendant as George Howard, stating that his true name was unknown, the statute would have been met, and such is believed to be the better practice. It is readily perceived that in a given case a defendant may be prejudiced by the use of the alias dictus by which a number of names may be joined, and thus all read to the jury; suggesting to them that the defendant has been using assumed names. But no such prejudice resulted in this case. A like point was decided in *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097, in which the court said that while, for most purposes, the need and use of the

¶ 16. See Criminal Law, vol. 14, Cent. Dig. § 662.

charging alias are done away with, it is still proper in some instances, an illustration of one of which was offered by the indictment then before the court. The indictment charged the defendant with conviction of prior offenses, and the court observed: "For the purpose of identifying him as the person who had suffered those convictions, the use of the alias was not only permissible, but proper." At the trial the defendant in this case was referred to sometimes as "Howard," sometimes as "Kirby," and as "Howard or Kirby." He was formerly convicted under the name of George Howard, and it seems that he gave his name to the court as Joseph Kirby. The point urged by defendant is not well taken. *Lee v. State*, 55 Ala. 259; *Haley v. State*, 63 Ala. 83; *Barnesclotta v. People*, 10 Hun, 137; *Kennedy v. People*, 39 N. Y. 245.

2. The next point urged is that the information charges two offenses, in that it is alleged that the property was taken "by means of force and putting in fear," and that it was taken "from the person and possession and from the immediate presence of one W. M. Bell." It is contended that a robbery accomplished by means of force is a different kind of a robbery from that accomplished by means of fear, that a robbery from the person is different from a robbery from his immediate presence, and that the information in this respect is uncertain. The defendant presented these points by demurrer, which was overruled. We think these objections are hypercritical. Robbery may be, and often is, accomplished by the concurrence of force and fear. When it is accomplished by force, fear is the usual concomitant. If one were not apprehensive of the force, he would not have the fear. So, on the second point suggested, how can there be a taking from one's person, and that taking be not from his immediate presence? Of course, the article taken might be from the immediate presence without being taken from the person. That portion of the information which is criticised is substantially similar to the one before the court in *State v. Clancy*, 20 Mont. 498, 52 Pac. 267, and is not vulnerable to the attacks made upon it by defendant. When tested by the rules prescribed by the Penal Code, it is sufficient. *State v. Gill*, 21 Mont. 151, 53 Pac. 184.

3. The defendant moved for a continuance, which the court denied. An examination of the affidavit upon which the motion was based shows that it was insufficient for the purpose intended, and the court's action upon the motion was clearly correct. Moreover, the granting or refusing of a motion for the continuance of a criminal case rests in the sound discretion of the court below, and the appellate court will not interfere unless there has been an abuse thereof. *Territory v. Perkins*, 2 Mont. 467; *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750; *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132.

4. Three jurors were accepted over defend-

ant's challenges. Two of them, when upon their voir dire examination, said in response to questions put by defendant's counsel that they were prejudiced against the defense of insanity. Upon examination by the county attorney and the court, they said, in effect, that they would treat it like any other defense the defendant might urge; would follow the instructions of the court thereon, and, if the instructions upon the law should in any manner differ from their own ideas, they would follow the instructions. In short, without discussing their testimony in detail, it may be said that they qualified themselves as competent jurors. Another said that he had read the newspaper accounts of the alleged robbery, and had formed an opinion therefrom, but not a fixed one. Upon re-examination he said he could entirely discard the opinion then formed, and could give the defendant as fair a trial as if he had never heard of the case. This juror was clearly competent. Pen. Code, § 2051; *State v. Mott* (Mont.) 74 Pac. 728.

5. The evidence showed that the defendant, together with one Cole, had entered into a conspiracy to "hold up" the Northern Pacific train near Homestake, in Silver Bow county. Accordingly they stopped the train about a mile from Homestake, and attempted to blow open the safe in the baggage car. While they were proceeding in furtherance of this conspiracy, the defendant, after having intimidated Bell, a mail clerk, by the use of a revolver, reached into Bell's pocket and took therefrom the sum of 75 cents. The taking of the 75 cents is the particular crime for which the defendant is prosecuted. At the trial the state was permitted to show the details of the entire transaction, commencing with the formation of the conspiracy in Butte, and following it out until the train was again allowed to go upon its way. It is contended by the defendant that it was error to admit in evidence certain testimony concerning the details of the attempted "train robbery." "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Pen. Code, § 390. It is therefore technically inaccurate to speak of a "train robbery." The meaning of the phrase, however, is clear. In this case the defendant and Cole intended to take personal property—the contents of the safe—from those who had it in charge, using such force and producing such fear as might seem to them to be necessary. It is said that the conspirators did not contemplate the robbery of Bell, and that crime was therefore not within the purview of the conspiracy. This point is not well taken. If, while a person is engaged in the commission of one felony, he commits another, evidence of the commission of both is admissible as part of the *res gestæ*. *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741; *State v. Desroches*, 48 La. Ann. 428, 19 South. 250;



Seams v. State, 84 Ala. 410, 4 South. 521; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; People v. Teixeira, 123 Cal. 297, 55 Pac. 988; Commonwealth v. Hayes, 140 Mass. 366, 5 N. E. 264; Dove v. State, 37 Ark. 261; Snapp v. Commonwealth, 82 Ky. 173; Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; State v. McCahill, 72 Iowa, 111, 30 N. W. 533, 33 N. W. 599; State v. Dooley, 89 Iowa, 584, 57 N. W. 414; State v. Taylor, 118 Mo. 153, 24 S. W. 449; State v. Pike, 65 Me. 111; State v. Wentworth, 37 N. H. 196; Leeper v. State, 29 Tex. App. 63, 14 S. W. 398. Defendant and Cole entered into a conspiracy to commit a felony, namely, the "train robbery," and set forth to carry it out. While actually engaged in an attempt to carry out the conspiracy, defendant committed another felony—the robbery of Bell—which, as it transpired, was but a part of the main transaction. The evidence objected to was clearly admissible.

6. The state was permitted to introduce in evidence a letter, which we quote in full, in order to arrive at a clear understanding of the matter involved. It is as follows: "Tom: From what I see in the papers and from what I can hear, you are afraid I am trying to ditch you. Well, you can come out in the Prosecuting Attorney's office and see what I say. You or no one else will go to the 'pen' on account of me and I was told by six different people, including your own lawyer, that you had me arrested, but we will let that go. You will never have occasion to say that I ditched you or no one else. But it serves me right in one way; you told me to have nothing to do with that wind-jamming, notoriety-loving Hoosier, and I would not take your advice so now I have got to pay for it. [Signed] G. Joe Kirby." The defendant objected to the introduction of this letter on the ground that it was not sufficiently identified, and was incompetent, irrelevant, and immaterial. The witness Cole testified that he was familiar with defendant's handwriting, and, after examining the letter, said: "It looks like his handwriting, and that is his signature there. That is all I can say. The signature and the body of the letter are the same handwriting." The first objection, therefore, is not well taken. State v. Mahoney, 24 Mont. 281, 61 Pac. 647. However, so far as can be determined from the record, the letter bore no relevancy to the crime committed. It was also wholly immaterial, and this fact alone saves the action of the court from reversal. We cannot see how the defendant in any wise could have been injured by its admission in evidence. It did not tend to prove the defendant guilty of the crime for which he was on trial, nor of any other crime, in the slightest degree. The most that can be said is that it indicates that defendant was in the possession of evidence inimical to the interests of Tom. Defendant asserts that he will not disclose such information, which assertion, presumably, was intended to as-

sure Tom that defendant's sense of honor was unimpaired, although it was reported that he had been wronged by Tom. Then, again, defendant did not attempt to controvert the state's evidence showing the robbery of Bell by him, and that testimony was clear and convincing. The only defense which defendant attempted was that of insanity, and it failed utterly. It is manifest that defendant was not injured by the introduction of the letter. Technically, the court's action was inexcusably erroneous. But error, in order to secure a reversal for defendant, must be prejudicial to him, and this clearly was not. Lane v. Bailey, 29 Mont. —, 75 Pac. 191.

7. The witness Conley, warden of the penitentiary, testified that he had known the defendant, Howard, at that institution, and, speaking of the defendant, said: "He was confined there for seven years and three months on a charge of robbery from Silver Bow county. Howard was released from the penitentiary on the 26th day of January, 1903." Thereupon, over defendant's objection, the court admitted in evidence a commitment in the case of the state of Montana against George Howard, which recites that the defendant therein named was convicted of robbery on October 26, 1895, in the district court of Silver Bow county. The defendant argues that there was no proof of the authenticity of the commitment, and further that the defendant was not identified as the man to whom it refers. Upon the record, these objections are captious. Evidently the commitment offered was the original. At any rate, no objection was made to the effect that it was not. The court doubtless inspected it when the objection was made, and was satisfied as to its sufficiency. Conley identified the defendant as the one who had been confined in the penitentiary for robbery committed in Silver Bow county. The defendant was committed on October 26, 1895, and released January 26, 1903, which exactly corresponds with the requirement of the commitment. Other witnesses testified that they knew the defendant on trial while he was in the penitentiary. The proper way to prove the defendant's prior conviction was not by the introduction of the commitment, but by the record of the judgment. Code Civ. Proc. § 3193. But this was also done. The defendant therefore has no cause for complaint on this phase of the case.

8. The witness Furlong, on direct examination, testified that he had been confined in the penitentiary, and was at the time of the trial a prisoner in the county jail. He said he had known the defendant for about 15 months, and had observed his demeanor at the penitentiary. From what he had seen of the defendant, he thought the latter insane. On cross-examination, counsel for the state asked the witness a number of questions with the evident purpose of showing that Furlong was a member of the conspiracy "to

rob the train." These questions were objected to as incompetent, irrelevant, and immaterial, as well as being improper cross-examination. The court did not abuse its discretion in allowing these questions to be put to the witness, under the circumstances of this case. "The cross-examination would be of little value if the witness could not be fully interrogated as to his motives, bias, and interest, or as to his conduct, as connected with the parties or the cause of action." 3 Jones on Evidence, § 829. The right of cross-examination extends not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy, and this right should not be restricted unduly. Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; Hefferlin v. Karlman (Mont.) 76 Pac. 757; Code Civ. Proc. § 3376. It is the duty of the trial court to exercise a sound legal discretion in controlling the cross-examination of a witness, and, if no abuse of discretion is shown, the appellate court will not interfere. 3 Jones on Evidence, § 821. It is also insisted that the following question tended to degrade the witness: "You are in jail at the present time charged with holding up Swanson's saloon?" The witness answered in the affirmative. In the light of his previous testimony, we do not think the question tended to degrade him. On direct examination he had testified as to his confinement in the State Prison, and that he was at the time of the trial confined in the jail. Nor, under the circumstances, was the allowance of the question prejudicial as not proper cross-examination. *Matusevitz v. Hughes*, 28 Mont. 212, 66 Pac. 939, 68 Pac. 467.

9. Defendant says the evidence is insufficient to sustain the conviction, for the reason that there is no evidence in the record that the money taken was the property of Bell. The testimony discloses that defendant reached into Bell's pocket and took out the money after covering him with a revolver. The fact that the money was in Bell's possession is sufficient evidence of his ownership thereof to sustain the conviction. *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. Davis*, 97 Cal. 194, 31 Pac. 1109; *People v. Nelson*, 56 Cal. 77; *Bow v. People*, 100 Ill. 438, 43 N. E. 593; *State v. Hobgood*, 46 La. Ann. 855, 15 South. 406.

10. The state did not offer any evidence to rebut that offered by defendant in support of his defense of insanity. The question as to whether the defendant had the criminal intent necessary to the commission of the crime was raised by his plea of not guilty. The question was one of fact. *State v. Keerl*

(Mont.) 75 Pac. 362. The jury heard all the evidence, and decided adversely to defendant's contention. Doubtless it acted within its province of considering the testimony on the question of insanity as of little or no weight. *Bishop's New Criminal Procedure*, §§ 609-673; *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088. And from the record, we do not think it acted unwisely.

The verdict was returned April 10, 1903. Three days later, when the defendant was brought into court to receive his sentence, his counsel asked that the question of the defendant's sanity be inquired into by a jury as required by law. The court denied the request, and the defendant assigns error. Section 2521 of the Penal Code provides: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury, which must be drawn and selected as in other cases; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict." The doubt mentioned in the above section is one arising in the mind of the presiding judge, and much must be left to his judicial conscience. Unless there be a doubt in the mind of the judge a quo—a doubt which he must legally determine as he would determine any other matter of grave import before him—he will not be warranted in calling a special jury to try the issue. Such is the purport of the authorities. *State v. Peterson*, 24 Mont. 81, 60 Pac. 809, and cases cited; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Geiger*, 116 Cal. 440, 48 Pac. 389. In this case the judge heard all the testimony upon the trial, as well as observed the demeanor and appearance of the defendant during its progress, and, from what he heard and saw, entertained no doubt as to the defendant's sanity. The record, we think, bears out his conclusion as correct.

We have given diligent attention to all other assignments of error urged by defendant's counsel which are argued in his brief, but find none prejudicial to defendant. It follows that the judgment and order should be affirmed.

CLAYBERG, C. C., and FOORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MILBURN, J., being absent at the time of the delivery of this opinion takes no part herein.

## CAPELL et al. v. FAGAN.

(Supreme Court of Montana. June 17, 1904.)

## LOST INSTRUMENTS—PROOF—SUFFICIENCY.

1. Code Civ. Proc. §§ 3106, 3107, defines primary and secondary evidence, and section 3131 declares that there can be no evidence of the contents of a writing other than the writing itself, except in certain instances, the first of which is where the original has been lost or destroyed, in which case proof of the loss or destruction must first be made. Section 3132 provides that, when the terms of an agreement have been reduced to writing, it is to be considered as containing all those terms, and there can be no evidence of the terms of the agreement other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings, or where the validity of the agreement is the fact in dispute, etc. Section 3146 provides that, in conformity with the preceding provisions, evidence may be given upon a trial of the contents of a writing, when oral evidence thereof is admissible, and section 3228 declares that the original writing must be produced and proved, except as otherwise provided, and that, if it has been lost, proof of the loss must first be made before evidence can be given of its contents, but that, upon such proof being made, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness. *Held*, that under these provisions, in order to establish the former existence of an instrument in writing, under which plaintiff claimed, he was compelled to prove its execution and contents, including all the substantial parts of the lost instrument to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts.

2. Proof of negotiations, conversations, and acts of parties before, at the time of, and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost.

3. When a written contract is to be proved by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily.

4. While, under the statutes, the consideration need not be mentioned in a deed, yet, if it is mentioned and set forth in the deed, it becomes a substantial part of the contents thereof, and must be proven like any other of the contents on loss thereof.

5. In an action to recover a portion of a mining claim, in which plaintiffs claimed under a deed which had been destroyed, evidence considered, and *held* not to show the contents of the deed by such direct and positive evidence as to enable the court to say that there was a conveyance.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by Carl J. Capell and others against Joseph B. Fagan. From a judgment for defendant, plaintiffs appeal. Affirmed.

McBride & McBride and J. E. Murray, for appellants. W. A. Pennington, for respondent.

CLAYBERG, C. C. Appeal by plaintiffs from a judgment against them and from an order overruling their motion for a new trial.

The action was instituted to quiet the title

to an undivided one-fourth interest in the Josephine quartz lode mining claim. Plaintiffs claim ownership and possession of the property in controversy. Defendant claims ownership and right of possession of an undivided one-half of the premises, admitting that plaintiffs are entitled to the other half, and that each are entitled to an undivided one-eighth of the entire claim. Concededly, the entire one-fourth interest in question formerly belonged to defendant, and plaintiffs contend that it was conveyed to one Farley, their predecessor in interest, by defendant in February, 1898, by a deed which was not acknowledged so as to entitle it to record, and that the deed was afterward destroyed by fire. The defendant, on the other hand, contends that he agreed to convey only an undivided one-eighth—or one-half of the one-fourth—to Farley, and that he retained, and still held and owned, the other undivided one-eighth. Both parties agree that an instrument in writing was drawn by one Harry Lynch in his saloon in Butte, and plaintiffs contend that by this instrument the full one-fourth was conveyed to Farley. There can be no doubt but that a written instrument was drawn by Lynch, which was executed by defendant, and delivered to Farley in February, 1898. Appellants have alleged their source of title as being by this written instrument. The burden, therefore, was upon them to establish the title alleged. This written instrument was not recorded, because it was never acknowledged by the grantor, and, it having been destroyed by fire, appellants attempted to establish its former existence and contents by parol evidence.

The provisions of our Code of Civil Procedure relative to such proof are as follows: Section 3106: "Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents." Section 3107: "Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents, is secondary evidence of the instrument and contents." Section 3131: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: (1) Where the original has been lost or destroyed; in which case the proof of the loss or destruction must first be made. \* \* \* In the cases mentioned in subdivisions 3 and 4, a copy of the original or of the record must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents." Section 3132: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in

the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 3136, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties." Section 3146: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: \* \* \*

(14) The contents of a writing, when oral evidence thereof is admissible." Section 3223: "The original writing must be produced and proved, except as provided in this part. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents, in some authentic document, or by the recollection of a witness, as hereinbefore provided."

It is apparent from these provisions that, in order to establish the former existence of this instrument in writing, appellants were compelled to prove its execution and contents. The rights of the parties in this controversy rested upon this written instrument, and could only be settled by the application of its terms to the questions in controversy. Its terms could not be so applied until its contents were established. The word "contents," used in this statute, evidently includes all the substantial parts of the lost instrument, and therefore proof of such contents requires a practical reproduction of the instrument in all of its substantial parts. The law is well settled that proof of the negotiations and conversations and acts of the parties before, at the time of, and after the execution of a written instrument are not competent to prove its contents, where the instrument is lost. *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101; *Nicholson v. Tarpey*, 124 Cal. 442, 57 Pac. 457; *Taylor v. Riggs*, 1 Pet. 591, 7 L. Ed. 275; *Kimball v. Morrell*, 4 Me. 368; *Richardson v. Robbins*, 124 Mass. 105. The greater part of the record is composed of this class of testimony, and under the above authorities cannot be considered.

It being conceded that some sort of paper was executed and delivered to the plaintiffs' predecessor in interest, and has been destroyed by fire, the only question for our consideration is, did appellants satisfactorily prove its contents by competent testimony? The following rule as to proof of the contents of a lost instrument was announced by the Supreme Court of the United States at an early date, and has been generally followed by our courts of last resort since that time: "When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations

ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement." *Taylor v. Riggs*, 1 Pet. 591, 7 L. Ed. 275.

The Supreme Court of New York, in the case of *Edwards v. Noyes*, 65 N. Y. 125, uses the following language: "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with the formalities required by law. It should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices, which it was the object of the statute of frauds to prevent, would be encouraged. \* \* \* As to lot 108, the plaintiff attempted to show that one Rodgers conveyed it to him by a deed which was lost in 1835. He had no copy of the deed, but attempted to prove its contents by witnesses who had never read it, but who claimed that they had heard it read many years before the trial. They could give but a small fraction of what the deed appeared to contain. On the whole, their evidence was quite unsatisfactory."

The Supreme Court of California, in the case of *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101, uses the following language: "The material question was as to the language of the written contract. Whether lost or not, there could be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. Code Civ. Proc. § 1856. The Code expressly provides, in case of lost instruments, for oral evidence of their contents. Code Civ. Proc. §§ 1855-1870, subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In *United States v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650, Justice Story remarked: 'If no such copy exists, the contents may be proved by parol evidence by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.'"

The Supreme Court of Arkansas, in the case of *Hooper v. Chism*, 8 Eng. 496, says: "There is no rule of law that ought, upon the ground of public policy, to be better settled than this; that wherever parties have reduced their contract or agreement to writing, the instrument itself is the best and

highest evidence of what the contract or agreement really was. No matter what the conversation or representations on either side that preceded it may have been, they are all supposed to be merged in the written instrument, which is to be regarded as the conclusion agreed upon between them. A contract is the law which the parties have prescribed unto themselves, and the object of reducing it to writing is that a memorial of its terms and provisions may be preserved, and not left to depend, for proof of them, upon the uncertain and imperfect recollection of witnesses. No man's rights would be safe, and no prudence could guard against fraud, if this were not the law; and the exceptions to it—which ought to be admitted with great caution—are more apparent than real. The rule rests upon the supposition that there is a written contract, as in the case now before the court is conceded by both parties. \* \* \* When a party is allowed to establish the contents of a lost instrument, he must at least show with reasonable certainty what its terms and provisions were. Without making any question as to grades of secondary evidence, if no copy of the instrument exists, and parol testimony is offered, it ought to be that of a witness who has seen or read the instrument, or is otherwise enabled to speak with some degree of accuracy as to its contents, and identify it as the one executed by the party to be charged where that is disputed. Else a party relying upon a lost instrument would often be placed in a better position to take the chances of parol testimony, and the temptation would be held out to him to destroy or suppress it." The court then quotes the language of Chief Justice Marshall in *Taylor v. Riggs*, 1 Pet. 600, 7 L. Ed. 275.

The Supreme Court of Illinois, in the case of *Rankin v. Crow*, 19 Ill. 626, says, in regard to testimony proving the contents of a lost deed: "Fort testified that he was present when it was made; that it was read over by Jamison; that the consideration was \$110; that it was for the land in dispute; but whether it was a warranty or quitclaim deed he does not know. He professes to give no part of its contents, or even its terms, except that it was a deed for this land from Gibson to Dunn. To prove the contents of a written instrument, the vague recollections of witnesses are not sufficient to supply its place. The substance of the contract ought to be proved satisfactorily, and, if that cannot be done, the party is in the condition of every other suitor in court who has no witnesses to support his claim. When the parties reduce their contract to writing, the obligations and duties of each are described and limited by the instrument itself. The safety which is expected from them would be impaired if they could be established upon uncertain and vague impressions of witnesses."

The following cases may also be examined

upon the question as to the character of proof required in cases of proof of the contents of lost instruments: *Metcalf v. Van Benthuyssen*, 3 N. Y. 424; *Madeira's Heirs v. Hopkins*, 12 B. Mon. 595; *Elwell v. Walker*, 52 Iowa, 256, 3 N. W. 64; *Loftin v. Loftin* (N. C.) 1 S. E. 837; *Kimball v. Morrell*, 4 Me. 388; *United States v. Britton*, 3 Mason, 464, Fed. Cas. No. 14,650; *Edwards v. Rives*, 35 Fla. 89, 17 South. 416; *Tisdale v. Tisdale*, 64 Am. Dec. 775.

Testing the testimony offered by plaintiff in this case by the rules announced in the foregoing decisions, we must conclude that the substantial contents of the lost instrument were not proved by such clear and satisfactory evidence as is required by these rules, and that the court did not err in finding that there had been made no deed proven in the case. We find on investigation of the record that the only direct and positive testimony offered by appellant as to the contents of the instrument were the names of the parties and a description of an undivided one-fourth interest in the Josephine lode mining claim. Only two witnesses were examined as to the contents of the instrument, viz., Farley, the grantor, and Lynch, the person who drew it. Both of these witnesses testified to its execution and delivery, gave the names of the parties thereto, and stated the description of the land mentioned in it. They further stated that it was drawn by Lynch at the request of Farley and Fagan; that there was presented to Mr. Lynch a blank form of deed, and an old deed conveying the property in question to defendant Fagan; that Lynch filled up all the blanks in the form of deed presented, and inserted the description. Farley says nothing concerning any of the contents except the description, the names of the parties, and the consideration. As to the consideration he says: "The consideration, if I remember right, named in the new deed, was one dollar." Lynch says: "The blank which was brought to me by Mr. Fagan and Mr. Farley was a regular form of deed, but as to details I have forgotten it. The consideration was filled up. I cannot say whether or not there was a consideration named in the deed, but I think there was. My recollection is that it was one dollar. I cannot state positively that the consideration was put in the deed. I cannot state at this time, but I think that it was." While, under the statutes, the consideration need not be mentioned in a deed, yet if it is mentioned and set forth in the deed, it becomes a part of the contents of such deed, and must be proven like any other of the contents thereof. The testimony as to the consideration named in the instrument is uncertain and equivocal. There is no testimony disclosed in the record as to any of the remaining contents of the instrument in question. There is nothing to show the character of the paper—if a conveyance, whether it was a bargain and sale, warranty, or mere quitclaim deed—or to dis

close the character of the title. There are no granting words proven. So far as the proof disclosed in the record, the paper simply consisted of the names of the parties grantor and grantee, and a description of the premises. All the remaining contents are left entirely to presumption. An instrument cannot be given the effect of a conveyance unless it contains words of grant. The use of the word "deed" by witnesses is a mere conclusion of the witnesses, and it cannot be presumed that the written instrument in this case was a deed of conveyance, at least without proof that it contained sufficient words of grant. Again, witness Lynch was asked upon cross-examination whether or not he did not, on the 31st day of May, 1900, at the city of Butte, state to Fagan and his attorney, Walsh, in the presence of both of them, that he had forgotten all about the transaction; that the whole matter had passed out of his recollection; that he did not know what was the consideration, or what interest was named in the paper; and that they were trying to give Fagan the worst of it, and he would be very glad to help him if he could. Lynch denied having such a conversation, but both defendant Fagan and his attorney testified positively and directly that such conversation was had. Aside from the inherent improbability that Lynch, who was keeping a saloon, and not in the business of preparing conveyances, could remember for over two years the contents of a paper which he "filled in," having testified to no particular attendant circumstances which would have had a tendency to fix the facts in his mind, we have the positive testimony of two witnesses that he afterwards stated to them he had forgotten all about what the contents of the instrument were.

We are of the opinion that appellants' testimony, as disclosed by the record, did not so show the contents of the written instrument by such direct and positive evidence as to enable the court below or this court to say that it was a conveyance of the one-fourth interest in the Josephine lode mining claim. It follows from this that the decree of the court, and the order appealed from, should be affirmed, and we recommend their affirmation.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

(36 Mont. 562)

TRAPHAAGEN et al. v. KIRK.

(Supreme Court of Montana. June 22, 1904.)

MINING CLAIMS—PUBLIC LAND—RAILROAD GRANTS—CHARACTER OF LAND—CONCLUSIVE-NESS—CONTRACT OF SALE—CONSIDERATION—ADEQUACY—SPECIFIC PERFORMANCE.

1. Under Act Cong. Feb. 28, 1805, c. 136, § 7, 28 Stat. 683, providing that no patent or other

conveyance of title shall be delivered to the Northern Pacific Railroad Company for any lands in Montana and Idaho, under the congressional grant to such railroad, until the lands shall have been examined and classified as non-mineral by mineral land commissioners provided for, a patent to such railroad company for land classified by such commissioners as non-mineral is conclusive as to the character of the land, in the absence of fraud, imposition, or mistake.

2. In order to make a valid mining location under Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424], providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface must be the property of the United States.

3. Where an entire section of public land had been patented by the government to the Northern Pacific Railroad Company, which had conveyed the same to defendant, an entry thereon by complainants for the purpose of making a mining location without defendant's consent was a trespass on defendant's rights, and was therefore ineffectual for the purpose of initiating a valid mining claim.

4. Where complainants' entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under Civ. Code, § 4417, providing that specific performance cannot be enforced against a person unless he has received an "adequate" consideration for the contract.

Commissioners' Opinion. Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

Bill by F. W. Traphaagen and another against Thomas Kirk. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

Hartman & Hartman, for appellants. Jno. A. Luce, for respondent.

CLAYBERG, C. C. This is an appeal from a judgment against plaintiffs. The action was brought for the specific performance of a contract for the conveyance of land. Defendant filed a demurrer to the complaint, which was sustained by the court, and plaintiffs having elected to stand upon their complaint, judgment followed for defendant.

The cause of action set forth in the complaint is very peculiar, and the allegations of the complaint are, briefly, as follows: That on and prior to February 23, 1900, the defendant was the owner, by conveyance from the Northern Pacific Railway Company, of section 23, township 3 south, of range 3 east, Gallatin county, and in the possession thereof; that he was also the owner of the right to use the waters of Elk creek in connection with said land; that plaintiffs, prior to February 23, 1900, discovered upon said land "a vein or lode of corundum-bearing rock," and believing said land to be unoccupied land

of the United States, and said vein or lode open to location, duly located a claim "upon and along said vein" upon and across said land; that the United States, in its grant of this land to the Northern Pacific Railway Company, reserved and exempted therefrom "all minerals found in the soil of said real estate," and that the railway company made the same reservation in its conveyance to defendant; that prior to June 30, 1897, the proper mineral land commissioners of the United States reported this land as nonmineral, and classified it as such, whereupon the railway company applied to the Commissioner of the General Land Office for leave to enter it, which application was approved, and on July 12, 1897, a patent was issued to the railway company, which reserved "all minerals contained in the soil" of said land, and that afterward the railway company conveyed to the defendant, making the same reservation; that on or about February 23, 1900, plaintiffs informed defendant that they had discovered this vein, and had located and staked a mining claim upon said land, and that the claim, if properly worked, would be of great value; that by reason of the grant to the defendant and his predecessors, and the reservations therein contained, the plaintiffs and defendant were in doubt as to their respective legal rights in and to the aforesaid vein; that it was recognized by the respective parties that such rights could only be determined by litigation, which might be further complicated by the assertion of the rights of the government and the railway company, respectively; that for the purpose of avoiding such litigation and preventing costs, expenses, and delays, and for the purpose of amicably settling their differences, and in consideration of the discovery and location of this claim, and of the mutual promises and agreements between the parties, it was agreed that plaintiffs should transfer to the defendant an undivided one-third interest in said lode or lode, and that defendant should transfer to plaintiffs an undivided two-thirds interest in said lead or lode, together with the necessary amount of real estate covered by said location to enable the lode to be operated, and also a right to the use of the waters of Elk creek necessary to the mining and treatment of ores and the operation of said mine; that the respective transfers should be mutually made within a reasonable time from the date of said agreement; that afterwards, and prior to the commencement of the suit, and prior to the refusal of defendant to make such transfer, plaintiffs, relying upon the agreement of defendant as aforesaid, in good faith expended large sums of money in an attempt to interest capital in the operation, exploration, and development of said lode or lead; that thereafter, and prior to the commencement of the suit, plaintiffs offered to convey to said defendant an undivided one-third interest in said lode or claim, and demanded that de-

fendant should comply with the conditions of the agreement on his part, and convey to the plaintiffs an undivided two-thirds interest therein, but that defendant has failed and refused so to do.

The complaint then sets forth the particular description of the land in question so as be conveyed, in the following language: "An undivided two-thirds ( $\frac{2}{3}$ ) interest in and to a strip of land not exceeding 300 feet in width, running diagonally across the upper portion of section 23, in Tp. 3 south, of R. 3 east, in the county of Gallatin, state of Montana, at the place on said section where a certain lead or lode of corundum-bearing rock is contained and situate, said strip of land to conform to the meandering of said vein or lode of corundum-bearing rock, together with the necessary ingress and egress to the same for the purpose of mining, milling, and marketing the ore therefrom, and otherwise prospecting and operating said lode, together with the right to such use of the water right of said defendant, consisting of the right to the use of the waters of said branch of Elk creek, in said county and state, as may be necessary for the proper operation, treatment, mining, milling, and concentration of the ores of said lode, extending in a northeasterly and southwesterly direction from the principal point of discovery and development thereon of said lode to the limits of said section."

The demurrer was based upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, uncertain, and unintelligible in certain respects set forth in the demurrer.

The only question necessary to consider is, does the complaint state facts sufficient to constitute a cause of action? In order to arrive at a correct conclusion as to the alleged rights of plaintiff in or to any of the land in question, we must consider and determine the character and legal effect of the patent to the land, under which defendant is alleged to have acquired ownership. To this consideration a brief review of the source of title seems important.

Defendant is alleged to claim ownership under a patent issued by the United States to the Northern Pacific Railway Company. In 1864 Congress passed an act granting to the Northern Pacific Railroad Company "every alternate section of land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railway line as said company may adopt through territories of the United States," extending from Lake Superior to Puget Sound. Act July 2, 1864, c. 217, 13 Stat. 365. At the next session Congress amended this grant by providing "that all mineral lands be, and the same are, hereby excluded from the operations of this act." Res. Jan. 30, 1865, No. 10, 13 Stat. 567. It is apparent from these provisions of the grant, (which are

all that are material to the questions herein involved) that mineral land did not pass by the grant. The Supreme Court of the United States have always held that the grant was, in present, floating in its character until the line of the railroad was definitely located, when it attached to each alternate section mentioned in the grant, and became fixed in its character. When the land was surveyed by the government the particular sections mentioned in the grant were specifically designated, and the grant then took effect from its date. Under these decisions the railway company insisted that the character of the land, as to whether mineral or not, must be determined as of date of the grant, and, if it was not then known to be mineral, it passed by the grant. This condition seems to have been recognized by the Supreme Court of the United States until it had for consideration the case of *Barden v. N. P. Ry. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992, wherein it was decided that all mineral land except iron and coal, whether known or unknown, was excluded from the grant. Subsequent to this decision Congress passed an act "to provide for the examination and classification of certain lands in the states of Montana and Idaho." Act Feb. 26, 1895, c. 136, 28 Stat. 683. Section 7 of this act provides: "No patent or other conveyance or title shall be issued or delivered to the Northern Pacific Railroad Company for any lands in such districts until such lands shall have been examined and classified as non-mineral." Under the provisions of this act, mineral land commissioners were appointed by the government to examine and classify, as to their mineral character, all lands, under the aforesaid grant, claimed by the Northern Pacific Railroad Company in the above-mentioned states. The complaint alleges full compliance with this act, and the issue of patent by the United States to the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, the grantee named in the original grant.

Now, what is the effect of this patent? Congress has provided for the disposition of various classes of public lands, and has authorized the officers of the Land Department to ascertain the character of such land and issue patent therefor. In the absence of fraud, imposition, or mistake, the determination of that department as to the character of land is conclusive. *Barden v. N. P. Ry. Co.*, supra, and cases cited. No fraud, imposition, or mistake has been alleged, and, the patent having been issued, it is conclusive that the land in question is nonmineral in its character.

Plaintiffs' alleged rights were originated by the discovery and location of a mineral vein within the limits of the land alleged to have been patented to defendant's predecessor in interest. Section 2319, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424], provides:

"All valuable mineral deposits in mineral lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are contained, to occupation and purchase." Under this section, in order to make a location, surface ground, including the vein or lode, must be appropriated, and such surface ground must belong to the United States. *State v. District Court*, 25 Mont. 504, 65 Pac. 1020, and cases cited. Under plaintiffs' own allegations, none of the surface ground of the land in question was owned by the United States, it having been patented to the Northern Pacific Railway Company. There can be no doubt, therefore, that plaintiffs, by their attempted location of a mineral claim upon the land in question, acquired no rights at all. According to their own showing, the "mineral in the soil" was the only thing remaining in the government. This court knows of no statute of the United States which provides for the acquirement of "minerals in the soil," aside from the mineral statute above quoted, which requires the location of certain surface ground, including the minerals sought to be obtained. Plaintiffs do not claim to be the successors in interest of the United States in and to the "minerals in the soil," otherwise than by the making of a mining location under the laws of the United States.

There is still another objection to the validity of plaintiffs' claimed location. The surface of the entire section No. 23 had been patented by the government to the Northern Pacific Railway Company, and conveyed to defendant. Under this conveyance the defendant was entitled to the exclusive possession of all the surface ground of such section. Any entry by any other person for any purpose, without defendant's consent, was a trespass upon the rights of the defendant. It has been uniformly held by the Supreme Court of the United States that a valid mining claim cannot be initiated by the commission of a trespass. *Clipper M. Co. v. Eli. M. Co.*, 24 Sup. Ct. 682, 48 L. Ed. 944, and cases cited. We are therefore clearly of the opinion that the pretended location of a mining claim by the plaintiffs was absolutely of no force or effect.

But again, the contract of which specific performance is sought is without adequate consideration; the only thing of value to be surrendered by plaintiffs is an alleged interest in a certain vein. We have seen that they had no such interest, and therefore could not surrender or convey the same or any part thereof.

But it is claimed by plaintiffs that the information given by them to defendant of the existence of this vein in his land was sufficient consideration. Of what value would such information be to defendant unless plaintiffs could also furnish to him the means of acquiring the subject-matter dis-



closed? By their own showing, the minerals contained in such vein were reserved by the United States. We do not consider the validity of this alleged reservation by the government (which is extremely doubtful: *Silver Bow M. Co. v. Clark*, 5 Mont. 378, 5 Pac. 570), because, if it is void, all "minerals in the soil" passed by patent, and plaintiffs show no interest therein.

Plaintiffs also allege that the settlement of the matters in dispute between the parties without litigation was sufficient consideration. While in some instances this might be sufficient to support some contracts, we are clearly of opinion that the allegations of plaintiffs in this case do not disclose such an adequate consideration as is necessary to support a suit for specific performance. Section 4417, Civ. Code; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

Neither do we believe that the complaint contains a sufficiently specific description of the property involved to warrant any decree.

We advise that the judgment appealed from be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

HOLLOWAY, J., being disqualified, takes no part in this decision.

# FAR WEST OIL CO. v. WITMER BROS. CO. (L. A. 1,110.)\*

(Supreme Court of California. May 18, 1904.)

## OIL LEASE—CONSTRUCTION—COST OF DRILLING—PUMPING.

1. A contract for the boring of oil wells provided that the lessee should provide at its cost all materials of every kind necessary to do the work, and all labor, including labor and material in erecting and maintaining fixtures, and the lessor agreed to pay one-half of the cost of drilling, casing, and pumping all wells which did not produce a certain amount of oil per day for the first 30 days. *Held*, that the lessor was chargeable with one-half of the expense of all the preliminary work of preparing the ground, erecting the derrick, placing and connecting the engine and drilling rig, etc., including one-half the reasonable value of the use of the machinery owned and furnished by the lessee.

2. Under an oil lease, by which the lessee agreed to pay one-half of the cost of pumping oil, and it was provided that, if not satisfied with the charge, the lessor might itself assume the pumping, the lessor was liable for one-half the actual cost reasonably incurred in pumping, even though it might have been possible to have obtained some one else to do the same work for a less sum.

In Banc. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Far West Oil Company against Witmer Bros. Company. From a

judgment for plaintiff for a part of its demand, it appeals. Reversed.

Lee & Scott, for appellant. J. S. Chapman and P. W. Dooner, for respondent.

SHAW, J.: This is an appeal from an order denying plaintiff's motion for a new trial. Both parties to the action are corporations. The defendant was the owner of certain lots in the city of Los Angeles that were supposed to contain petroleum, and plaintiff was engaged in boring and operating oil wells. On February 19, 1895, the defendant leased the said lots to plaintiff for the term of 10 years, and the plaintiff agreed to bore wells thereon, and operate them for the production of oil. The complaint contains four counts, the first of which was upon an alleged account stated for the amount claimed to be due plaintiff from defendant for the expense of drilling and casing an unproductive well, and for the pumping of the productive wells on the lots leased. The court found that it was not true that the account was stated, as alleged in the first count of the complaint, and this finding is claimed to be contrary to the evidence.

We think the court was correct in its construction of the evidence upon this point. The opinion of the learned judge who tried the case, contained in respondent's brief, clearly and correctly states the case in the following language: "There were insistent efforts on the part of the plaintiff to obtain such concessions and agreement as would amount to an account stated, all of which seems to have been avoided by the defendant, and the fact appears to be that at no time was there ever an agreement that any fixed sum was due or to become due, except upon contingencies which involved the sinking of further wells and the deepening of existing wells and other matters, so that whatever rights plaintiff has in the matter, in my opinion, must be worked out through the agreement between the parties."

The second and third counts of the complaint were upon certain agreements alleged to have been made whereby the defendant had agreed upon certain conditions to pay a certain sum of money in full of plaintiff's claim for the same matters mentioned in the first count of the complaint. The court found that these agreements were never made, and it is not seriously claimed that this finding is contrary to the evidence. We think the evidence fully sustains the finding of the court. By the terms of the lease the plaintiff agreed that within 30 days from its date it would begin operations by erecting on the premises all the necessary machinery and tools, and would immediately thereafter proceed to "bore, drill, or sink" wells thereon for the purpose of obtaining oil, and that after the completion of the well or wells it would "operate and pump all wells producing over one barrel a day in such manner as

\*Rehearing denied June 17, 1904.

would take out the greatest amount of oil possible." The lessee was to pay one-half of the cost of pumping the oil from productive wells and one-half of the cost of drilling and casing the wells that proved unproductive. The net proceeds of the oil over the cost of pumping was to be equally divided.

The fourth count of the complaint alleged that in pursuance of the lease the plaintiff sunk upon the premises four wells, three of which proved to be productive and one unproductive; that the cost of drilling and casing the unproductive well was \$2,864.60; that the productive wells were pumped by the plaintiff from the time of completion up to April 6, 1896, at a cost of \$3,746.76, making an aggregate of \$6,611.36, one-half of which, or \$3,305.68, would, under the lease, be due from the defendant to the plaintiff; that the defendant had paid thereon the sum of \$728.27, leaving a balance of \$2,577.41, for which amount judgment is asked. By some error in the figures the prayer is for a small amount in excess of this sum, but the mistake is not material to the consideration of the case. The court found that the plaintiff was entitled to \$690 as the total cost of pumping the productive wells, and \$1,922.34 as the total cost of drilling the unproductive well, and that it was not entitled to make any charge for casing the unproductive well because of the fact that, when it was discovered to be unproductive, plaintiff drew the casing from the well, and kept it for its own use. Judgment was therefore given for \$577.90, being one-half of the above amounts, less \$728.27 paid on account. In making this reduction of the amount claimed in the accounts rendered by the plaintiff the court below disallowed all the items for the use of the machinery, casing, and lumber necessary to carry on the operation of drilling the well, and also all charges for all supplies and repairs required, it being of the opinion that these items were not properly included in the cost of drilling and casing the well under that clause of the lease providing that the lessor should pay one-half of the cost thereof. The court apparently considered that the only thing the lessor could be charged with under that clause was the cost incurred in the actual operation of the drill in the well. With respect to the cost of pumping the productive wells, the court during the trial stated its opinion thus: "I think the true test would have been, what could you have gotten somebody else to have come there and pumped those three wells for at that time," and accordingly all items for time occupied in cleaning out the wells when, during the operation of pumping oil therefrom, they became clogged with sand so that cleaning was necessary to do effective pumping, appear to have been rejected. Evidence was taken to show what would have been the usual charge for the pumping by those engaged in that

business, and the court allowed the sum of \$30 per month for 23 months as the reasonable cost thereof, irrespective of the outlay made by the plaintiff in that work, or the rental value of the machinery used for that purpose. For the drilling of the unproductive well the court, according to counsel for respondent, allowed only the cost of the labor while the drill was going and the cost of pumping water, sand, and oil from the well for several months during the drilling operations. This was too narrow a construction of the provisions of the lease on these two points. The provision regarding the cost of drilling and casing was as follows: "In the execution of said work of boring or drilling for oil, gas, etc., the lessee shall furnish and provide, at its own cost, charge and expense, all derricks, pumps, pipes, engine, tanks and materials of whatsoever kind that may be necessary to properly carry on the work by it undertaken, and all labor employed in the development and production, including all labor and material in erecting and maintaining fixtures for use in and about said work. The lessor agrees to pay one-half of the cost of drilling, casing and pumping all wells drilled to a depth of at least one thousand feet which do not produce an average of at least fifteen barrels of oil per day for the first thirty days in which said well shall have been pumped." The contract must be considered as a whole, and regard must be had to the situation of the parties, the surrounding circumstances, and the object to be accomplished, in order to arrive at the intention of the parties. Neither party could receive any benefit from an unproductive well. The lessee must, in the first instance, incur all the expense of constructing it. Before it could be known that a well was unproductive, it would be necessary for the lessee to drill it, case it, and, if oil were found, to pump it for 30 days to see if it would produce the 15 barrels a day. If no provision for its benefit was made in the lease, it would suffer the loss thereby occasioned, which would include all the expense incurred by it in drilling the well and getting it ready to be pumped. As the net proceeds of productive wells were to be equally divided, it would be but reasonable and natural to divide also the loss on unproductive wells. Accordingly the clause was inserted that the lessor should pay one-half of the cost of drilling, casing, and pumping such wells as should prove unproductive. The word "drilling" in the second clause is obviously used in a general sense, referring to the same word in the first clause, and includes everything referred to in the first clause as necessary for that work. The first clause does not specifically mention casing. Therefore it was particularly mentioned in the second clause, as also was the pumping, in order to make it clear that the lessor was to bear one-half of the entire loss from such wells, including the expense of

pumping and casing them, as well as the cost of the things mentioned in the first clause as necessary to the work of drilling.

The defendant was properly chargeable with one-half of the expense of all the preliminary work of preparing the ground, erecting the derrick, placing and connecting the engine and drilling rig, digging the slump hole, and, indeed, the entire cost of the well from the time the first work was begun on the ground until the machinery was removed when it was abandoned, including the expense of removal. No good reason appears why the defendant should not also be charged with one-half of the reasonable value of the use of the machinery, tools, lumber, and casing used by the plaintiff in the work. It seems that the plaintiff was the owner of the machinery and tools, and that it purchased the lumber and casing, and that after the enterprise was concluded it retained this property as its own. If the plaintiff had hired the use of the same, the cost of hiring would be a legitimate part of the cost of drilling the well. The rule cannot be different because of the fact that it was the owner of the machinery and tools. In contemplation of law it would have been able to hire them to others, or use them itself at other work, and thus would have received the value of such use, if it had not devoted them to use in this enterprise. For the use of the machinery, tools, and materials which it was to furnish at its own expense for the drilling of the productive wells it was to receive as compensation one-half of the net proceeds of the oil. The clause respecting the unproductive wells is an independent covenant, intended to cover the loss incurred on account of them primarily suffered by the lessee, and divide it equally between the parties interested. This conclusion is confirmed by the conduct and declarations of the parties during and immediately after the transaction, showing that the clause was understood in this way. On December 7, 1895, the plaintiff rendered to the defendant a bill for the cost of the unproductive well, which included charges for the use of the engine, boiler, casing and lumber, amounting to nearly \$700; the entire bill against the defendant on account of that well at that date being \$1,432.30. The defendant made no objection whatever to these items, but in its response claimed a small deduction on account of certain items of labor, and offered to pay the remainder, including the items now objected to, for which it now claims it was not liable under the lease. Evidently at that time the defendant understood that it was responsible under the contract for the use of the machinery, tools, lumber, and casing. There is no evidence that it ever objected to these charges until the suit was begun.

The clause concerning payment of one-half of the cost of pumping the productive wells is as follows: "The lessee agrees to

pay one-half of the cost of pumping oil after producing wells have been struck and are ready for pumping; and, if not satisfied with the charge made by said lessee for said pumping, the lessor may itself assume the pumping of productive wells, provided it agrees to do so at a less sum than charged by the lessee. One-half of such cost the lessee agrees to pay to said lessor." The parties were jointly interested in this part of the work, each receiving one-half of the net proceeds. The language of this provision means that, if either party undertook to do the work of pumping, and no price was agreed upon, one-half of the expenses reasonably and prudently incurred should be paid by the other party. The lessee was required, as above stated, to operate and pump all wells so as to take out the greatest amount of oil possible. The measure of its right against the defendant was manifestly one-half of the actual cost reasonably incurred in pumping the wells. This would necessarily include the cost of cleaning out the wells when they became clogged, and all other unavoidable expense not arising from plaintiff's fault or neglect, and necessary to enable it to do the required pumping. The amount of this expense cannot be reduced by showing that others might have been willing to do the same work for a less sum, or that the usual price of such work was not so much as the actual cost. The plaintiff was held to reasonable care and diligence to avoid unnecessary expense, but, having exercised that care and diligence, it is entitled to charge defendant with one-half the cost actually incurred.

For these reasons we think the court erred in its findings as to the amount for which the defendant was liable.

The order is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; MCFARLAND, J.; LORIGAN, J.

143 Cal. 287

BASTIAN v. BRITISH AMERICAN ASSUR. CO. (Sac. 1,171.)

(Supreme Court of California. May 16, 1904.)

FIRE INSURANCE—PROVISION IN POLICY—EFFECT.

1. Under Civ. Code, § 2611, providing that a policy may declare that a violation of specified provisions thereof shall void it, and on general principles of law, where a fire policy provides that it shall be void if any dynamite be kept on the insured premises, the presence of any dynamite there when a fire occurs relieves the insurer of liability, whether it caused the fire or not.

Commissioners' Decision. Department 2. Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Action by Richard Bastian against the British American Assurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Van Ness & Redman, for appellant. Swee-ny & Sessions, for respondent.

COOPER, C. Action upon a policy of fire insurance. The case was tried before the court, findings filed, and judgment entered in favor of plaintiff. This appeal is from the judgment on a bill of exceptions. The policy covered a two-story frame lodging house and the furniture therein. It was provided in the policy that it should be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises \* \* \* dynamite." The answer alleged that dynamite was kept and used upon the premises, contrary to and in violation of the terms and conditions of the policy. The court did not find upon the issue so tendered by the answer, but found that the fire which destroyed the property "was not caused by any of the articles mentioned in said policy of insurance as being prohibited or forbidden to be used, or kept, or allowed upon the insured premises." The court evidently proceeded upon the theory that it was immaterial as to whether or not dynamite was kept or allowed upon the premises, unless it was made to appear that the fire which destroyed the property was caused by the dynamite. It seems to be admitted that at the time of the fire, and for several months prior thereto, there was kept upon the premises a stick and a half of dynamite. In fact, the position of plaintiff's counsel is in accord with that of the court below, and is thus stated: "Counsel for appellant contend that it is wholly immaterial what was the origin of the fire, or what caused the fire, or whether the dynamite in question had anything to do with the fire or not; that the dynamite was upon the premises during the life of the policy of insurance, and its mere presence there was sufficient in itself to render said policy null and void, regardless entirely of the question as to whether the dynamite had anything whatever to do with the fire, or or in any manner contributed thereto, or to the destruction of respondent's property. If counsel's position on the law be correct, then they must prevail in this court, because it is admitted that during the life of the policy of insurance issued to respondent by appellant on August 10, 1901, respondent had something like ten pounds of dynamite on the insured premises, all of which he had used in sinking a well, except a stick and a half, which was in the cellar of his lodging house at the time the fire occurred." We are of opinion that the court could not set aside and ignore the plain provisions of the contract of insurance. Defendant had the right to limit its liability by the terms of the contract it made with plaintiff. It agreed to insure the plaintiff's premises, but not in case the plaintiff kept or allowed dynamite thereon. It was expressly stated that if dynamite should be kept or used upon the

premises the policy should be void. There is no question here as to the condition having been waived by any acts or conduct of defendant. The condition was not made to depend upon the question as to whether or not the fire was caused by dynamite. If it were incumbent on the insurer in such case to prove that the fire was caused by dynamite being on the premises, it would render the clause in most cases of no effect. It would place the certain definite stipulation in such a condition that in cases where the origin of the fire was uncertain no effect could be given to it. Most insurance policies contain stipulations that the policy shall become void if the premises are allowed to remain vacant for a certain time, or if the risk is increased by the erection of buildings of a certain character near to the insured premises. Yet it has never been held that it is incumbent on the insurance company to prove that the fire was caused by reason of such vacancy or such adjoining buildings. Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies. For a consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay the insurer may justly rely and insist upon the terms and conditions of the policy. If the insured cannot bring himself within the terms and conditions of the policy, he cannot recover. The terms of the policy constitute the measure of the insurer's liability. If it appears that the contract has been violated, and thus terminated by the assured, he cannot recover. He seeks to recover by reason of a contract, and he must show that he has complied with such contract on his part. It may be that the terms and conditions are such that the contract is most favorable to the insurer, but this is not for the courts. If the conditions are uncertain, or contradictory, or ambiguous, the courts will construe a doubtful provision in favor of the insured; but this rule does not go to the extent of disregarding a plain provision of the policy. If the parties have made certain terms and conditions upon the terms of which their contract shall continue or terminate, they must abide by them. The terms of an insurance policy, like any other contract, are to be taken in their plain, ordinary, and popular sense. In such case it is the duty of the court to enforce them like other contracts, and not to speculate as to the hardship or injustice of their provisions. In this case the parties plainly agreed that the policy should be void if the insured kept dynamite on the premises. He kept dynamite on the premises, and it was there at the time of the fire. It is true, not in a large quantity, but the policy did not allow it in any quantity. An explosion was heard about the time or shortly after the fire started. Whether the explosion caused

the fire, or occurred after the fire had been started from other causes, is wholly immaterial. The explosion may have rendered it much more difficult to control or extinguish the fire. It is said in *Ostrander on Fire Insurance* (2d Ed.) § 327: "The insurance policy in most cases prohibits the keeping or storing of such explosive substances as gunpowder, dynamite, nitroglycerin, and saltpeter, and the courts have held without exception that when these things are kept on the premises insured in violation of the terms of the policy the insuring company will not be liable." Where a policy contained a clause that it should be void if any burning fluid or chemical oils were used, it was held that the use of kerosene oil on the premises rendered the policy void. *Cerf v. Home Ins. Co.*, 44 Cal. 320, 13 Am. Rep. 105. So, where the policy insured a building "while occupied as a dwelling house," it was held that, if the premises ceased to be used as a dwelling house, but were occupied as a disreputable lawdy house, it would cause the policy to become void. *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138. It was there said: "The policy was a contract to pay only in case of loss of the insured premises while occupied as a dwelling house. The liability was limited by the terms of the contract, and such limitations are held valid. It is the business of the insured, and the burden is upon him to see that the premises are not used in such manner as to make void the policy. The insurer is at liberty to select the character of risk he will assume, and he is not liable except upon proof that the loss occurred within the terms of the policy." The rule is laid down in the Civil Code (section 2611): "A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy." See, also, *Slinkard v. Manchester, etc., Co.*, 122 Cal. 505, 55 Pac. 417. The above propositions are supported by all of the well-considered cases. *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Westfall v. The Hudson River Fire Ins. Co.*, 12 N. Y. 289; *Wheeler v. Ins. Co.*, 62 N. H. 327, 13 Am. St. Rep. 582; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Trustees of Fire Association of Philadelphia v. Williamson*, 26 Pa. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 85 Am. Dec. 543; *Boyer v. Grand Rapids Fire Ins. Co.* (Mich.) 83 N. W. 124, 83 Am. St. Rep. 338.

We advise that the judgment be reversed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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148 Cal. 281

COOK v. CEAS et al. (Sac. 1,080.)

(Supreme Court of California. May 11, 1904.)

GUARDIAN AND WARD—BOND—ACTION—LIMITATIONS.

1. Under the rule that an action cannot be brought on a guardian's bond until the amount of his indebtedness has been determined by an order of the probate court, and under Code Civ. Proc. § 1049, declaring that an action or proceeding is deemed to be pending from commencement until finally determined on appeal, or until time for appeal has expired, an action on a guardian's bond, brought before expiration of the 60 days within which an appeal might be taken from the order of the probate court settling his account, was premature.

2. Code Civ. Proc. § 1805, requiring action on a guardian's bond to be commenced within three years from the "discharge or removal" of the guardian, applies to an action after a final order of the court removing or discharging the guardian, and does not include termination of the guardianship by the ward attaining majority.

Van Dyke, J., dissenting.

In Banc. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Adelia Cook against George T. Ceas and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. A. Gett, for appellant. A. L. Shinn and R. Platnauer, for respondents.

BEATTY, C. J. Hensly and Gardiner were sureties on the bond of Ceas as guardian of the plaintiff, and the action is to recover \$3,000, the full penal sum named in the bond, the probate court having determined on settlement of the guardian's final account that he was indebted to his ward in excess of that amount. Ceas and Hensly, although named as defendants, were never served, and Gardiner alone defended the action. His defense was based upon two grounds: First, that the action was commenced prematurely; and, second, that the action was barred by the special limitation prescribed for actions upon guardians' bonds by section 1805 of the Code of Civil Procedure, which reads as follows: "No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed."

The facts upon which the first defense is founded are these: The order or decree of the probate court settling the account of the guardian and determining the amount of his indebtedness to plaintiff was entered as a final order of that court on the 24th day of January, 1901, and the action was commenced January 30, 1901; i. e., within the 60 days allowed by law for taking an appeal from the order settling the account. The

facts upon which the second defense is founded are that the plaintiff attained her majority April 30, 1897, and the action was not commenced until more than three years thereafter, to wit, January 30, 1901. In this connection it is claimed that by the coming of age of his ward the guardian was ipso facto removed or discharged, within the meaning of those terms as employed in section 1805 of the Code of Civil Procedure, above quoted, and, consequently, that the three years limited for the commencement of this action began to run from April 30, 1897, and fully elapsed April 30, 1900. Upon the facts, as here stated, the superior court sustained both defenses, holding that the action had been prematurely commenced, and at the same time that it was barred by the statute. Section 1805, Code Civ. Proc. Judgment was entered accordingly, and the plaintiff appeals.

It is claimed that the judgment of the court is founded upon two conclusions so manifestly inconsistent that both cannot stand. So far as an affirmance of the judgment is concerned, it is immaterial whether this inconsistency exists or not, for, if either conclusion is correct—if the action was commenced too soon or commenced too late—the judgment for the defendant must stand. We do not, however, concede that the two conclusions of the superior court are necessarily inconsistent, for it is a legal possibility that the commencement of an action may be premature, and at the same time too late in view of some special statute of limitations. The general rule prescribing the time when the period of limitation begins to run against a cause of action fixes it at the date when the cause of action accrues (Code Civ. Proc. § 312), but this general rule is by the same section of the Code expressly declared to be subject to such different rules as may be prescribed for special cases. In such special cases the date when the statute begins to run may be fixed without reference to the accruing of the cause of action, and if, for any reason, the cause of action does not mature until the statute has fully run, a plaintiff might commence his action after it was barred and before the right of action had accrued. This apparently anomalous condition of things is clearly illustrated by the reasoning of the court in the case of *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87. The individual liability of every stockholder of a corporation for his proportion of its debts is imposed by a provision of the Constitution (article 12, § 3), but by a special statute of limitations (Code Civ. Proc. § 359) the action against a stockholder to enforce this liability must in many cases be commenced within three years after the liability is created. It was argued in that case that to give effect to this section of the Code according to its literal terms would bring about the result in many cases that an action against the stockholders would be barred before the debt fell

due; as, for instance, where money was borrowed upon bond or note of the corporation maturing more than three years from date. But the court, assuming that in such case the creditor would have no action except upon the bond or note, declared that he would have practically waived the liability of the stockholders by putting himself in a position where his cause of action would not mature before the bar of the statute had interposed. They did not decide, and of course could not have decided, that in the case supposed there would be no liability on the part of the stockholders; for when the Constitution says that stockholders shall be liable for their proportion of all debts of the corporation it is not competent for the Legislature to say, directly or indirectly, that they shall be liable for such debts only as mature within three years.

But it is not alone in cases arising under special statutes of limitation that an action may be barred before the cause of action is complete. Even in cases which fall under the general rule which sets the statute in motion when the cause of action accrues an action may be barred before the cause of action is complete, and may be prematurely commenced after the bar of the statute has attached. If, for instance, a debt is expressly made payable 20 days after demand, the creditor is not allowed to defeat the policy of the statute by unreasonable delay in making demand. He cannot keep the obligation alive forever by failing to do an act within his power. And so with respect to any case where a demand and refusal of performance is essential to the cause of action an unreasonable delay in making demand will not prevent the running of the statute. *Barnes v. Glide*, 117 Cal. 2, 48 Pac. 804, 59 Am. St. Rep. 153. It was upon the doctrine of this class of cases, many more of which might here be cited, that the superior court founded the two conclusions supposed to be so irreconcilable. That they are not necessarily inconsistent I think has been sufficiently shown, but it still remains to be considered whether they, or either of them, can be sustained.

As to the first defense, it is conceded by the appellant that according to the settled rule in this state an action against a guardian or his sureties for breach of his bond cannot be commenced until the amount of his indebtedness has been determined by an order of the probate court. The same rule prevails in respect to actions against the sureties upon the bonds of executors and administrators, and in each case it rests upon the ground that the probate court has been invested with exclusive jurisdiction to settle accounts of administrators, executors, and guardians, and that, until the amount due to the ward or distributees has been determined by order of that court, and payment demanded, there is no default on the part of the trustee, and no cause of action against him or his sureties. Among the cases bearing upon this point the following

may be referred to: *Graff v. Mesmer*, 52 Cal. 636; *Trumpler v. Cotton*, 109 Cal. 250, 41 Pac. 1033; *Reither v. Murdock*, 135 Cal. 197, 67 Pac. 784; *Allen v. Tiffany*, 53 Cal. 16; *Chaquette v. Ortel*, 60 Cal. 594; *Spencer v. Houghton*, 63 Cal. 82, 8 Pac. 679. So far the rule is clear, and is conceded, but the appellant does not concede the further proposition, essential to the conclusion of the superior court, that this action was premature because, notwithstanding an order had been entered by the probate court settling the guardian's account, the time for appealing from that order had not elapsed when the complaint was filed. The argument against this proposition is, in brief, that this is not an action on the judgment or order settling the guardian's account, but is an action on the bond of the sureties, in support of which the order of settlement is only needed as evidence, and therefore that it is no obstacle to the commencement of the action that the mere evidence of the obligation is not yet complete. This argument seems to prove too much. If the order of the probate court is only evidence in support of the action, and no part of its necessary foundation, why delay the action until the probate court has acted? If that court is only taking one of the steps toward perfecting evidence to be used on the trial of the action, there would seem to be no reason for holding that its order is an essential preliminary to the commencement of the action. In truth, nothing is gained to the argument by saying that this is a suit on the bond and not on the order. A suit on a bond cannot be commenced before there is any breach of the bond. It is not the bond that constitutes the cause of action, but some breach of the bond; and if a guardian is not in default until he fails or refuses on demand to pay over the amount found due on settlement of his accounts, then a final order of settlement is an essential element of the cause of action against his sureties.

The question, then, is reduced to this: When did the order settling the account of the guardian become a binding order? The numerous decisions of this court construing and applying section 1049 of the Code of Civil Procedure have settled this question conclusively in accordance with the decision of the superior court. "An action or proceeding is deemed to be pending from the commencement thereof until it is finally determined on appeal or until the time for an appeal has expired." Code Civ. Proc. § 1049. The settlement of a guardian's account is certainly a proceeding within the meaning of this section, and it is a proceeding in which an appeal from the probate court to this court may be taken at any time within 60 days after the entry of the order. The proceeding, then, was pending when this action was commenced, and it has been held here in a great number and great variety of

cases that, so long as an action or proceeding is pending in this sense, the judgment or order from which an appeal has been or may be taken cannot be made the basis of any new action. See *Estate of Blythe*, 90 Cal. 472, 34 Pac. 108; *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; *Story v. Story*, 100 Cal. 41, 34 Pac. 675; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. Many more decisions of this court to the same effect might be cited, but I content myself with referring to the recent case of *Feeney v. Hinckley*, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290, in which it was held that the statute of limitations does not commence running against an action upon a judgment of the superior court until the expiration of the time for appealing.

The effect of these numerous decisions is not in the least impaired by the fact that in some cases, and for some purposes, an appealable judgment may be offered in evidence. It may, of course, be offered in evidence whenever the mere fact that it has been entered is material; as, for instance, in support of a plea in abatement, or to show the regularity of an execution. Nor is the force of the rule as to finality of judgments at all affected by what was said in the concurring opinion of Justice Harrison in *Naftzger v. Gregg*, supra. He held, with the rest of the court, upon the proposition that the judgment in question was not a bar, but thought the ruling of the court admitting it in evidence was not necessarily erroneous, because the court, when making the ruling, could not anticipate that the party offering it would not prove that, although the time for appealing had not elapsed, an appeal had nevertheless been taken and finally determined. But he went on to say that when the case was submitted without such additional evidence the court erred in holding that the judgment was a bar; thus expressly upholding the rule that an appealable judgment can never be made the foundation of a right of action or of defense to an action. The justice of this rule is apparent from the fact that an appealable judgment might be reversed after having been used to sustain an action or to bar an action. *Story v. Story*, supra. It is a fact, though not shown by this record, that an appeal was taken from the order settling the account here in question after this action was commenced, but within the 60 days allowed for an appeal. *Guardianship of Ceas' Estate*, 134 Cal. 114, 66 Pac. 187. If that order had been reversed instead of affirmed, what would have been the status of this case? Clearly, it would have been necessary to dismiss it, for the effect of a reversal would have been to relegate the proceeding for a settlement of the account to the stage it was in before any order was made by the probate court, and it is conceded that no action on the bond can be commenced in advance of the order of settlement. This being so, it follows that this ac-

tion was begun prematurely, for the rule as to finality of judgments and orders does not vary according to the success or failure of an appeal. This conclusion would sustain a judgment affirming the judgment of the superior court, but we would not be justified in disposing of the present appeal without deciding the more important question whether the action was barred three years after the plaintiff came of age; for, if we did, she would be compelled to commence another action and prosecute another appeal to obtain a decision upon a question clearly presented upon this record.

For the purpose of determining this question, we have only to ascertain the meaning of the expression "discharge or removal of any guardian," as employed in section 1805 of the Code of Civil Procedure. The provisions of that section, especially enacted for the protection of sureties on bonds of guardians, are prohibitory and peremptory in terms and effect. No action against them can be maintained unless it be commenced within three years from the "discharge or removal" of the guardian. The meaning of these words, as used in this connection, is determined by the sense in which they are employed in other sections of the same statute, including the provisions regulating the practice in probate cases, which are made applicable in guardianship proceedings. Code Civ. Proc. § 1808. It will be found that the word "discharge" is used sometimes in a sense peculiar to itself, and sometimes in a sense exactly equivalent to that of the word "removal." An executor or administrator may obtain an order or decree that he has fully accounted and paid over to the proper parties the entire residue of the estate after payment of debts and expenses. Such a decree is called a discharge (Id. § 1897), and its effect is to exonerate him and the sureties on his bond. This provision of the probate act being applicable to proceedings in guardianship, it follows that a guardian may obtain a similar decree of discharge exonerating him and his sureties; and this evidently is the discharge which the court is prohibited from granting until one year after the ward's majority. Civ. Code, § 257. A guardian may settle with his ward the day after he comes of age, and obtain his release, but he cannot have a decree of court confirming the settlement and release until the ward has had a year to consider whether he will affirm or repudiate it. Id. § 256. It seems very clear that the discharge contemplated by these provisions of the Codes is not the discharge referred to in section 1805 of the Code of Civil Procedure, for it would be absurd to limit the time for bringing an action upon an order which determines that there is no liability—an order which renders it impossible to maintain an action. But there is another kind of discharge to which that section may be held to refer without imputing folly to the Legislature. It is assumed in section 1753 of the

Code of Civil Procedure that the guardian of a minor may be discharged of his office by order of court before the ward arrives at the age of majority or marries. The guardian of an insane person may be "discharged" by order of court when it appears that the guardianship is no longer necessary. Code Civ. Proc. § 1802. Guardians of either sort may be "removed" for incapacity or mismanagement, etc. (Id. § 1801), and so for the same and other causes executors and administrators may be "removed." It will thus be seen that the words "remove" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office, without exonerating them from liability to account. To such orders section 1805 has a just and reasonable relation, and no doubt it is to them that it refers. As to the word "removal," there can be no doubt that the reference is to an order removing the guardian from office, and, as "discharge" is sometimes used in the statute in the sense of "removal," it is here to be construed in that sense on the principle of *noscitur a sociis*. There is still another view in which this construction appears most reasonable. There are guardians of minors and guardians of insane. The former are deprived of office by "removal," the latter by "discharge." Section 1805 applies equally to bonds of either class, and declares in one breath that an action against the sureties of a guardian of an insane person must be commenced within three years after his discharge, and one against the sureties of the guardian of a minor within three years after his removal. For these reasons we conclude that an action against the sureties of a guardian is not, by the terms of section 1805, barred until three years after a final order of court removing or discharging the guardian. By the terms of the statute, therefore, this action was not barred, for it does not appear, and it is not claimed, that the guardian of plaintiff ever was discharged or removed by any order of court.

The respondent contends, however, that the coming of age of the plaintiff operated a discharge of the guardian, and set the statute in motion April 30, 1897. It is certainly true that when a ward arrives at the age of majority the authority of the guardian comes to an end. Section 255 of the Civil Code says that it is suspended, but it is suspended without the possibility of restoration and in reality ended. In *re Alliger*, 65 Cal. 228, 8 Pac. 849; *Estate of Curtis*, 121 Cal. 469, 53 Pac. 938. But although his authority is at an end when his ward comes of age, it cannot be said that in any ordinary or usual or statutory sense of the terms he has been removed or discharged, so that the statute does not in terms apply to such a case, and, in order to bring the respondent within its protection, its terms must be enlarged by construction. In other jurisdic-



tions this seems to have been done. In the state of Montana it was held, construing a statute identical in terms with our own, that the death of the ward operated a discharge of the guardian, and set the statute in motion. *Berkin v. Marsh*, 44 Pac. 528, 56 Am. St. Rep. 565. In Massachusetts no action can be maintained against the sureties on a guardian's bond unless it be commenced within four years "from the time when the guardian shall be discharged." Chief Justice Shaw, in construing this statute, said: "The court are of opinion that by the term 'discharged' in this statute is intended any mode by which the guardianship is effectually determined and brought to a close either by the removal, resignation, or death of the guardian, the marriage of a female, the arrival of a minor ward at the age of twenty-one, or otherwise." *Loring v. Alline*, 9 Cush. 68. This construction of the statute, in substance identical with our own, has been followed in other cases in Massachusetts, and reaffirmed as late as *McKim v. Mann*, 141 Mass. 507, 6 N. E. 740. A similar construction has been placed upon similar statutes in Michigan and Wisconsin, and perhaps other states. On the other hand, the Supreme Court of Texas has in several cases refused to extend the operation of a similar statute beyond its literal terms, adhering firmly to the doctrine stated in *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52, to the effect that the statute does not begin to run in favor of the sureties until the guardian has been removed or discharged by order of court in one of the cases provided for in their Code of Procedure. The weight of authority, it must be conceded, is on the side of respondent, but we are disinclined to follow the construction adopted in Massachusetts, Michigan, Wisconsin, etc., for a reason not adverted to in some of the decisions, and not allowed sufficient weight, as we think, in those cases where it has been adverted to. A statute of limitations ought not to be enlarged in its operation by judicial construction when it is so framed as to work injustice either by itself or in conjunction with other provisions of law. In this state we have one rule which prohibits an action on the bond of a guardian's surety until there is a final order settling the guardian's account, and another rule barring the action in three years after the removal or discharge of the guardian. So far as its express terms require, the rule must no doubt be enforced, even where without the fault of the ward a final settlement of the account has not been obtained within three years after the removal or discharge; but neither justice nor sound policy requires that a law capable of working so inequitably should be enlarged by construction so as to embrace a class of cases not comprehended in its terms. And this conclusion does not leave the sureties on guardian's bonds without an ample measure of protection against

stale claims. They have all the advantage of the general statute of limitations and of the doctrine of *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153, which will hold wards to the rule of reasonable diligence in procuring settlement of their guardian's accounts. In this case it does not appear whether or not there was unreasonable delay on the part of the plaintiff in seeking a settlement of the account.

The judgment of the superior court is affirmed on the ground that the action was prematurely commenced, and without prejudice to another action.

We concur: LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

VAN DYKE, J. I dissent, and adhere to the opinion in said case in department, and hereby adopt the same, as follows:

This is an action upon a guardian's bond. The principal on the bond, George T. Ceas, and one of the sureties, C. P. Hensly, defaulted, and took no part in the trial of the cause. The court below rendered judgment in favor of the defendant Gardiner, the other surety on the bond, and against the plaintiff. The appeal is from this judgment, and is taken upon the judgment roll. Appellant contends that upon the facts admitted and found the judgment should have gone for the plaintiff.

It is alleged in the complaint that upon April 2, 1883, the superior court of Sacramento county, having jurisdiction of the matter, by an order duly given and made, appointed the defendant George T. Ceas the guardian of the person and estate of the plaintiff, his daughter, she having property in her own right, and being a minor under the age of 14 years, and required the said guardian to enter into a bond in the penal sum of \$3,000; that thereafter the bond, as required by said order, was entered into by the said Ceas as principal, and the defendants Hensly and Gardiner as sureties, in the usual form, and in the sum mentioned in the order. It is further alleged that the plaintiff married W. R. Cook in October, 1899, and is now his wife, but that the money claimed against the defendants is her separate property. It is further alleged and found by the court to be true: "That such proceedings were thereafter had in the superior court of said Sacramento county that the final account of said George T. Ceas, as guardian of plaintiff, was rendered, settled, and allowed by said superior court of Sacramento county, by its decree duly made, given, and entered on the 24th day of January, 1901, and whereby it was ascertained and determined by said superior court of Sacramento county that there was a balance due from said defendant George T. Ceas, as guardian of plaintiff, to plaintiff herein, \$3,150.47, and the said superior court of Sacramento county then duly made and entered its decree

that Adella Cook, formerly Adella Ceas, plaintiff herein, do have and recover from said George T. Ceas, defendant, as guardian of plaintiff, the said sum of \$3,150.47, which sum was for moneys received by said George T. Ceas as guardian of plaintiff." It is further alleged, and found to be true by the court, that neither said Ceas, as principal, nor said Hensly, as surety, had paid said sum of money so found to be due, or any part thereof, and that after the making of said order, and before the commencement of this action, the plaintiff demanded of the defendant P. H. Gardiner payment of the said amount specified in said bond, to wit, \$3,000, and that the said Gardiner refused, and still refuses, to pay the same, or any part thereof. The court further finds that at the time the complaint in this action was filed the order settling the final account "had not become a final order, and would not be until sixty days after the entry of the same, and consequently this action was prematurely brought"; and also "that the court finds that the plaintiff's cause of action is barred by the provision of section 1805 of the Code of Civil Procedure of the state of California, for the reason that said minor reached her majority more than three years (to wit, April 30, 1897) before this action was commenced." These so-called findings are mere conclusions of law drawn by the court from the facts admitted and found as already referred to. It is quite apparent that these conclusions of law are contradictory, and, necessarily, both cannot stand. If the action were prematurely brought—that is, before the cause of action accrued—it could not well be said that it was at the same time barred by the lapse of time. Section 1805 of the Code of Civil Procedure, referred to in the so-called finding, declares that no action can be maintained against the sureties on any bond given by a guardian unless it be commenced within three years from the discharge or removal of the guardian, unless the person at the time is under some legal disability to sue. The theory upon which the court assumed that the cause of action was barred seems to have been predicated upon the assumption contended for by respondent's counsel in his brief that upon the arrival of the ward at the age of majority the guardian was ipso facto discharged or removed. Such a result, however, does not follow upon the ward's arriving at majority or marrying. In the event of marriage the powers of the guardian are merely suspended as to the person of the ward, but not affected as to the estate. Section 255, Civ. Code; section 1751 Code Civ. Proc. And where the guardian is appointed by the court he is not entitled to his discharge as to the estate until a year after the ward's majority. Civ. Code, § 257. Here, however, it is expressly found that no order or decree had ever been entered discharging or removing said guardian, nor could such order have been made before the

settlement of his final account. Code Civ. Proc. §§ 1808, 1697. And the plaintiff's cause of action did not accrue either as against the guardian or the sureties on his bond until the settlement of the guardian's account and the ascertainment of the amount due from him to his ward. "The general rule is that the liability of the surety on an administrator or guardian's bond depends upon the liability of the principal, and does not attach until that has been ascertained and determined by the judgment of a court of competent jurisdiction. This rule has been repeatedly announced and affirmed in this court." *Reither v. Murdock*, 135 Cal. 197, 67 Pac. 784. See, also, *Allen v. Tiffany*, 53 Cal. 16; *Chaquette v. Ortet*, 60 Cal. 594; *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679. Although the guardian had the right to appeal with 60 days from the judgment or order settling his final account, there is no evidence that he did appeal. On the contrary, it may be presumed he did not, for it is recited in the findings that he failed to appear at the trial.

Conceding that the order in the probate court settling the guardian's account may be construed as a judgment, and that a judgment does not become final for many purposes until the time to take an appeal has expired, yet for many purposes it does take effect and is in full force from the time it is rendered and entered in the trial court. *Harrison, J., in Natzger v. Gregg*, 99 Cal. 88, 33 Pac. 757, 37 Am. St. Rep. 23, says, in reference to the admission of a judgment in evidence in that case: "It was a judgment that had been rendered between the same parties upon the same cause of action, and by a court of competent jurisdiction; and unless it is to be held that a judgment is not, under any circumstances, admissible in evidence until the time for an appeal therefrom has expired, the court properly received it. Section 1049 of the Code of Civil Procedure does not purport to prescribe a rule of evidence, but merely to determine the condition of an action after judgment has been rendered, and, inferentially, the effect of the judgment; and there are many cases in which a judgment is admissible in evidence at any time after its entry." A judgment may be executed as soon as entered, although the time for appeal has not expired, or even after an appeal has been taken therefrom, unless it be stayed by a proper undertaking. So, a judgment of divorce, it has been held, is effective to dissolve the marriage tie when it is rendered and entered upon the minutes. *In re Cook*, 83 Cal. 415, 23 Pac. 392. Besides, there is nothing in the record to show that any appeal was actually taken from the order settling the account. It cannot be presumed in aid of the judgment, in the absence of either allegation or finding to that effect, that an appeal was taken. It is therefore to be presumed that before the trial of this

action the order had become final by lapse of time. At the time the order was made it had all the attributes of a final order, but was subject to the condition that it might be vacated on appeal. When the liability to this condition ceased by the expiration of the time for taking an appeal, the order became final as from its date, and was a sufficient foundation upon which to maintain an action on the bond. The case is somewhat analogous to that of a plea in abatement, in which, although the action pleaded in abatement may be pending at the time of the filing of the plea or answer, yet if at the time of the trial it has been dismissed, or otherwise ceased to be a pending action, the second action does not abate. *Dyer v. Scalmini*, 69 Cal. 637, 11 Pac. 327; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; *California S. & L. S. v. Harris*, 111 Cal. 137, 43 Pac. 525.

In this case an issue was raised by the pleadings as to the settlement of the guardian's account, and the order settling the same must have been admitted in evidence to justify the finding that it had been rendered and settled as stated. This action is not upon the judgment or order settling the account of the guardian, but upon the guardian's bond. The bond, as required by the Code (Code Civ. Proc. § 1754), contained among other things, the condition that at the expiration of the trust of the guardian he should have his account settled by the superior court, and pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him in such settlement, to the person or persons lawfully entitled thereto; and, as alleged and found herein, the court settled his account, and found the amount for which the action is brought to be due the ward; and the failure to pay over this sum, as directed by the court, caused a breach of the bond, which is the foundation of this action.

The judgment should be reversed, and cause remanded.

143 Cal. 363

NASON et ux. v. LINGLE et al. (L. A. 1,286.)

(Supreme Court of California. May 27, 1904.)

SPECIFIC PERFORMANCE—EXCHANGE OF REAL PROPERTY—WIFE'S PROPERTY—AUTHORITY OF HUSBAND—STATUTE—COMPLAINT—DEFECTIVE ALLEGATIONS—PRESUMPTION—STATUTE OF FRAUDS—CONSTRUCTION.

1. Under Civ. Code, § 1624, subd. 5, providing that an agreement for the sale of real property, when made by an agent, is invalid, unless the authority of the agent is in writing, and section 2300, providing that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, oral authority of a husband is insufficient to enable him to make a valid contract for the exchange of his wife's separate real property.

2. Where the complaint in an action for specific performance of a contract for the exchange of land alleged the tender of a deed by plaintiffs, and a demand on defendant for a deed, before

the action was commenced, but contained no specific allegation as to the dates of tender and demand, and further alleged that the property which defendant had agreed to convey to plaintiffs had been conveyed by defendant to his wife, without alleging the date of conveyance to her, the presumption is that the alleged tender and demand were after title had passed to defendant's wife.

3. Where defendant agreed to exchange his land for the separate real estate of a married woman, whose husband had made the contract in her behalf, having only her oral authorization to make it, defendant was not prevented by the contract from making a valid gift of his land to his wife.

4. The rule that an agreement need only be signed by the party to be charged, in order to take it out of the statute of frauds, has no application to the case of an action by a married woman and her husband to enforce specific performance of a contract which she did not sign for the exchange of land with defendant; it appearing that the contract in her behalf was made by her husband in relation to her separate real estate, he having only her oral authorization to enter into the contract, and that they failed to bring the action until after defendant had conveyed the property to a third person.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Arthur G. Nason and wife against Donald H. Lingle and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Withington & Carter, for appellants. J. Wade McDonald, for respondents.

CHIPMAN, C. Specific performance of an alleged contract for the exchange of certain real property. Defendants demurred to the third amended verified complaint for insufficiency of facts and for uncertainty. The court sustained the demurrer as to the first ground, and overruled it as to the second. Plaintiffs declined to amend, and judgment passed for defendants, from which plaintiffs appeal.

Plaintiffs are husband and wife. The complaint alleges title in plaintiff Ada Ward Nason to certain described land situated in San Diego county, Cal., on or about March 1, 1901; that defendant Donald H. Lingle had title at the same time to certain described land in Jackson county, Mo.; that on or about March 8th, plaintiff Arthur Nason, "acting for and by and with the consent of his co-plaintiff, Ada Ward Nason, offered in writing to exchange said property in California for the said property of the defendant Donald H. Lingle, situated in Missouri, and the said Lingle then and there accepted said proposition, and agreed in writing to and with the said Arthur G. Nason, plaintiff herein, to make a good and sufficient deed for the said property in Missouri, conveying title thereto, subject to a mortgage of \$2,000 thereon, and to accept a conveyance of the said property in California, and to give a mortgage for a like sum thereof [thereon?] as a part of the purchase price of the same"; that the said Arthur Nason "was orally authorized and

empowered to make such contract for and in relation to said property in California by his coplaintiff, Ada Ward Nason, and the proposition so made and accepted as aforesaid by the said Arthur G. Nason was so made and accepted by and on behalf of the said coplaintiff, Ada Ward Nason, and not for himself"; that said Donald Lingle knew that said Arthur was acting in behalf of said Ada. It is further alleged that, in pursuance of said contract, plaintiffs executed a deed conveying a good and sufficient title to said property in California to said defendant Lingle, and tendered the same to him, and demanded of him a like deed of said property in Missouri, conveying a good title to plaintiff Ada Nason; and "that the said tender and demand were made prior to the institution of this suit, and the said demand was made after the tender of said deed." When plaintiffs' said deed was made and tendered, and when said demand was made, do not appear, further than that these facts occurred before the commencement of the suit. The amended complaint was filed December 2, 1901. The date of filing the original or either of the other amended complaints does not appear. It is next alleged that prior to the commencement of the suit the said defendant Donald Lingle conveyed the said Missouri property to defendant Wildey (date of this conveyance is not stated); "that said conveyance was without consideration, and executed voluntarily by the said Lingle with the design to hinder, delay, and defraud plaintiffs in any action they might institute touching said property," and that said Wildey took said property in trust for said Lingle; "that thereafter, on the same day [date not given], the said Wildey and his wife executed an alleged conveyance, without consideration, at the instance of said Donald H. Lingle, of the said property to defendant Eunice N. Lingle, \* \* \* the wife of said Donald H. Lingle, for the like purpose of hindering, delaying, and defrauding plaintiffs in said action."

When plaintiff Arthur Nason contracted to make the exchange, the property was the separate property of his wife, Ada. The only authority he had to deal with it was oral, and, in law, was no authority at all. Civ. Code, § 1824, subd. 5, and section 2309; *Salfield v. Sutter Co. L. I. & R. Co.*, 94 Cal. 546, 29 Pac. 1105. No time is alleged within which the exchange was to be made. So far as appears, nothing stood in the way of the act being performed within a reasonable time. Civ. Code, § 1857. Subsequent ratification by Mrs. Nason is claimed as resulting from her tender of deed to defendant Donald Lingle. Whether that act would constitute ratification, under section 2810 of the Civil Code, need not be decided. The complaint fails to show that such tender, if it can be treated as ratification, was made before Lingle had conveyed his property to Wildey, and the latter had conveyed to Lingle's wife. The contract was made March 8, 1901. The

amended complaint was filed December 2, 1901. The tender of deed to Lingle, it is alleged, was prior to the commencement of the suit, and the same allegation is made as to the time when Lingle conveyed to Wildey, and the latter to Lingle's wife. The pleading must be construed most strongly against the pleader. *Green v. Covilland*, 10 Cal. 317, 70 Am. Dec. 725; *De Castro v. Clarke*, 29 Cal., at page 17; *Hays v. Steiger*, 76 Cal. 555, 18 Pac. 670. And the presumption therefrom is that the alleged tender of the deed and demand by plaintiffs were after title had passed to Lingle's wife, and it may have been months after.

The contract, therefore, was one that Lingle was under no legal obligation to recognize, and one the specific performance of which he could not enforce at the time he conveyed his property. It is true, the conveyance was without consideration, and to his wife, and, at best, was but a gift. But Lingle having no rights under the contract which could be enforced by him on Mrs. Nason's property, and Nason having no authority to make the contract, and therefore no claim which he could enforce upon Lingle's property, the latter had the right to make a gift of his property to his wife.

Appellants claim that, to take the case out of the statute of frauds, the agreement need only be signed by the party to be charged (citing numerous cases), and that though, as a general rule, an agreement, to be binding, must be mutual, the rule applies only to the remedy, and not to the contract, it being sufficient if the remedy is mutual, and that the commencement of the action by the party who has not signed makes the remedy mutual. Citing *Vassault v. Edwards*, 43 Cal. 458, at page 465. The court there said that although the contract, on principle, should be mutual, "the courts, however, in view of the uniform construction of the statute of frauds, that the agreement was valid and binding upon the party by whom it was signed, and in order to work out the requisite mutuality, held that in such cases it was sufficient if the remedy was mutual. It was accordingly held from an early day that, when the action for specific performance was instituted by the party who had not signed the agreement, the act of filing the bill made the remedy mutual." Citing cases. Mr. Pomeroy says that the reason commonly given for this rule, which is that by commencing the suit the party who has not signed waives all objection to the absence of mutuality, and makes himself liable on the contract, is not entirely satisfactory, and that the rule is disputed by some courts. He adds that it was arbitrarily laid down by the earlier decisions which interpreted the statute, and has been followed by the great majority of subsequent cases. *Pomeroy's Specific Performance*, § 170, and notes. The rule, however, certainly can have no application where the party who did not sign the contract failed to bring his

action until after the other party to the contract had withdrawn from it, or had conveyed the property the subject of the action, and could no longer perform. In the recent case of *Hay v. Mason* (Jan. 21, 1904) 75 Pac. 300, the action was for damages for breach of a unilateral contract signed by Mason to exchange land. The option was "irrevocable for fifteen days and good thereafter until withdrawn." Plaintiffs tendered a deed after the 15 days had expired, but not until after defendant had given notice of his withdrawal shortly after the expiration of the 15 days. The court said: "There was no agreement or memorandum of any kind signed by plaintiffs as to the land to be by them conveyed to the defendant. It is therefore evident that at no period of time prior to the making and tender of the deed by plaintiffs could either party have enforced specific performance of the contract." Assuming that the rule would be the same in the exchange of property as where money was to be paid, the court said: "If we give the plaintiffs the full benefit of the rule, yet they cannot recover in this case."

It is advised that the judgment be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(14 Cal. 351)

PEOPLE v. PRICE. (Cr. 1,122.)

(Supreme Court of California. May 24, 1904.)

BURGLARY — COMPLAINT — INFORMATION — VARIANCE — REQUISITES OF INFORMATION — REQUISITES OF COMPLAINT — ALLEGATIONS OF OWNERSHIP — INDOORSING COMMITMENT ON COMPLAINT.

1. A complaint in a prosecution for burglary described the building entered as "that certain building situate at No. 1247 Fresno street in the city of F.," and the information described it as "that certain house, room, store, dwelling, and apartment of Charles C., situate at the corner of Fresno and O streets, and designated by the number 1247 Fresno street, in the city of F." *Held*, that there was no variance between the allegation of the information and that of the complaint as to the premises entered, it being evident that the same house was referred to in both instruments.

2. Pen. Code, § 956, provides that when an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material; and section 960 provides that no information is insufficient by reason of any defect which does not tend to prejudice a substantial right of the defendant on the merits. *Held*, that it was not necessary that the complaint on a prosecution for burglary should allege the ownership of the building entered, where the street number of the premises was given.

3. It was not necessary that the information should allege the ownership of the premises, where the street number was given.

4. Pen. Code, § 872, relative to the preliminary examination of an accused, provides that, if there is sufficient cause to believe defendant guilty, the magistrate must indorse on the deposition an order to the effect that it appears to him that the offense mentioned in the deposition has been committed, and that there is cause to believe defendant guilty, and ordering that he be held to answer and committed. *Held*, that it was proper for the magistrate to indorse the commitment on the original complaint, treating it as a deposition within the statute.

Commissioners' Decision. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Roy Price was charged with burglary, and from an order setting aside the information the people appeal. Reversed.

U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Geo. W. Jones, for the People. Snow & Freeman, for respondent.

GRAY, C. The defendant is charged with burglary. The plaintiffs appeal from an order granting defendant's motion to set aside the information made on the ground that the defendant had not been legally committed by a magistrate. Respondent's contention is that the complaint filed in the police court upon which the warrant for defendant's arrest was issued, and which was also treated as a deposition, and the commitment indorsed thereon, failed to charge a crime, in that it did not contain any allegation of ownership of the property alleged to have been entered. It is further contended that there is a fatal variance between the complaint or commitment and the information subsequently filed by the district attorney. The complaint describes the property entered as "that certain building situate at No. 1247 Fresno street, in said city of Fresno." The information describes the same property as "that certain house, room, store, dwelling, and apartment of Charles Chalup, situated at the corner of Fresno and O streets, and designated by the number 1247 Fresno street, in the city of Fresno." It is clear that the same house is referred to in both these instruments, and that the information charges the burglary of the same building referred to in the original complaint. Identity of the house will be presumed from identity of number, name of street and city, just as identity of the person will be presumed from identity of name. Nor is it necessary to allege the ownership of the building in the complaint, or even in an information, where the building is otherwise so described that the defendant cannot be misled as to the property referred to. *People v. Rogers*, 81 Cal. 209, 22 Pac. 592; *People v. Main*, 114 Cal. 632, 46 Pac. 612; *People v. White*, 116 Cal. 19, 47 Pac. 771. Streets are named and buildings thereon are numbered for the purpose of identifying the houses in a city, and it is hard to conceive of a more certain or accurate method to accomplish that end.

Section 956 of the Penal Code provides: "When an offense involves the commission

§ 1. See Burglary, vol. 2, Cent. Dig. § 56.

of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." This is a rule of criminal pleading, and applies to burglary as well as to larceny and other cases. Under it the name of the owner of the property entered is immaterial, except where necessary to identify the property. *People v. Prather*, 120 Cal. 660, 53 Pac. 259. Suppose we admit, as is contended, that a person could not be convicted of burglary as to his own house not occupied by another, it does not follow from this that the defendant must be informed in the complaint or information that the house in question is not his, or that it belongs to another. If the house is described by street and number, he can find out, if he does not already know, whether it is his or not, and can suffer no prejudice by the absence of an allegation as to ownership. Section 960, Pen. Code. Many cases from other jurisdictions are cited by respondent, which are in harmony with the action of the court below. But the case must be governed by our own statutes as construed by this court. It was perfectly proper to indorse the commitment on the original complaint, treating it as a deposition for that purpose, within the meaning of section 872 of the Penal Code. *People v. Smith*, 59 Cal. 365; *People v. Young*, 64 Cal. 212, 30 Pac. 628.

We have discussed the case from the standpoint of the briefs filed by the parties to the appeal. We do not wish to be understood, however, as intimating that any insufficiency in the complaint before the magistrate would warrant a court in dismissing the information. It is not necessary to decide any such question here, because it is not presented in the briefs, and the case is already disposed of on other grounds.

We advise that the order be reversed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the order appealed from is reversed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

143 Cal. 354

CURTIN v. INGLE. (S. F. 3,591).\*

(Supreme Court of California. May 25, 1904.)

CONTRACT—CONSTRUCTION—STATEMENT OF ACCOUNT—EVIDENCE—SUFFICIENCY—APPEAL AND ERROR.

1. A contract by which defendant acknowledged the receipt of certain grain bags, and agreed to ship them, filled with grain, to plaintiffs during the ensuing season, and that all bags not shipped or accounted for on a date mentioned in the receipt would be paid for at a stipulated price, does not bind defendant abso-

lutely to pay the stipulated price for all bags not shipped by that date, but gives him the option to pay or account therefor.

2. Where defendant received certain grain bags, and agreed to pay a stipulated price or account for all not shipped to plaintiffs, filled with grain, by a date mentioned in the receipt, evidence in an action for the price of the bags that plaintiffs, a year later than the date mentioned in the receipt, wrote defendant a letter in which they stated to him that they had hoped he would be able to do something in the grain line, so as to have enabled him to use the bags in that way, but had not been advised that he had done anything in that line, and inclosing a statement of account, in which defendant was charged for the bags at the stipulated price, requesting him to pay it, as it was "getting to be an old matter," and proof that, for seven months subsequent to the date mentioned in the receipt, defendant continued to ship the bags to plaintiffs, filled with grain, is sufficient to show that the date mentioned in the receipt was not of the essence of the contract, so as to make defendant's retention of the bags after that date an election by him to purchase them.

3. Where defendant received certain grain bags, and agreed to pay an agreed price or account for all not shipped to plaintiffs, filled with grain, by a date mentioned in the receipt, defendant cannot be required to pay for such of the bags as he retained after that date, in the absence of demand either directly for an accounting, or embracing that in the alternative.

4. In an action on a contract by which defendant acknowledged receipt of certain grain bags, and agreed to pay a stipulated price or account for all not shipped to plaintiffs, filled with grain, by a date mentioned in the receipt, testimony of defendant that, about the date mentioned in the receipt, he wrote a letter to plaintiffs, telling them where the bags were, and that they had better make some disposition of them, though the receipt of the letter is denied by plaintiffs, tends to show that defendant did account to plaintiffs for the bags; and hence a judgment for plaintiffs for the stipulated price of the bags, in the absence of a finding that there were bags in defendant's possession unaccounted for to plaintiffs, is erroneous.

5. In an action for the price of certain grain bags received by defendant, which he agreed to return to plaintiffs, filled with grain, by a date mentioned in the receipt, and pay a stipulated price or account for any bags remaining in his possession on that date, a statement of account rendered by plaintiffs and sent to defendant a year later than the date mentioned in the receipt, charging defendant with the bags at the stipulated price, to which defendant made no reply, amounts to nothing as evidence, in view of the fact that the suit was not based on an account stated, and that defendant had, prior to the receipt of the statement, declared to plaintiff that he did not intend to acquiesce in their statements by failure to reply to them.

6. In an action on a contract by which defendant acknowledged receipt of certain grain bags, and agreed to pay a stipulated price or account for all not shipped to plaintiffs, filled with grain, by a date mentioned in the receipt, but in which no mention was made of any twine, it is error to render a judgment for plaintiffs for twine, though the evidence disclosed the making of a contract by defendant with a third person relating to the twine, but failed to show that plaintiffs had been substituted as the parties in interest.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Frank Murasky, Judge.

Action by D. A. Curtin against J. W. Ingle. From a judgment for plaintiff, and an order

\*Rehearing denied June 24, 1904. Beatty, C. J., dissenting.

denying a motion for a new trial, defendant appeals. Reversed.

See 69 Pac. 836, 1013.

Wal. J. Tuska, for appellant. Cannon & Freeman and W. B. Treadwell, for respondent.

GRAY, C. This action was brought to recover \$806.33 for bags, \$80.64 for twine delivered to defendant, and \$34.80 for money paid to and received by defendant. The trial was had without a jury, and the findings and judgment were for plaintiff for the several amounts claimed and interest. Defendant appeals from the judgment, and from an order denying him a new trial.

The plaintiff sues as assignee of Moore, Ferguson & Co., a firm of grain dealers doing business in San Francisco, which firm will be hereinafter referred to as the plaintiffs. The defendant was a merchant doing business at Philomath, Or.

As to the empty bags involved in the case, the plaintiffs rely upon a contract in writing signed by defendant as follows:

"Philomath, Oregon, Sept. 1st, 1893. Received from W. F. Crosby 14,500 bags at Philomath warehouse for the purpose of shipping grain. Said bags are the property of Moore, Ferguson & Co., San Francisco, and are to be shipped to them filled with grain during the season 1893-4, according to the terms of a certain warehouse agreement entered into with W. F. Crosby on July 28th, 1893, all bags not shipped or unaccounted for at the expiration of this agreement May 31st, 1894, I hereby agree to pay for at the market price at time of delivery seven (7) cents each. J. W. Ingle."

The contract referred to in the foregoing receipt is as follows:

"This agreement entered into between W. F. Crosby of Albany, Oregon, party of the first part, and J. W. Ingle, of Philomath, Oregon, party of the second part, this 28th day of July, 1893, for the purpose of operating the grain warehouses and elevators situated on the line of the Oregon Pacific Railroad in Benton County, Oregon, at Philomath and Wren stations, upon the following conditions, to wit: The party of the first part agrees to furnish the party of the second part with bags and twine for receipt and shipment of all grain passing through said houses; and assist the party of the second part in paying for service of his employees by making small advances upon the salaries due them, said advances to be deducted from payments due said party of the second part as hereinafter mentioned; the said party of the second part agrees to operate said warehouses at his own expense, receive, clean, store, sack and ship grain to the order of the party of the first part, make purchases from farmers for the said party of the first part at a cost to the party of the first part of two and one-half cents per bushel; said pay-

ment to be made by the party of the first part to the party of the second part upon shipment of said grain less amount of said advances to employees. The bags furnished by the party of the first part shall be accounted for by the party of the second part as the property of said party of the first part, and at the expiration of this agreement, on May 31st, 1894, all bags not accounted for, the party of the second part agrees to pay to the party of the first part the market price of bags so unaccounted for at the market price at the time of delivery. The party of the first part agrees to buy the grain stored in said warehouses at the regular market price; said market price to be determined and regulated by the price of said grain in San Francisco, less expense of handling. Should the party of the first part at any time fail to pay such market price, then the party of the second part has the right to sell to others, provided he can realize such market price. In case of the sale to others, as above described, the party of the second part shall pay to the party of the first part, a rental of one per cent per bushel on all grain so sold, and at the rate of four cents per bushel on bags and twine; said payment to be made before the shipment of such grain to other parties. The said party of the second part is hereby allowed to add choppers to said houses, at his own expense, for his own free use, and shall be allowed to handle other product than grain without charge.

"Witness our signatures the 28th day of July, 1893. [Signed] W. F. Crosby. J. W. Ingle."

The finding with reference to the contract upon which the suit is based follows the allegation of the complaint, and reads as follows: "On the 1st day of September, 1893, the copartnership firm of Moore, Ferguson & Co. delivered to the defendant fourteen thousand five hundred (14,500) grain bags, for the purpose of shipping grain and said defendant then and there agreed in writing to ship to said Moore, Ferguson & Co. the said bags, filled with grain, during the season of 1893-94, and by said writing further agreed to pay at the rate of seven (7) cents each for whatever number of said bags should not, prior to the 31st day of May, 1894, have been so shipped, filled with grain, or otherwise, to the said Moore, Ferguson & Co., or that by him prior to that time delivered to said Moore, Ferguson & Co." There was no finding as to whether the bags in question had been accounted for by defendant, nor is there any allegation in the complaint as to the want of an accounting for these empty bags. On the contrary, the complaint and findings both proceed upon the theory that the liability of defendant to pay for the bags became absolute as to any bags not shipped to San Francisco, "filled with grain," or otherwise, prior to May 31, 1894. This is

not a proper interpretation of the contract. It was only such bags as should be unaccounted for on the last-mentioned date that defendant agreed to pay for. This date was not of the essence of the contract, nor was it stipulated in the receipt or elsewhere that the defendant should account directly to plaintiffs for these bags. There is no evidence in the record even tending to show that it was ever agreed that any of these bags should be returned empty by defendant to plaintiffs at San Francisco. The contract left it optional with defendant to use and pay for any of these bags that he did not ship, filled with grain, to the plaintiffs, at San Francisco, or to account for any and all of the unused bags. The evidence shows, without conflict, that the defendant did account to Crosby for the bags, and it appears from the undisputed evidence that the defendant was warranted in reaching the conclusion that such was his duty. He had been told in two letters from plaintiffs that he was dealing in reference to these same bags with Crosby, and not with plaintiffs, and also told that he must continue to deal with Crosby. When this case was here on a former appeal, it appeared that much of this evidence had been excluded at the first trial, and, referring to it, the court said: "The excluded evidence tended to show that the defendant was justified in treating Crosby as the agent of Moore, Ferguson & Co., in the premises, and in dealing with him as he did." *Curtin v. Ingle*, 137 Cal. 95, 69 Pac. 836, 1013. In the same case the court also said, speaking of the agreement between Ingle and Crosby: "The defendant therefore had the right to have that agreement considered in connection with said receipt, as they form parts of the same transaction between Crosby and defendant." The receipt made no change in the previous contract or arrangement with Crosby, except to recite that the bags were the "property of Moore, Ferguson & Co.," provide that the bags should be shipped to plaintiffs, filled with grain, and to fix the price of bags unaccounted for at 7 cents. If there had been any purpose to change the previous arrangement and contract to account to Crosby for the unused bags, as this contract had previously been repeatedly impressed on the mind of the defendant by the letters of the plaintiffs, such change could have easily been provided for in the receipt of September 1, 1893, by saying therein that the unused bags should be paid for, accounted for, or be delivered to plaintiffs at San Francisco or in Oregon, as the parties may have desired. The plaintiffs place an interpretation on the contract that it will not bear, and undertake by this suit to force defendant to pay for all these unused bags, without giving him the benefit of the option to account for them, which he had by the express terms of the contract. That this date mentioned in the receipt of May 31, 1894, was not considered of the

essence of the contract by the plaintiffs themselves appears from their letter written long afterwards, on May 31, 1895, in which they say: "Were in hopes that you would be able to do something in the grain line, especially oats, so as to have enabled you to use the bags in that way, but have not been advised that you have done anything in the oat line." From this it seems that plaintiffs had been waiting until this date in 1895 without demanding either an accounting or pay for the bags, in the hope that the bags might yet be shipped to them, filled with grain. And even in this last letter they do not ask for an accounting as to the bags, nor do they demand the delivery of the bags. But they do, however, inclose a statement of account with this letter, in which \$806.33 is charged to defendant on account of these bags, and request him to pay the same, as this is "getting to be an old matter."

As further evidence that the 31st day of May, 1894, was not intended as an absolute limit of defendant's time to account for the unused bags, we have the fact disclosed by the plaintiffs' books that Ingle continued to ship the bags, filled with grain, after that date. Between July 31 and December 31, 1894, plaintiffs received from Ingle 2,631 of the bags mentioned in the receipt, filled with grain. And during all those months there is no demand from plaintiffs for an accounting or payment for unused bags. The plaintiffs were then resting on the hope that defendant might yet be able to return to them all the bags filled with grain.

In view of all this evidence, it is not fair to say that defendant's retention of the bags after the date fixed by the contract amounted to an election by him to purchase them. Of course, these secondhand bags, as most of them are shown to be, will not be worth very much after the expense of shipping them empty back to San Francisco is paid. And they are probably not worth 7 cents apiece in Oregon. Therefore it becomes important to consider and construe the various contracts, receipts, and letters between the parties properly. If there was uncertainty, as there seems to have been, in regard to the liability of the parties, the plaintiffs were at least as much responsible for that uncertainty as the defendant; and it behooved them, in that condition of affairs, to put the defendant clearly in default, so that they could maintain the burden upon them to show that he had broken his contract. They should not have ignored that branch of the contract which looked to an accounting for or return of these unused bags in Oregon, but should have made some demand either directly for the accounting, or embracing that in the alternative. We think the undisputed evidence, as disclosed by the record, warrants the legal conclusion that plaintiffs are not entitled to recover for these empty bags.

Aside from the foregoing, the judgment must be reversed and a new trial had for



another reason. Without objection, the defendant testified as follows: "I informed Moore, Ferguson & Co. about the unused bags—where they were. That was about June or July, 1894. I wrote them, in substance, this: That the grain season for harvesting was now approaching, and that they had better make some disposition of the bags; that they could now use them and save themselves, but, if they intended to hold me for them on a cash basis, they would get left. And I think I said, too, that they understood fully that I was to return all sacks empty, and to be held responsible for them." It was subsequently denied by a witness on behalf of plaintiffs that the firm had ever received any such letter from defendant. Even if we admit that the contract and understanding was that defendant should account direct to plaintiffs for the bags, here is evidence tending to show that he did in fact so account. He says he told them where the bags were, and that he did this at just about the date that he had agreed to either account or pay for the bags. This was all that was necessary for him to do in the way of accounting, except, perhaps, on demand, to deliver the bags at the place where, as he further testified, they were stored; and, as we have seen, no such demand was ever made. The reception of this evidence without objection shows that it was treated by all parties as a matter in issue before the court. And indeed, from plaintiffs' construction of the contract—that the accounting for the bags should have been directly to them—it was a matter of the utmost importance for them to establish, and for the court to find, that there had been no accounting to them for the bags. And yet there is no finding at all on this subject. There is no finding that there were any bags unaccounted for to plaintiffs. Defendant agreed to pay for such bags only as were not shipped or were unaccounted for. In view of the foregoing evidence, no judgment could properly be entered upon this contract without some disposition in the findings of this most important condition of defendant's liability under his contract.

As the record stands, the contract does not sustain the allegations of the complaint. The evidence also fails to support the findings quoted above, for the reason that an important condition of the written contract relied on is omitted from the finding as to what the contract was. Further, there is no finding at all as to whether there were any bags unaccounted for at the time.

Respondent contends that the statement of account forwarded to defendant May 31, 1895, and to which no reply was subsequently made by defendant, amounted to an account stated, and was sufficient to support the findings as to defendant's liability for the price of the bags. It is admitted, however, that this suit is not based on an account stated. The statement of account,

therefore, and failure to reply to it, can only be looked to as evidence in the nature of an admission on the part of defendant. If defendant had replied to the letter containing the statement, denying all liability to pay the claim, of course the statement would have amounted to nothing as evidence; and we think the same rule should apply where the defendant declares in advance that he does not intend to acquiesce in the statements of plaintiffs when he fails to reply to them.

On December 28, 1893, plaintiffs had written to defendant, saying that "any bags not shipped to us with grain by the close of the season we will expect you to pay for as per terms of your receipt sent us." Defendant replied to this letter on January 1, 1894, as follows: "Your two letters of recent date to hand and contents noted. I am somewhat surprised at the way you talk now. In the beginning you ignored me altogether and expressed surprise that I should be trying to deal with two parties at the same time. It seems to me that you would now take your own medicine and deal with Mr. Crosby alone. I want to state now that I am not dealing with you but Mr. Crosby, and that if you have any such contract with him about bags you must look to him to fulfill it, for I have no such arrangement. My contract with him speaks for itself, and you need not suppose for a moment that you can make suggestions to me by mail, and because I do not see fit to answer, that I therefore acquiesce. Please bear in mind that I am dealing with Mr. Crosby." This letter, as it seems to us, ought to destroy the force of any inference that in its absence might be drawn from his subsequent failure to answer plaintiffs' letters. Certainly this letter contained an express repudiation of any intention on the part of defendant to ever admit that he was liable to pay plaintiffs for these unused bags, or that he was dealing with plaintiffs at all concerning them. The contract concerning the twine was between Crosby and defendant, and, so far as this twine is concerned, there is nothing to show that plaintiffs were subsequently substituted for Crosby as a party to said contract. The twine is not even mentioned in the receipt. Therefore the evidence failed to show that defendant purchased any twine from plaintiffs. The statement of account of May, 1895, cannot be treated as evidence as to purchase of twine, for the reasons already stated.

As to the item of \$34.30 cash, it does appear from the evidence that plaintiffs rendered a statement of account directly to defendant on September 11, 1893, charging him with this item as a balance due plaintiffs on a certain transaction concerning a shipment of oats from defendant through Crosby. It seems that the defendant did not reply to this statement. This was some evidence of indebtedness as to this item, and is sufficient

to sustain the finding in regard to it. However, this does not support the judgment.

We advise that the judgment and order denying a new trial be reversed.

I concur: CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed. VAN DYKE, SHAW, J.; ANGELLOTTI, J.

#### ADCOCK v. OREGON R. & NAV CO.

(Supreme Court of Oregon. June 20, 1904.)

PERSONAL INJURY—DAMAGES—EXCESSIVENESS  
—POWER OF COURT TO REQUIRE REMITTITUR—  
GROUNDS OF DAMAGES—PHYSICAL INJURIES  
—RESULTING NERVOUSNESS.

1. Under an allegation of a physical injury, plaintiff cannot recover damages for an injury resulting from a fright or a mere nervous shock.

2. In an action for personal injuries, in which no injury to the nervous system was alleged, and plaintiff's counsel disclaimed any intention to show such injury as an item of damage, evidence that plaintiff had been nervous since the accident was not objectionable as relating to an element of damage not claimed by the complaint.

3. In an action for personal injuries, in which it appeared that plaintiff was strong and robust before the accident, and had been nervous since, an inference that the nervousness was the result of the physical injury was justified.

4. In an action for personal injuries, the court has power to order a remittitur of a part of the damages awarded by the verdict, as a condition to overruling the motion for a new trial.

5. Where, in an action of tort, it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict.

6. Where, in an action for personal injuries, defendant's motion for a new trial was based on the ground of excessive damages, appearing to have been given under the influence of passion and prejudice, and also upon the insufficiency of the evidence to justify the verdict, it must be presumed on appeal that an order requiring a remittitur of half the damages assessed as a condition to denying the motion for a new trial was based in part on the insufficiency of the evidence, and not on a conviction that the verdict was the result of passion and prejudice.

7. An order of the trial court allowing or refusing a motion for a new trial is not assignable as error on appeal.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Action by Elizabeth Adcock (formerly Dozier) against the Oregon Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for an injury to the plaintiff caused by the collision of a cook car upon which she was working with one of defendant's cars. The complaint alleges that by such collision she "was violently thrown against the side of the said cook car, \* \* \* and was thereby greatly injured and bruised in and upon the

head and in and upon the right side and hip of her, the said Elizabeth Dozier, the plaintiff herein, and her right arm was then and there burned and scalded, so that the said Elizabeth Dozier thereby became sick and unable to work, and suffered great bodily pain and anguish, and was confined to her bed and room for a period of about three weeks, and was permanently injured in the use of her left eye and right leg, and is unable, by reason thereof, to use her said left leg and right arm as prior to said injury, and her eyesight has been thereby greatly impaired, to the damage of the plaintiff three thousand dollars (\$3,000)." The answer denies the negligence alleged, and, for affirmative defense, avers that the injury to the plaintiff was due to the negligence of a fellow servant and to her own contributory negligence. At the beginning of the trial, however, the attorneys for the defendant stated to the court and jury that it admitted its negligence, and that plaintiff was not guilty of contributory negligence, and therefore the only issue upon which plaintiff would be required to present proof would be as to the extent of her injuries and the amount of her damages. The jury returned a verdict in favor of the plaintiff, assessing her damages at \$1,050. The defendant moved to set aside the verdict and for a new trial on the ground (1) of excessive damages, appearing to have been given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; and (3) error in law occurring at the trial. Upon the hearing of the motion, the court was of the opinion that the verdict was excessive, and should not have been for a larger sum than \$825, but, upon a remittitur by plaintiff of one-half of the verdict, the motion was overruled, and judgment entered in her favor for that amount and the costs of the action. From this judgment the defendant appeals, assigning error in the admission of testimony and in overruling the motion for a new trial.

W. W. Cotton, for appellant. J. J. Balleray, for respondent.

BEAN, J. (after stating the facts). The plaintiff gave evidence tending to show that before the accident she was a strong, healthy, and robust woman; that she was injured upon the head, had one arm scalded, and was hurt upon the shoulder, hip, and knee; that she was removed to a neighboring house and confined to her bed for about three weeks; that thereafter she was removed to her daughter-in-law's house, in Nolin, and for a number of weeks was unable to do anything, but had to be assisted in dressing; that she was weak and became tired and exhausted easily; that she complained of her side, back, knee, and arm; that at the time of the accident her name was Dozier, but she was married about two months

thereafter to her present husband, Adcock. Her son John Dozier was called as a witness on her behalf, and testified, over the objection and exception of defendant, among other things, as follows: "Q. What has been your mother's condition as to being nervous? A. She complains of being very nervous at times. Q. Can't you observe, yourself? A. Yes, sir; I can notice a great difference. Q. What is her condition? A. I can't say exactly what her conditions are. I am not a physician, and am unable to say." Thereupon plaintiff's counsel, by leave of the court, propounded to the witness the following leading question: "Every since that accident, has she been nervous?" and the witness answered: "Yes, sir." Dr. McFaul, a practicing physician, testified that he examined the plaintiff at his office some time prior to July 7, 1903, and thereupon, over the objection and exception of the defendant, was asked and answered the following questions: "Q. What was her condition as to her nervousness? A. She was suffering considerably. I couldn't tell particularly about the nervous conditions. She was suffering apparently considerable at the time. Q. Doctor, what is the probable result—I mean to the nervous system—of a sudden jar or jolt from a collision of a railroad train?" Objection was made to this question on the ground that the testimony called for was immaterial and at variance with the allegations of the complaint, when counsel for the plaintiff stated that in asking questions he disclaimed any right to damages for, or intent to prove, any injury to the brain or nervous system of the plaintiff, or any psychic or mental disturbance, and withdrew the last question propounded to the witness.

It is argued that the testimony in reference to plaintiff's being nervous after the accident was incompetent, under the allegations of the complaint, because not alleged as a matter of special damages. A general allegation of damages will let in evidence of such damages as are the natural and necessary result of the injury complained of, but, if the plaintiff seeks to recover damages not so connected with the injury alleged, he must plead them. Where a plaintiff alleges that his person has been injured, and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately follow from the injury, under a general allegation that damages were sustained. If he seeks, however, to recover damages for consequences which do not necessarily and immediately arise from the injury alleged, he must aver the special damages which he seeks to recover. Under an allegation of a physical injury, therefore, the plaintiff cannot recover damages for an injury resulting from fright or a mere nervous shock. *Maynard v. Oregon Railroad Co.*, 43 Or. 63, 72 Pac. 590; *Kleiner v. Third Avenue R. Co.*, 162 N. Y. 193, 56 N.

E. 497. The evidence objected to, however, was not offered or admitted, as we understand the record, for the purpose of proving damages for an injury to the nervous system of the plaintiff, but merely as proof of one of the manifestations of the physical injury complained of. The evidence was that ever since the accident the plaintiff had been "nervous," without any particular indication as to what was meant by the term. The word "nervous" is a generic term, having many different meanings, and it is manifest from the disclaimer of counsel of an intention to show injury to the nervous system as an item of damage that, as employed in the questions and answers, it simply means that the plaintiff was excitable and easily agitated or annoyed, as the result of her physical injury, not that she was suffering from a nervous disease caused by the accident. There was no attempt to prove injury to the nervous system, or that plaintiff was suffering from any nervous derangement, and therefore we do not think the rule invoked by counsel is applicable to the case in hand.

It is urged that plaintiff failed to show that the nervousness referred to by the witness resulted from the accident. The law is that damages recoverable for an injury are limited to its natural and probable consequences, and in such case the question always is whether there is sufficient connection between the wrongful act and the injury. It is not sought, however, to prove plaintiff's nervousness as a ground of damages. It is shown that she was a strong, robust woman prior to the accident, and ever since that time has been nervous; inferentially indicating at least that her nervousness was the result of the physical injury sustained at the time.

It is next contended that the court had no power or authority to overrule defendant's motion for a new trial on condition that plaintiff remit one-half of the damages assessed by the verdict. The power of the court to require the entry of a remittitur in an action to recover damages for a tort, as a condition to overruling a motion for a new trial, has sometimes been denied; but, according to the weight of authority, the power exists, unless it is apparent that the verdict was the result of passion and prejudice. In the early case of *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1,578, which was an action to recover damages for a malicious prosecution, Mr. Justice Story said that when it clearly appears that the jury have committed a grave error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is the duty of the court to interfere and prevent the wrong, and that the case before him would be submitted to another jury unless the plaintiff remitted a part of the damages assessed by the jury. The remission was made, and a new trial

refused. In *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80, the jury rendered a verdict in favor of the plaintiff for \$800. On the hearing of a motion to set aside the verdict for excess of damages and as contrary to the weight of the evidence, the court was of opinion that the verdict was excessive, but, in consequence of the plaintiff's offer to remit one-half thereof, ordered it to stand. Upon appeal the ruling was affirmed, Mr. Justice Gray saying: "The defendant has no ground of exception to the action of the superior court upon the motion for a new trial. Such a motion, so far as it depends upon the weight of evidence or other matter of fact, is exclusively addressed to the discretion of the presiding judge. When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue. The judge in this case having adopted the latter course, and ordered the verdict to stand for the sum of four hundred dollars, the only question of law arising thereon is whether the law would warrant a verdict for this amount." In *Northern Pacific Railroad v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, which was a personal injury action, the plaintiff recovered a verdict for \$25,000. The court overruled a motion for a new trial on condition that plaintiff should remit \$15,000 of the verdict, and upon appeal the judgment was affirmed. The doctrine of this case was challenged in the subsequent case of *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, and the court asked to re-examine the question in the light of the authorities. It did so, and, as a result of its examination, says: "The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not in any just sense impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to

him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case." To the same effect are numerous authorities collected in 18 Enc. Pl. & Pr. 125; 3 Sedgwick, Dam. (8th Ed.) § 1322; 2 Sutherland, Dam. (3d Ed.) § 459.

We are clear, therefore, that it is within the power of a trial court, as a condition to overruling a motion for a new trial, to require the entry of a remittitur of a part of the verdict in an action of tort, when, in its opinion, the verdict is excessive.

It is contended, however, that in this case the court could not have required the plaintiff to remit one-half of the verdict in her favor, except upon the theory that the jury were influenced by passion and prejudice. If such had been the view entertained by the court, the proper practice would undoubtedly have been to grant a new trial, as the part of the verdict allowed to stand would have been as much tainted by passion and prejudice as that which was remitted. Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess; but, where it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by merely remitting a part of the verdict, but it must be entirely rejected, since the effect is to cast suspicion on the conduct of the jury and their entire finding. *Stafford v. Pawtucket Hairecloth Co.*, 2 Cliff. 82, Fed. Cas. No. 13,275; *Loewenthal v. Streng*, 90 Ill. 74; *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333; *Steinbuchel v. Wright*, 43 Kan. 307, 23 Pac. 560. But we cannot assume in this case, from the mere fact that the court required a remittitur of half the amount of damages assessed by the jury, as a condition to denying the motion for a new trial, that it believed that the verdict was the result of passion and prejudice. There is no finding to that effect. The recital in the order is that it appeared to the court that the damages assessed were excessive. The motion for a new trial was based on the ground of excessive damages, appearing to have been given under the influence of passion and prejudice, and also upon the insufficiency of the evidence to justify the verdict; and it may have been, and we must assume was, allowed in part for the latter reason. Moreover, an order of a trial court allowing or refusing a motion for a new trial is not assignable as error, under the practice in this state. *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Beekman v. Hamlin*, 23 Or. 313, 31 Pac. 707. And it is therefore at least doubtful whether a party against whom a verdict has been rendered can assign as error on appeal the over-

ruling of his motion for a new trial on condition that his adversary will remit a part thereof in his favor. 18 Enc. Pl. & Pr. 180.

There being no error in the record, the judgment is affirmed.

(45 Or. 167)

WRIGHT et al. v. LYONS et al.

(Supreme Court of Oregon. June 20, 1904.)

MINES AND MINING—LODE CLAIM—ESTABLISHMENT—MARKING BOUNDARIES—STATE REGULATIONS—FEDERAL AND STATE REQUIREMENTS—CONFLICT.

1. Where locators of a lode claim, in marking the same, omitted to establish the center end posts or monuments, and did not cause to be attached to the copy of notice of location delivered to the clerk for record an affidavit in proof of the work required to be done by B. & C. Comp. § 3977, as required by sections 3975, 3976, such omissions were fatal to a valid initiation of their title.

2. B. & C. Comp. §§ 3975, 3976, requiring locators of a lode claim to establish the center end posts or monuments of the claim in a particular manner, and to attach to the copy of notice of location filed with the clerk of the county wherein the claim is situated an affidavit in proof of the work required to be done by section 3977, as conditions precedent to the establishment of a valid claim, are not in conflict with Rev. St. U. S. §§ 2319, 2322, 2324 [U. S. Comp. St. 1901, pp. 1424-1426], requiring that the location of such a claim shall be distinctly marked on the ground, so that its boundaries can be readily traced, etc.

Appeal from Circuit Court, Malheur County; M. D. Clifford, Judge.

Action by George Wright and others against O. B. Lyons and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

According to the complaint filed in this cause, George Wright and R. M. Turner, being citizens of the United States, and above the age of 21 years, on September 3, 1901, entered and discovered upon the public domain a quartz ledge or lode of mineral-bearing rock in place, and located a claim thereon, being 1,450 feet along the lode by 300 feet on each side, by conspicuously posting a notice of such location at the point of discovery, and causing the same to be staked and marked upon the ground as follows: "One stake at point of discovery with said notice of location posted thereon. One stake on the northwest corner, one stake on the northeast corner; one stake on the southeast corner and one stake on the southwest corner of said quartz claim, each and all of said stakes being four inches in diameter, four feet high above the ground, blazed inside with the words 'Geo. Wright. Blue Bucket,' written on the blazed portion of each of said stakes, and each and all of said stakes intended to designate the point of discovery and each of the four corners, respectively, of the said 'Blue Bucket' quartz claim; each and all of the said stakes being in conspicuous places and in plain view of the travelling public and designated the corners of said

claim so that the boundaries thereof could be readily traced." Thereafter they caused to be sunk upon and along the lode an open cut, 6 feet deep, 4 feet wide, and 10 feet in length from the point of discovery, and on September 30th caused a notice, without having attached thereto an affidavit in proof of the work required to be done by section 3977, B. & C. Comp., to be duly recorded in the office of the county clerk for Malheur county, in Book B of Record of Quartz Locations, at page 184; the claim being designated as the "Blue Bucket Quartz Claim." Plaintiffs have succeeded to the interest and title of Wright and Turner, and, having been ousted, as they allege, by defendants, demand judgment for a recovery of possession. A demurrer was interposed to the complaint and sustained, and, judgment having been rendered dismissing the action, plaintiffs appeal.

Wm. Miller and Will R. King, for appellants. John L. Rand, for respondents.

WOLVERTON, J. (after stating the facts). Plaintiffs have by their complaint herein set out in detail the manner of locating the claim in dispute, with a view of determining the entire controversy upon the demurrer. Passing the contention made that the record does not contain a sufficient description with reference to some natural object or permanent monument to identify it definitely and distinctly, as required by Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], we will inquire touching the validity of the location and recording of the claim under the provisions of our own statute, and whether such statute is inimical to the laws and regulations of the United States relative to the same subject.

Section 3975, B. & C. Comp., provides that a quartz claim shall be located by posting on the vein or lode discovered a notice of such discovery and location, indicating, among other requirements, the general course or strike of the vein or lode, as nearly as may be, with reference to some natural object or permanent monument in the vicinity, and by defining the boundaries upon the surface so that the same may be readily traced. It further provides that such boundaries shall, within 30 days after the posting of notice, be marked by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone, or earth and stone, at least two feet in height; that is to say, one of such posts or mounds of rock shall be established at each corner and one at each center end of the claim. Section 3976 provides that such locator shall, within 60 days from and after posting the location notice, file for record with the recorder of conveyances, if there be one, who shall be the custodian of mining records and miners' liens, otherwise with the clerk of the county wherein said claim is situated, a copy of such notice, having attached

thereto an affidavit showing that the work required to be done by section 3977 has been performed, and that no location notice shall be entitled to record until the work so required shall have been done, and the affidavit in proof thereof attached. Section 3977 provides that before the expiration of 60 days from the date of the posting of the notice of discovery, and before recording the notice of location as required by the preceding section, the locator must sink a discovery shaft upon the claim, located to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode or vein of mineral deposit in place, and that a cut or cross-cut or tunnel which cuts the lode at a depth of ten feet, or an open cut at least six feet deep, four feet wide, and ten feet in length along the lode from the point where the same may be in any manner discovered, shall be equivalent to such discovery shaft, and, further, that the locator, or some one for him, who did work upon, and has knowledge of the facts relating to the sinking of, the discovery shaft, shall make and attach to the copy of the notice of location to be recorded an affidavit showing compliance by the locator with the provisions of this section, which affidavit shall be recorded with such copy of the location notice. These sections of the statute are made very specific, and it was intended, no doubt, that the locator, in order to acquire a right or initiate a title to a mining claim, should comply with them, at least in substance. It is plain in the present instance that Wright and Turner did not mark the boundaries of the claim in the manner prescribed, in that they omitted to establish the center end posts or monuments, and, further, that they did not cause to be attached to the copy of notice of location delivered to the clerk for record an affidavit in proof of the work required to be done under section 3977, and none such was recorded. These omissions we deem fatal to the valid initiation of their title. All these requirements pertain to the location of the claim, and, unless observed in their substance, there can be no location. No right or title in the public domain can be acquired without such observance. "The right to the possession," says Mr. Chief Justice Waite in *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735, "comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations." Citing this case with many others, Mr. Lindley, in his valuable work on *Mines* (volume 1 [2d Ed.] § 329), states the principle concisely as follows: "A substantial compliance with the requirements of the laws,

federal and state, as well as local rules, where they exist and are not repugnant to state or federal legislation, is a condition precedent to the completion of a valid location." To the same purpose, see *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Noyes v. Black* (Mont.) 2 Pac. 769; *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106. As the locators have not complied in substance with the statutory prerequisites, they did not acquire a valid right of possession or initiatory title to the mine, such as will afford their successors in interest or the plaintiffs herein a basis for an action in ejectment.

It is insisted, however, that these provisions of the state law are repugnant to the statute of the United States relative to the location of lode claims, and therefore that the locators are not bound to observe them, and may acquire and have acquired a valid location by an observance of the United States regulations only. All public lands in which mineral deposits are found are declared by the federal statute to be open for occupation and purchase under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and are not inconsistent with the laws of the United States. Locators, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, are given the exclusive right of possession and enjoyment; and miners of each mining district are authorized to make regulations, not in conflict with the federal statutes or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries may be readily traced; all records of such a claim must contain the name or names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it; and, after location, certain annual work is to be performed until patent issues. *Rev. St. U. S.* §§ 2319, 2322, 2324 [*U. S. Comp. St.* 1901, pp. 1424-1426]. The very terms of these requirements permit state and local laws and rules regulating the location of mining claims, the only limitation prescribed being that they shall not conflict with the paramount law providing for disposal of the public mineral domain to purchasers. One of the fundamental requisites is that the claim shall be distinctly marked on the ground; but how, the statute does not attempt to define, the manner of the marking being left to the regulations of the state or the mining district in which the mine is located; and all rea-

sonable regulations looking to that end are certainly within the compass of the federal law. So with reference to the recording of the claim. The record must at least substantially accord with the United States statutory requirements, but there is here left scope for state and district regulations, and a reasonable amount of development work may be required, so as to expose the lode, render certain the discovery, and indicate the good faith of the locator; and, as evidence of such compliance, proof may be required that the work has been done. Such regulations are not deemed to be repugnant to the federal statute, and are therefore valid and binding upon the locator, if he would secure a good location. 1 Lindley, Mines (2d Ed.) §§ 249, 250; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; Kendall v. San Juan Mining Co., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583; Northmore v. Simmons, 97 Fed. 386, 38 C. C. A. 211; O'Donnell v. Glenn, 8 Mont. 248, 10 Pac. 302, s. c. 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037; McCowan v. Maclay, 16 Mont. 234, 40 Pac. 602; Sissons v. Sommers (Nev.) 55 Pac. 829, 77 Am. St. Rep. 815; Beals v. Cone (Colo. Sup.) 62 Pac. 948, 83 Am. St. Rep. 92. We are clearly of the opinion that the requirements of our statute complained of by plaintiffs are reasonable and within the scope and purpose of the United States statute. Such regulations are therefore valid, and, the plaintiffs' predecessors not having complied with them in the particulars hereinbefore designated, the demurrer to the complaint was properly sustained.

It follows that the judgment of the trial court must be affirmed, and it is so ordered.

(45 Or. 192)

#### MILLER v. HEAD CAMP.

(Supreme Court of Oregon. June 20, 1904.)

LIFE INSURANCE—BENEFIT SOCIETIES—PAYMENT OF ASSESSMENTS—SUSPENSION—WAIVER—APPEAL—BILL OF EXCEPTIONS—PLEADINGS—ADMISSIONS.

1. Where there is no bill of exceptions in the record, the only question involved is whether the findings of fact support the judgment.

2. Defendant benefit society declared assessments during October and November, 1898, payable during the month following such levy. Insured never paid such assessments, and became ill January 10, 1899, and died on January 18th. Two days prior to his death the clerk of the local lodge, without knowledge that insured was seriously ill, issued receipts for such assessments, dating them as of January 5th, and sent the sums due therefor to defendant, without insured having certified that he was in good health. Proof of death was submitted to defendant April 5th, but it did not return the money so received until July 21st. The certificate provided that it should not be in force at any time when the member should be suspended from the order, and that, if he should not pay any assessment within the time prescribed, his certificate would become void, and so continue until he was reinstated, though a suspended member might be reinstated by making application within three months, certifying good health.

*Held*, that it was error to hold that there was a waiver of forfeiture, as a matter of law, as the defendant's general agent did not know of insured's illness and death.

3. Facts admitted by pleadings are tantamount to findings duly made.

Appeal from Circuit Court, Harney County; M. D. Clifford, Judge.

Action by Sarah C. Miller against the Head Camp, Pacific Jurisdiction, Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action by Sarah C. Miller against the Head Camp, Pacific Jurisdiction, Woodmen of the World—a corporation organized on the lodge plan, as a benefit society, under the laws of Colorado—to recover the sum of \$1,000 on a certificate of mutual life insurance issued by it to her son F. T. Miller, and in which she is named as the beneficiary. Miller died January 18, 1899, having been a member of Harney Valley Camp, No. 381, a subordinate lodge at Burns, Or.; and, the defendant refusing to pay any part of the sum specified in the certificate, this action was instituted, the complaint being in the usual form. The defense is based on the ground that Miller died suspended from the order. The reply having alleged that a forfeiture of his membership was waived by the defendant, a trial was had by the court, without the intervention of a jury, and findings of fact and conclusions of law were made, upon which judgment was entered for the plaintiff in the sum demanded, and the defendant appeals.

A. D. Stillman (C. M. Campbell, of counsel), for appellant. Dalton Biggs, for respondent.

MOORE, C. J. (after stating the facts). There being no bill of exceptions, the only question involved is whether the findings of fact support the judgment. Noland v. Bull, 24 Or. 479, 33 Pac. 983; Allen v. Leavens, 20 Or. 164, 37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 613; Richardson v. Dunlap, 26 Or. 270, 38 Pac. 1. The court found, in effect, that the defendant is a corporation, as alleged; that it issued to F. T. Miller a certificate in which its by-laws were referred to as a part thereof; that in October and November, 1898, the defendant duly declared assessments on all its members on account of death losses, which were payable during the month next following such levy; that these assessments were never paid by Miller, who became ill with la grippe January 10, 1899, which four days thereafter developed into polioencephalitis, followed by mental confusion, delirium, and coma, resulting in his death on the 18th of that month; that two days prior thereto one J. J. Tupker, who was then clerk of Harney Valley Camp, No. 381, issued receipts for such assessments, dating them as of the 5th of that month, and at the same time sent to the defendant the sums due therefor, which were received by it without Miller's having certified that he was in

good health; that, though proof of Miller's death was submitted to the defendant April 5, 1899, it did not return the money so received until July 21st of that year; that Tupker was the duly authorized agent of the plaintiff and of the defendant; that he never made any misrepresentations to it; that the defendant accepted the payment of such assessments without any conditions or qualifications; that its officers had a right to waive, and, by the retention of the money paid by Tupker, did waive, a forfeiture, and treated Miller as in good standing at the time the remittance was made; and that Tupker did not then know of Miller's serious illness. Based on such findings the court concluded, as a matter of law, that the defendant waived a forfeiture of Miller's certificate; that Miller was a member in good standing in the defendant's order at the time of his death; and that plaintiff, as his beneficiary, was entitled to a judgment against the defendant for the sum of \$1,000. In addition to the findings made by the court, the pleadings admit that Miller's certificate provided that it should not be in force at any time when he should be suspended from the order; that, if he should not pay any assessment levied against him within the time prescribed, his certificate would become void, and so continue until he should be duly reinstated; that a suspended member, within three months after his suspension, might be reinstated by making application therefor, certifying his bodily health to be good, and agreeing that, should his death occur within one year thereafter, as the result of any disease which he might then have, none of his beneficiaries should be entitled to receive any benefits on that account; that with such application he should pay the clerk of his camp all arrearages for assessments and camp dues; that, when the camp clerk sent remittance sheets to the head auditor on account of such payment, he should accompany the same with the reinstatement application, and, if he failed in this respect, such payments should be returned; that no attempted reinstatement by the clerk of a camp, without such reinstatement application, should be effective or entitle his beneficiaries to receive any benefit. The facts admitted by the pleadings are tantamount to findings duly made. *Fink v. Canyon Road Co.*, 5 Or. 301; *Luse v. Isthmus Transit Co.*, 6 Or. 125, 25 Am. Rep. 506. But as they are only evidentiary, and do not necessarily support the judgment, they are stated merely to show the method prescribed for the reinstatement of a suspended member.

Do the findings of fact made by the court show that the defendant waived its right to insist upon a forfeiture of Miller's membership in the order in consequence of his non-payment of assessments? A waiver is an intentional relinquishment of a known right, implying an election to forego some advantage which one might, at his option, have insisted upon, and, to be effective as an estop-

pel, there must be, first, a knowledge of an existence of the right; and, second, an intention to relinquish it. *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Supreme Lodge K. P. v. Quinn*, 78 Miss. 525, 29 South. 326. *Mr. Justice Bean*, in *Whigham v. Supreme Court*, 75 Pac. 1067, in discussing this subject, says: "In the nature of things, there can be no waiver or estoppel without knowledge of the facts upon which it is based. The waiver of a right presupposes a knowledge of the right waived, and, therefore, before defendant can be held to be estopped or to have waived any of its rights by reason of the conduct of a subordinate lodge or its officers, it must be shown that it or they had knowledge of the facts." In the case at bar the court found that the money sent by Tupker was received by the defendant six days after Miller's death. The defendant's general agent must have known that Miller was in default at that time, but evidently did not know of his death, which fixed and determined the rights and obligations of the parties to this action. *Stringham v. Mutual Life Ins. Co. of N. Y.* (Or.) 75 Pac. 822. And as this agent was ignorant of Miller's illness, a waiver of forfeiture cannot be inferred from the acceptance and retention of the money in the absence of such knowledge. If the court had found the ultimate fact that the defendant's officers waived a forfeiture and continued to treat Miller as in good standing January 16, 1899, the decision upon the question of fact would probably have been sufficient; but the finding made is equivalent to a conclusion of law, based as it is upon the receipt and retention of the money, and, without further finding that the defendant's officers knew of Miller's ill health, is insufficient.

Though the clauses of the constitution and by-laws admitted by the pleadings seem to negative the right of a subordinate camp clerk to waive a forfeiture, the finding of the court that Tupker was the agent of the defendant cannot, in the absence of a bill of exceptions, be controverted, and it must therefore be assumed that evidence was introduced in support thereof. It will be remembered that the court found that on January 16, 1899, when Tupker remitted the assessments to the defendant, he did not know of Miller's "serious" illness. This implies that he knew Miller's health was impaired, but did not know his life was endangered. If the court had found that Tupker, as defendant's agent, waived a forfeiture, such finding, in the condition of the transcript before us, would probably have been sufficient; but the waiver upon which the court's conclusion of law seems to be based consists of the acts of the defendant's officers, and does not, in our opinion, refer to Tupker as its agent. These officers had no knowledge of Miller's illness, and, as there is no finding that Tupker waived a forfeiture, his implied knowledge of Miller's impaired health at the



time he paid the assessments for him is not a sufficient finding to uphold the judgment, which is reversed, and a new trial ordered.

(69 Kan. 444)

**BURNELL v. BRADBURY.**

(Supreme Court of Kansas. June 11, 1904.)

**TRIAL—ASSAULT—JUDGMENT ON FINDINGS.**

1. In an action to recover damages for assault and battery, where the jury returned a verdict of \$1 for plaintiff, and by special findings allowed \$1 as punitive damages, and allowed nothing for actual damages, and the findings returned by the jury found none of the elements existing authorizing an allowance of punitive damages, but did find the elements existing which would authorize an allowance of actual damages, and the character of the assault was such as to entitle plaintiff to recover nominal damages, *held* error to render judgment for defendant on the findings of the jury.

(Syllabus by the Court.)

Error from District Court, Clay County; Sam Kimble, Judge.

Action by Fidella Burnell against William S. Bradbury. Verdict for plaintiff. Judgment on the findings in favor of defendant and against plaintiff for costs, and she brings error. Reversed.

Coleman & Williams, for plaintiff in error.  
Jno. E. Hessin, for defendant in error.

**ATKINSON, J.** This action was brought by Fidella Burnell against William S. Bradbury to recover damages for an assault and battery. The jury returned a verdict of \$1 for plaintiff. It also returned eight special findings. On motion of defendant, the court rendered judgment on the special findings in favor of defendant and against plaintiff for costs. Plaintiff brings error. The assault of plaintiff by defendant arose out of a controversy as to whether plaintiff or defendant had the legal possession and right of occupancy of 20 acres of hay land at the time of the assault. Plaintiff was the owner of the land. Defendant was plaintiff's tenant. The premises were rented by plaintiff to defendant for use as hay land. Defendant had so rented the premises of plaintiff for several years. Defendant had cut one crop of hay from the premises, and claimed also the right to cut and remove a second crop. Plaintiff insisted on the right to pasture cattle on the premises after the hay had been cut therefrom. Defendant denied plaintiff had this right. Plaintiff drove more than 100 head of cattle on the premises to graze, and was herding them thereon. Defendant charged plaintiff as being a trespasser. He ordered her off the premises, and directed that she drive the cattle therefrom. Plaintiff refused to leave the premises or to drive the cattle off. Defendant attempted to drive the cattle from the premises. He claimed that plaintiff interfered with his driving them off; that, when he had succeeded in driving some of them off the premises, plain-

tiff, with her horse and dog, would drive them back again. Defendant, with a buggy whip or rawhide, assaulted plaintiff while mounted on her horse. He struck her about the body and limbs, and over the head and face also. Defendant claimed the strokes over the head and face were accidental and unintentional, but admitted using a whip upon plaintiff. As told by plaintiff, the assault was brutal and was wholly unjustifiable. Defendant attempted to justify his course on the claim that plaintiff was a trespasser upon the premises, interfering with his rightful occupancy thereof; that he ordered her off the premises, and she refused to go; that her conduct was very provoking; and that he used only such force as was necessary and rightful to remove plaintiff. In addition to a general verdict of \$1 for plaintiff, the jury returned the following special findings: "First. Was the defendant, William S. Bradbury, entitled to the possession of the twenty acres of land described in his answer, on the 19th of September, 1901? Ans. Yes. Second. Was the plaintiff, Fidella Burnell, in going on said land with her cattle on the 19th day of September, 1901, a trespasser? Ans. Yes. Third. Did the defendant use more force than was reasonably necessary in removing the plaintiff and her cattle from said premises? Ans. Yes. Fourth. In removing the plaintiff and her cattle from said land, was the defendant actuated by unlawful, wanton, and malicious motives? Ans. No. Fifth. If you find for the plaintiff, how much do you allow her for physical pain? Ans. Nothing. Sixth. How much do you allow her for mental suffering? Ans. Nothing. Seventh. How much do you allow her for humiliation and disgrace? Ans. Nothing. Eighth. How much do you allow the plaintiff for punitive damages? Ans. One dollar and costs, except plaintiff's attorney's fees."

It will be observed that in finding No. 4 the jury negated one of the elements necessary to authorize or warrant a finding of punitive damages, yet in finding No. 8 \$1 is allowed under a question that calls for the amount allowed by the jury as punitive damages. While by finding No. 1, it is found defendant was, at the time of the assault, entitled to the possession of the premises, and by No. 2 that plaintiff at the time of the assault was a trespasser thereon, by finding No. 3 it is found that defendant, in removing plaintiff from the premises, used more force than was necessary. The finding that defendant used more force than was necessary in removing plaintiff from the premises entitled plaintiff to a recovery. In *State v. Bradbury*, 67 Kan. 808, 74 Pac. 231—a criminal prosecution of defendant for the assault committed on plaintiff—it was held: "One entitled to the immediate possession of real estate may, if he can, take peaceable possession; but in taking possession from one actually, though wrongfully, in possession, he cannot assault, beat, and drive such occu-

pant from the premises, and justify his offense against the law upon the ground that he was legally entitled to the possession of the premises, and used no more force than was necessary to regain possession and drive the occupant off." In the case at bar, plaintiff charged that defendant assaulted and beat her with a whip. Defendant admitted that, in endeavoring to remove her from the premises, he used a whip on plaintiff. This entitled plaintiff to a recovery of nominal damages. We must assume the general verdict of \$1 for plaintiff returned by the jury was nominal damages, for such the law and the admitted facts necessarily required. The findings themselves, as above shown, disclose that the allowance by finding No. 8 of \$1 for punitive damages could not be otherwise than a finding of nominal damages. It is apparent from all the findings of the jury, and from the necessities of the case, the law, and the admitted facts, that the jury intended the allowance of \$1, in answer to question No. 8, to have been nominal damages, and not punitive damages. The special findings of the jury should be so construed as to harmonize them and uphold the general verdict, if reasonably possible to do so. *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *U. P. Ry. Co. v. Fray*, 43 Kan. 750, 23 Pac. 1039; *St. L. & S. F. Ry. Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533. There is evidence in the record to support all the findings of the jury, thus construed.

Error is assigned in the admission and rejection of testimony, the giving and refusing of instructions, and the ruling of the court on motions filed in the case. We have examined the entire record, and find no material or prejudicial error therein, aside from the error of the trial court in sustaining the motion of defendant for judgment on the special findings.

For the error committed in entering judgment for defendant on the special findings of the jury, the judgment will be reversed, and the district court directed to enter judgment for plaintiff on the general verdict. All the Justices concurring.

#### ST. LOUIS & S. F. R. CO. v. BROCK.

(Supreme Court of Kansas. June 11, 1904.)

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—WEIGHT OF EVIDENCE—INSTRUCTIONS.

1. There is a general rule that when two ways are open to a person, one of which is obviously safe, and the other plainly dangerous, and he voluntarily chooses the latter, he will ordinarily do so at his peril; but if one is placed in peril by the negligence of another, and, through consequent fear and bewilderment, errs in judgment, and makes an injudicious choice of a means of escape, contributory negligence cannot be ascribed to him as a matter of law.

2. In weighing conflicting evidence as to whether the whistle of a locomotive approaching a crossing was sounded, the law gives a preference to positive over negative evidence;

and where there is positive testimony by those in charge of the train that the whistle was sounded, and negative testimony of those within hearing that they did not hear it sounded, the court should, upon request, call the attention of the jury to the relative value of the two classes of testimony.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by J. T. Brock against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Pratt, Dana & Black, L. F. Parker, and Thos. H. Stanford, for plaintiff in error. A. B. Clark and J. D. Brown, for defendant in error.

JOHNSTON, C. J. J. T. Brock recovered a judgment against the St. Louis & San Francisco Railroad Company for \$7,000 for personal injuries sustained because of the alleged negligence of the company. In his petition he averred that, in traveling over a highway with which he was unfamiliar, it became necessary for him to cross the railroad track; that east of the crossing the railroad runs through a deep cut, and that in the same direction and near the crossing there is a curve in the railroad; that the embankments around the curve and along the cut are high, and that on the embankments grass, weeds, and brush were negligently permitted to grow and stand so as to greatly obstruct the view of one approaching the track; that as he approached the crossing cautiously, checking his team to a walk, looking and listening for a coming train, and hearing and seeing none, nor any signals indicating that one was approaching, and when his horses were upon the track, a locomotive and train came around the curve and out of the cut, running at a high rate of speed, without having given a signal or warning of any kind. To save himself, he whipped up his horses, and they sprang forward, clearing the track and avoiding a collision with the locomotive, but that when the wheels struck the rails of the track he was first thrown forward on the dashboard of the buggy, and then backward against the seat, wrenching and injuring himself severely, shattering his nervous system, impairing the action of his heart, and causing great pain and injury to his head, neck, and spinal column. The negligence charged was the failure of the company to sound the whistle 80 rods east of the crossing, or to give any signals in coming up to the crossing through the cut and around the curve, and, further, that there was negligence in allowing grass, weeds, and brush to grow along the track, so as to conceal a coming train or a traveler approaching the crossing. The first trial resulted in a verdict and judgment against the company for \$400, but it was reversed for error in the instructions. *Railroad Co. v. Brock*, 64 Kan. 90, 67 Pac.

538. At the second trial the jury awarded Brock damages in the sum of \$7,000, and a great many of the rulings then made are challenged.

It is now contended that the averments of the petition, as well as the plaintiff's evidence, shows that Brock recklessly ran a race with the locomotive, and was injured when he might have avoided danger if he had backed or turned his team off of the track, or had jumped from the buggy when he first saw the approaching train. There is a general rule that when two ways are open to a person, one of which is obviously safe, and the other plainly dangerous, and he voluntarily chooses the latter, he will ordinarily do so at his peril. This rule has its exceptions—as, for instance, if a person is placed in peril through the negligence of another, and, through consequent fear and bewilderment, errs in judgment, and makes an injudicious choice of a means of escape, contributory negligence cannot be ascribed to him as a matter of law. In such a case the party who put him in peril may be said to have caused the error in judgment as well, and the question as to whether he acted with reasonable care under the circumstances is generally one for the jury. Who can say that it would have been a wiser course for Brock to have attempted to back or pull his team off the track after seeing the locomotive, which he said was only about 200 feet away when he first discovered it? His team was then upon the track, moving forward, and who can say there would not have been greater risk in checking the team and backing or pulling them off, than to have proceeded in the direction in which they were already moving? By striking the horses and urging them forward he did clear the track and avoid a collision. A greater disaster might have resulted if he had chosen the other course. A person of ordinary prudence is not expected to act with the same presence of mind and care under the stress of sudden and impending danger as he would under other conditions, and whether Brock exercised reasonable care under the circumstances was peculiarly a question for the jury. Whether he should have stopped, as well as looked and listened for a train when he approached the crossing, was, as determined on the first review, properly submitted to the jury. Railroad Co. v. Brock, *supra*. In that proceeding the sufficiency of the petition was determined in his favor, and the testimony offered in support of his claim was held to make a *prima facie* case for his recovery.

There is complaint of the rulings made in charging the jury. The case appears to have been fairly submitted, except in one particular. Requests were made for instructions

as to the difference in the force and weight of positive and negative testimony, but all of them were refused. There was conflicting evidence, as is usual in cases of this kind, in regard to the blowing of the whistle for the crossing. Those in charge of the train testified positively that the whistle was sounded, while the defendant's witnesses testified that they did not hear it. The failure to blow the whistle or to give any signal of the approach was the principal ground of negligence charged against the railroad company, and hence the weight to be given to the different kinds of conflicting testimony with respect to the matter was very important. In cases of this character the courts have deemed it necessary to pointedly call the attention of the jury to the difference between positive and negative testimony. In *Missouri Pacific Railway Co. v. Pierce*, 30 Kan. 391, 18 Pac. 305—a case like this one—the refusal to give an instruction pointing out the distinction was made the ground for a reversal of the judgment. The circumstances of the two cases were similar, and the instruction requested and refused in this case is almost a literal copy of the one which it was held in the *Pierce* Case was erroneously refused. In *Missouri Pacific Railway Co. v. Moffatt*, 56 Kan. 687, 44 Pac. 607, it was held that where there was positive evidence that signals were given, and negative testimony that they were not given, it is the duty of the court, upon request, to call the attention of the jury to the relative value of the two classes of testimony. See, also, *Railroad Co. v. Lane*, 33 Kan. 702, 7 Pac. 587; *Railroad Co. v. Commissioners of Stafford County*, 36 Kan. 121, 12 Pac. 593; *Railway Co. v. Hinsdale*, 38 Kan. 507, 16 Pac. 937. Of course, if the witnesses had equal opportunities to hear, were giving like attention to the sounding of the whistle, and were equally positive in their statements as to whether it was sounded, there would be little room for the application of the rule. So it was said in *Railroad Co. v. Lane*, *supra*, that “the testimony of one who was in a position to hear, that it was not sounded, while negative in form, is a positive statement of fact, and, where the witnesses had equal opportunity to hear the whistle, and are equally credible, it is generally of as much value as the testimony of one who states that it was sounded.” Perhaps the testimony of Brock, who declares that he was giving heed for signals, may belong to this class, but some of the testimony in his behalf clearly comes within the rule of the *Pierce* Case, and hence the instruction should have been given.

For this error the judgment must be reversed, and the cause remanded for a new trial. All the Justices concurring.

**FULLER v. HORNER et al.**

(Supreme Court of Kansas. June 11, 1904.)

**FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—ASSIGNMENT OF CLAIM—NOTICE TO ASSIGNEE—LIMITATIONS—VENUE.**

1. In an action by a creditor for relief on the ground of the fraudulent conduct of his debtor, it is necessary to establish ignorance of the fraud until a time within the period limited for the commencement of an action, in order to remove the statutory bar.

2. The assignee of a claim is chargeable with any notice or knowledge the original creditor possessed of fraudulent acts on the part of the debtor affecting the collection of the debt.

3. An action by a creditor to set aside a fraudulent conveyance of his debtor's property may be maintained in any jurisdiction where the guilty parties may be found. In such a case the court does not act upon the land itself, but upon the parties to the fraud; and it has authority not only to declare the conveyance void as an obstruction to the enforcement of the creditor's rights, but it has the further power to compel the defendants to do all things necessary, according to the *lex loci rei sitæ*, which they could voluntarily do, to give full effect to the decree.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Bill by A. S. Fuller against Maria T. Horner and Sara T. Horner. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen & Allen and Troutman & Stone, for plaintiff in error. Bergan & Dana, for defendants in error.

**BURCH, J.** On August 1, 1888, Maria T. Horner executed and delivered to J. N. Strickler, cashier, a promissory note for \$1,200, maturing August 1, 1893, and secured it by a mortgage on real estate in the city of Topeka. Before their maturity these instruments became the property of Lucy M. Higgins, a resident of the state of Massachusetts. Lucy M. Higgins died intestate on December 23, 1896. Her executors reduced the note to judgment against Maria T. Horner, and obtained an order for the sale of the mortgaged premises in the district court of Shawnee county on April 6, 1898. The property was sold on November 14, 1898, and after the proceeds of the sale had been applied to the satisfaction of the judgment a balance remained unpaid of about \$1,850. In February, 1896, Maria T. Horner became the owner of certain real estate in the city of New York, by warranty deed duly recorded in the office of the register of deeds of the county of New York, in the state of New York, on the 17th day of February, 1896. On March 6, 1896, Maria T. Horner conveyed this property to her daughter Sara T. Horner by deed duly recorded March 9, 1896; and, for the purpose of this decision, the conveyance may be regarded as having been made voluntarily and without any consideration. Some time in the

year 1901 Sara T. Horner disposed of the New York property, and on May 22, 1901, invested a portion of the proceeds derived from its sale in lot No. 383 on Kansas avenue, in the city of Topeka. In June, 1901, the plaintiff purchased the judgment against Maria T. Horner, and on July 30th following filed a creditors' bill in the district court of Shawnee county against Maria T. Horner and Sara T. Horner to subject the Kansas avenue property to the payment of his claim. Judgment was rendered in favor of the defendants, and the plaintiff prosecutes error in this court.

The court found that Maria T. Horner and Sara T. Horner had resided in the state of Kansas from the year 1888 to the time of the trial, and that they had not been out of the state for any considerable length of time during the period of their residence here. The evidence and the findings of fact do not disclose notice or knowledge on the part of Lucy M. Higgins of the conveyance of the New York property by Maria T. Horner to her daughter, except such as the recording of the conveyance might impart. Neither do they show affirmatively that she was ignorant of the fraud which the plaintiff claims was committed. But her executors and the plaintiff were not informed of the conveyance in question until within two years before the commencement of the plaintiff's suit. Upon these facts, the question arises if the plaintiff's cause of action were barred by the statute of limitations at the time his suit was begun.

The plaintiff's action is one for relief on the ground of fraud. His claim is derived from Lucy M. Higgins, and any defect in her right to take advantage of her debtor's conduct necessarily handicaps him. Notice to her of a fraudulent attempt to prevent the collection of her debt is notice to the plaintiff, and her knowledge is his knowledge. The original wrongdoing on the part of the defendants, if any were committed, consisted in making the conveyance of March 6, 1896. The sale of the New York property by the fraudulent vendee, and the investment by her of the proceeds in other real estate, to which she took the title, wrought no fresh or additional injury, and fixed no new point of departure from which the plaintiff might compute the time for bringing suit. So far as the record shows, Lucy M. Higgins may have been fully cognizant of the first transfer, and its effect upon her rights, for a number of months before her death; and it is familiar law that ignorance of any fraud complained of until a time within the period limited for the commencement of an action must be established, to remove the statutory bar. *Young v. Whittenhall*, 15 Kan. 579; *Myers v. Center*, 47 Kan. 324, 27 Pac. 978. Assuming the fraud to have been discovered, a cause of action for relief on account of it was complete at least as soon as November 14, 1898. Whether or not such an action might have been commenced at an earlier date, it is not

<sup>1</sup> See *Limitation of Actions*, vol. 33, Cent. Dig. § 480

necessary to inquire. The plaintiff's action was not begun until July, 1901. Therefore it was barred.

The plaintiff argues that he had no cause of action against the Horners until the proceeds of the sale of the New York property were brought within the jurisdiction of the courts of this state. Such, however, is not the law. Some early decisions sustain the plaintiff's view, but the authorities are now substantially agreed that an action by a creditor to set aside a fraudulent conveyance of his debtor's property may be maintained in any jurisdiction where the guilty parties may be found. In such a case the court does not act upon the land itself, but upon the parties to the fraud; and it has authority not only to declare the conveyance void as an obstruction to the enforcement of the creditor's rights, but it has the further power to compel the defendants to do all things necessary, according to the *lex loci rei sitæ*, which they could voluntarily do, to give effect to the decree. *Johnson v. Gibson et al.*, 116 Ill. 294, 6 N. E. 205; *Woodbury v. Nevada, etc.*, Ry. Co., 120 Cal. 463, 52 Pac. 730; *Beach v. Hodgdon*, 66 Cal. 187, 5 Pac. 77; *Coleman & Quillan v. Franklin*, *Guardian*, 26 Ga. 368; *Lehmberg v. Biberstein*, 51 Tex. 457; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Miller v. Sherry*, 2 Wall. 237, 249, 17 L. Ed. 327; *Kirdahi v. Basha* (Sup.) 74 N. Y. Supp. 333; *Bailey v. Ryder*, 10 N. Y. 363; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Wait on Fraudulent Conveyances & Creditors' Bills* (3d Ed.) § 405; *Smith, Equitable Remedies of Creditors*, §§ 38, 51, 17e; 5 Enc. Pl. & Pr. 438. The case of *Gray v. Folwell*, 57 N. J. Eq. 440, 41 Atl. 869, apparently opposed to this conclusion, follows, without discussion, the case of *Servis v. Nelson*, 14 N. J. Eq. 94, in which the sum total of the court's consideration of the question is expressed in the statement that the land was not within the jurisdiction of the court or under its control. Since, in any event, the plaintiff's action in this state was barred before it was commenced, it is not necessary to consider what remedies may have been available to his assignors in the state of New York, or what relief they might have obtained under the drastic and comprehensive provisions of the garnishment law of this state.

The plaintiff assigns error with respect to a number of other matters embraced in the decision of the district court. None of them, however, affect the questions already discussed, and, since they are determinative of the case, the judgment of the district court is affirmed. All the Justices concurring.

(69 Kan. 367)

**McCORMICK v. FROMME.**

(Supreme Court of Kansas. June 11, 1904.)

APPEAL—CONDITION OF RECORD—EVIDENCE—QUESTIONS OPEN TO REVIEW.

1. Where, on appeal, the error assigned was the sustaining of a demurrer to plaintiff's evi-

dence, but there was no statement in the case-made showing that it contained all the evidence, and at the beginning of the trial the record recited, "And thereupon the plaintiff offered the following testimony," but there were no words expressive of continuity between the testimony of the witnesses, and it appeared that a written property statement was admitted in evidence, but it was omitted from the record, the appeal will be dismissed.

Error from District Court, Kiowa County; E. H. Madison, Judge.

Suit by E. L. McCormick against Henry Fromme. From a judgment in favor of defendant, plaintiff brings error. Dismissed.

J. W. Davis, for plaintiff in error. L. M. Day, for defendant in error.

**PER CURIAM.** The court below sustained a demurrer to plaintiff's evidence. This is assigned as error. There is no statement in the case-made showing that it contains all the evidence. At the beginning of the trial the record recites, "And thereupon the plaintiff offered the following testimony." There are no words expressive of continuity between the testimony of the several witnesses. At the close of the evidence appear the words "Plaintiff rests." The case-made also shows that a written personal property statement was admitted in evidence, and marked "Exhibit A." This is omitted from the record. The proceedings in error must be dismissed on the authority of *Smith v. Alexander* (Kan.) 74 Pac. 240. See, also, *Wertz v. Albrecht*, 58 Kan. 576, 50 Pac. 500; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492. The proceedings in error will be dismissed.

(69 Kan. 428)

**GLOVER v. RATCLIFF et al.**

(Supreme Court of Kansas. June 11, 1904.)

NEW TRIAL—MOTION—FILING—APPEAL—REVIEW.

1. Unless falling within the statutory exceptions to the rule, the application for a new trial must be made at the term the verdict, report, or decision is rendered; but where a motion for a new trial has been under consideration by the court, and its final consideration continued until the next term, it will be considered filed in time, even though, as a matter of fact, it did not come to the hands of the clerk until a few moments after the announcement of the adjournment for the term was made.

2. Under the circumstances of this case the time shown to have elapsed between the announcement of the final adjournment of a term of court and the filing of a motion for a new trial might well be disregarded, and the motion treated as though filed before such announcement.

3. Where a motion for a new trial, based upon a number of grounds, has been allowed, and the record does not show upon what particular ground the motion was granted, the action of the court in allowing such motion will not be reversed where such action can be sustained upon any ground assigned.

(Syllabus by the Court.)

Error from District Court, Rawlins County; A. C. T. Geiger, Judge.

Action by Fred B. Glover against W. J.

**Ratcliff and others. Verdict for plaintiff.** From an order granting defendants a new trial, plaintiff brings error. Affirmed.

Fred Robertson and Tully Scott, for plaintiff in error. Jno. E. Hessin, for defendants in error.

**CUNNINGHAM, J.** The relative position of the parties here is as it was in the court below. The plaintiff had a verdict in his favor, the jury at the same time returning answers to many special findings. Defendants' motion for a new trial was sustained. It is insisted that the court erred in so doing, having no jurisdiction to consider such motion, because the same was not filed in time.

It appears that the jury returned its verdict at the close of the day, and too late for further action in the case. With the exception of the completion of this case, the court had entirely finished its business for the term, and as the judge, as well as some of the attorneys, desired to leave the place where court was in session upon a comparatively early train the next morning court was adjourned to meet at 7:30 a. m. Attorneys for defendants had prepared two motions—one for judgment in their favor upon the special findings, and one for a new trial. Upon the convening of the court at the early hour indicated, the motion for judgment upon the special findings was filed and taken up. Its discussion consumed the entire time up to the time of the departing of the train upon which the judge and attorneys desired to go. The court overruled this motion, and, after consultation with the attorneys, it was directed that the hearing of the motion for a new trial should be continued until the next term. Thereupon an adjournment was ordered, and announced by the sheriff. It is claimed by the plaintiff that the motion for a new trial was not filed until after the court had adjourned. When the motion came on for hearing at the next term, the court heard evidence upon the question as to the time when the motion was actually filed. The clerk testified that it was from 5 to 10 minutes after the announcement of the adjournment. Witnesses on behalf of the defendants testified that immediately upon the agreement that the hearing of the motion should be continued until the next term the motion was carried to and laid upon the desk of the clerk for filing; the attorney who did this saying that he was not willing to say that the adjournment of the court had or had not been proclaimed at the time, but said that he took the motion to the clerk with all expedition after this arrangement was made and the adjournment ordered. Another witness stated that he did not think it was a minute after the agreement as to the adjournment before the paper was taken to the clerk, and at that time the judge had not left the bench. The judge's trial docket contained a minute of the filing of the motion for a new trial and of the continuance of the

hearing until the next term; the judge, however, making a statement that he did not see the motion filed, or know that it was in fact filed, but that the notation in the trial docket was made with the idea that it had been filed. We think, upon this showing, that the court was right in considering the motion, even though, as a matter of fact, it was not indorsed "Filed" by the clerk, or even had not come to his manual possession, before the actual proclamation of adjournment was made, the time between the two acts being so infinitesimal and insignificant that the court might well treat it as of no moment. More than this, it appears that the judge, and counsel as well, in their discussion about the continuance of the hearing of the motion, treated it as though it were actually filed.

The plaintiff urges that, even though the court had jurisdiction to consider the motion for a new trial, it should not have been sustained, and argues that the grounds upon which the court sustained it were insufficient. The motion set out 11 grounds therefor, and there is nothing in the record indicating upon which one or more of these the motion was granted. We cannot, therefore, say that the court was in error in so doing. *Barney v. Dudley*, 40 Kan. 247, 19 Pac. 550; *Ireton v. Ireton*, 62 Kan. 358, 63 Pac. 429.

The order of the court in granting a new trial will be affirmed. All the Justices concurring.

#### HARTFORD FIRE INS. CO. v. MCCARTHY et al.

(Supreme Court of Kansas. June 11, 1904.)

INSURANCE—CONDITIONS OF POLICY—OWNER-SHIP—KNOWLEDGE OF AGENT—REFORMATION OF POLICY.

1. Where a policy of insurance contained the condition that, if the interest of the assured be or becomes other than the entire, unconditional, unincumbered, and sole ownership of the property, the policy shall be void unless otherwise provided by agreement indorsed thereon, and such policy was issued by an agent having authority to issue policies of insurance and consummate the contract, and such agent, at the time of the issuing of the policy, had knowledge of incumbrance upon premises, but indorsed no mortgage clause thereon, *held* the company waived the condition of the policy.

2. Where such agent, having full knowledge of the incumbrance upon premises and the condition of the title when sold upon deferred payments, undertakes to indorse upon the policy a loss payable clause to protect the parties interested, and by mistake fails to place a sufficient indorsement thereon, *held*, in an action to recover upon the policy, the loss clause may be reformed to correct the mistake, and made to conform to the intention of the party making the same.

(Syllabus by the Court.)

Error from District Court, Harper County; P. B. Gillett, Judge.

Action by F. D. McCarthy against Henrietta Holmes and the Hartford Fire Insur-

¶ 1. See *Insurance*, vol. 28, Cent. Dig. §§ 939, 1028.

ance Company. Judgment for plaintiff, and defendant company brings error. Affirmed.

Fyke Bros., Snider & Richardson, for plaintiff in error. E. C. Wilcox, for defendants in error.

ATKINSON, J. This action was commenced by F. D. McCarthy to recover on a fire insurance policy issued by the Hartford Fire Insurance Company. That the interest of Henrietta Holmes, on a loss payable clause attached to the policy, might be determined in the action, she was made a party defendant. A trial before the court resulted in judgment for plaintiff \$150, attorney's fee \$100, judgment for defendant Henrietta Holmes \$450, and the reforming of a loss clause attached to the policy. Defendant insurance company brings error.

On November 15, 1900, J. N. Bailey, agent of the insurance company at the city of Hutchinson, issued the policy sued upon to E. C. Hoffman, who was the owner of the premises upon which the dwelling insured was located, subject to a mortgage incumbrance of \$200. The policy insured the dwelling on premises against loss by fire for a period of five years in the sum of \$600. The agent's attention was at the time called to the fact that there was a \$200 mortgage on the premises, but he indorsed no mortgage clause on the policy. In March, 1901, Hoffman sold the premises to defendant Henrietta Holmes, subject to the mortgage incumbrance. Hoffman assigned the policy to Mrs. Holmes, and J. N. Bailey, as agent of defendant, consented to the assignment. Subsequently, in March, 1902, Henrietta Holmes sold the premises to plaintiff for \$750, he assuming the payment of the balance (\$150) on mortgage incumbrance as a part of the purchase price. The sale to plaintiff provided for the payment of \$50 cash, \$50 on the 8th day of May, and \$10 on the 8th of each succeeding month, in accordance with the terms of a written contract. The contract and insurance policy, together with a deed for the premises to McCarthy, was placed with the First National Bank of Hutchinson in escrow, to be delivered to plaintiff when he should fully comply with the terms of the contract. In May the following assignment was indorsed upon the policy: "Hutchinson, Kansas, May 16th, 1902. For value received I hereby assign, transfer and set over to F. D. McCarthy, all my right and interest in the within policy. Henrietta Holmes." "The within company hereby consents to the above assignment. J. N. Bailey, Agent." On the same day J. N. Bailey, as agent of defendant, indorsed upon the policy the following loss clause: "Loss, if any, under this policy, to be adjusted with the assured herein named, and payable to Henrietta Holmes as her interest may appear, subject to all the terms and conditions of this policy. J. N. Bailey, Agent." Plaintiff took possession of the premises under the contract, and with his

family occupied the same as a home. On September 8th the dwelling on premises was totally destroyed by fire. Plaintiff had paid on the contract to Henrietta Holmes the sum of \$220, the sum of \$50 on the mortgage incumbrance, and had made no default in the requirements of the contract. Defendant denied liability, and refused to pay the loss, assigning as its reason therefor that the policy was void. The claim of defendant that the policy was void was based on the fact that plaintiff at the time of the fire was not the absolute owner of the premises. The policy sued upon contained a condition providing, in substance, that it should be void if the building insured stood on ground not owned by the assured in fee simple, unless otherwise provided by agreement indorsed in writing on the policy. In his petition plaintiff averred knowledge of the mortgage incumbrance by J. N. Bailey, the agent of defendant, and alleged waiver thereof. The petition also averred that the loss clause indorsed on the policy by J. N. Bailey, agent, subsequent to the sale of premises to plaintiff, was made with the full knowledge of defendant of the condition of the title at the time; that the agent of defendant intended to make the indorsement show that the company consented to the condition of the title, but failed to do so on account of mutual mistake and clerical error, and asked that said clause indorsed on the policy be reformed to conform to the purpose desired, and to the intention of the parties. The insurance company offered no evidence. It stood upon its demurrer to the evidence of plaintiff and of defendant Henrietta Holmes, which the court overruled. The trial court made findings of fact and conclusions of law. Among numerous other findings of fact the court found that J. N. Bailey, the agent of defendant, knew of the existence of the mortgage incumbrance at the time of the issuing of the policy; that he was the general agent of defendant, authorized to issue policies of insurance and waive conditions therein; that he had full knowledge of the terms of the sale of the premises by Henrietta Holmes to plaintiff, and knew at the time he indorsed the loss clause upon said policy the condition of the title, and that there was a balance of \$150 due upon the mortgage incumbrance; that at the time said J. N. Bailey made upon said policy the indorsement of said loss clause he intended that said indorsement should protect the interest of plaintiff and of defendant Henrietta Holmes in said property; that it was by mutual mistake that the said clause failed to do so; and adjudged that the policy be reformed so that the indorsement thereon should be made to waive all claims relative to the imperfect condition of title. These findings disclose facts constituting authority of the agent, Bailey, to waive the conditions of the policy, and also disclose a knowledge by the agent of the terms of the sale to plaintiff and the con-

dition of the title to the premises that constitutes a waiver of them by the insurance company. *Insurance Co. v. Bank*, 50 Kan. 449, 31 Pac. 1069; *Insurance Co. v. York*, 48 Kan. 488, 29 Pac. 586; *Insurance Co. v. Wood*, 47 Kan. 521, 28 Pac. 167; *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. 637; *Insurance Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165. There was evidence to support the findings made by the court. These findings made were sufficient to sustain the judgment. The agent, Bailey, having full knowledge of the incumbrance upon the premises, and the condition of the title as affected by the contract of sale to plaintiff, undertook to indorse upon the policy a loss payable clause to protect the parties interested. The loss clause by him indorsed upon the policy by mistake failed to express the intention of the agent and the purpose of the parties. Plaintiff in the action to recover upon the policy could ask a reformation of the loss clause to correct the mistake and make the clause conform to the intention of the party making it, and upon the trial support his claim of mistake by parol evidence. *Encycl. of Plead. & Prac.* 378; *Schaefer v. Mills*, 68 Kan. —, 76 Pac. 436.

Counsel for the insurance company submitted in writing to the court certain declarations of law, and asked that the court declare the law in the case in accordance therewith. In refusing this request the court committed no error. While the request is in conformity with the practice adopted in the courts of some of the states, the Civil Code makes no provision for such practice, nor has it been adopted by the courts of this state. Said defendant also submitted certain interrogatories to the court, and requested findings of fact in answer to the same. While the court did not answer the specific interrogatories submitted, the record discloses that the findings of fact made by the court fully cover the findings requested.

No material error appearing in the record, the judgment of the trial court will be affirmed. All the Justices concurring.

#### BANK OF TOPEKA v. CLARK.

(Supreme Court of Kansas. June 11, 1904.)

FINAL ORDER SETTING ASIDE JUDGMENT—ISSUANCE OF ALIAS SUMMONS—LIMITATIONS.

1. An order to set aside a judgment on the ground that the summons was void is a final order within Code Civ. Proc. §§ 542, 543 (Gen. St. 1901, c. 80, §§ 5019, 5027), and terminates the action unless set aside on proceedings in error, and tolls the statute of limitations for one year, requiring the issuance of alias summons within that time to save the right of action if it was barred at the date of the entry of the order.

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by the Bank of Topeka against J. F. Clark and others. Judgment for defendant Clark, and plaintiff brings error. Affirmed.

Mulvane & Gault and D. R. Hite, for plaintiff in error. Garver & Larimer, for defendant in error.

PER CURIAM. The Bank of Topeka sued J. T. Clark and others on a note due February 29, 1891. The summons served on Clark was not indorsed with the amount for which plaintiff would take judgment in case of default. Clark failed to appear, and judgment for \$7,458.15 was rendered against him November 16, 1896. On September 23, 1897, at the request of plaintiff, the court entered an order setting aside the judgment as to Clark, on the ground that the summons was void. On September 13, 1899, the plaintiff applied to the court to set aside its order of September 23, 1897, vacating its judgment against Clark. This application was denied. On January 7, 1903, the plaintiff caused an alias summons to issue against Clark, which was regularly served. Numerous proceedings were thereafter had, but in each successive step Clark, by appropriate motions and pleadings, saved whatever right he had under the statute of limitation. Finally, on June 22, 1903, the court rendered judgment against plaintiff for costs. To reverse this judgment this proceeding is prosecuted.

The plaintiff's right of action on the note was barred February, 1896. The order of the court of September 23, 1897, setting aside plaintiff's judgment, was final and terminated the action, unless set aside on proceedings in error. Code Civ. Proc. §§ 542, 543 (Gen. St. 1901, c. 80, §§ 5019, 5027); *Newberry v. A., K. & C. Ry. Co.*, 52 Kan. 613, 35 Pac. 210. No steps were taken to have this order reviewed or set aside. The failure of the action otherwise than on its merits operated to toll the statute for one year thereafter. Had the alias summons been issued within one year from September, 1897, the date the judgment was set aside, the statute of limitation could not have been successfully pleaded, but not having been issued until January 7, 1903, the plaintiff lost his right to bring a new action.

The judgment of the court below is affirmed.

#### GRAHAM v. TROTH.

(Supreme Court of Kansas. June 11, 1904.)

ACTION ON NOTE—ACTION BY HOLDER UNDER BLANK INDORSEMENT—EVIDENCE—RECORDS OF COURTS OF SISTER STATES—CERTIFICATION—SUFFICIENCY—FINDINGS ON CONFLICTING EVIDENCE—REVIEW.

1. A state is not a foreign country, within Code Civ. Proc. § 371, providing for the certification of records in courts of a foreign country.

2. A decree of a court of a sister state adjusting the rights of persons to a note is not inadmissible in an action on the note against the maker merely because the maker was not a party to the suit in which the decree was rendered.



3. In an action on a note indorsed in blank, parol evidence that plaintiff, suing on the note, is a trustee of an express trust, is competent, if material, to show the capacity in which he is holding the note.

4. The holder of the legal title to a note may recover thereon without showing the capacity in which he is holding it.

5. A verdict on conflicting evidence will not be disturbed on appeal.

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Isma Troth against Wyatt Graham. Judgment for plaintiff, and defendant brings error. Affirmed.

H. L. Burgess, for plaintiff in error. J. P. Hindman, Isma Troth, and J. Frank Wilson, for defendant in error.

PER CURIAM. Defendant in error was plaintiff below. His action was upon a \$2,000 note, upon which he sued in the capacity of a trustee of an express trust. The defendant's verified answer admitted the execution of the note, and contained defensive matter. Upon the trial the note in suit was introduced in evidence, and its indorsement in blank by the payee thereof shown. Conceiving that he was required to also show the capacity in which he had brought the action, the plaintiff introduced in evidence a decree of the common pleas court of Highland county, Ohio, establishing the allegations of his petition in regard to his express trusteeship. This was objected to because not properly authenticated. Its admission over this objection forms the first claim of error. Its authentication was by the judge of that court, with the certificate of the clerk, both of which are apparently regular under the United States statutes providing for the authentication of judgments from the courts of sister states. Added thereto, however, was the certificate of the Governor of the state of Ohio and the Secretary of State, apparently for the purpose of conforming to the requirements of section 371 of the Code of Civil Procedure, which provides for the certification of proceedings in courts of a foreign country. The objection made goes to the faultiness of the certificate of the Governor of Ohio as required by this section. The certificate of the judgment was sufficient without attaching thereto any certificate of the Governor. The state of Ohio is not a foreign country, and hence the judgments of its courts need not be authenticated in pursuance of this section. No such certificate being required at all, the attaching of a faulty one does not render the otherwise sufficient certificate bad.

The matter adjusted in the common pleas court was only as to the interest which several claimants had in the note sued upon. All of these parties were before that court. The defendant, the maker of the note, how-

ever, was not a party. He therefore claimed that the adjudication as to the character in which the plaintiff held the note was not binding on him, and incompetent to be introduced as against him. The question adjudicated involved in no way the interests of the maker of the note. It only settled the rights of the several parties interested in the proceeds thereof. This could be done without the presence of the maker. If he was required to pay the note at all, he was not concerned as to when he should pay it.

It is farther contended that, the note having been shown to have been indorsed in blank by the payee, such indorsement was, as a matter of law, a conveyance of the entire beneficial interest, and the plaintiff could not by any evidence aliunde contradict it, and make it to be an assignment to him as a trustee of an express trust. The indorsement in blank served to convey to the one to whom it was thereby transferred the legal title, and it was entirely competent, if material, to show the capacity in which he was holding such title. We are, however, further of the opinion that none of the above questions were very material, for, as we have suggested by this assignment, the plaintiff held the legal title to the note, and, as such holder, was entitled to recover thereon. *Manley v. Park* (Kan.) 75 Pac. 557. The question of distribution of the proceeds of such collection was a matter between the trustee and his cestui que trust, and not one in which the maker of the note was interested.

The plaintiff had been adjudged a bankrupt. A portion of the money due upon the note had belonged to him, and now belonged to the trustee in bankruptcy. The decree of the common pleas court required that such portion should be paid over to the trustee in bankruptcy after its collection by the plaintiff. Objection is now made that in some way this is violative of the rights of the defendant; that it is inconceivable that a bankrupt could be made a trustee for this purpose; and hence that the plaintiff could not recover. We see nothing inconsistent in the matter, and only mention it to afford opportunity to deny the contention of the plaintiff in error.

Objections are made to the giving of, and refusal to give, special instructions. After having given careful consideration to all of these, we find them without merit, and observe no beneficial end to be served by detailed comment.

The facts upon which the merits of the litigation turned were somewhat involved. A sharp conflict of testimony between the plaintiff and defendant was presented to the jury. It took the plaintiff's view. We may not, neither are we disposed to, interfere.

Finding no error in the proceedings of the trial court, the judgment will be affirmed.

## MacRAE et al. v. KANSAS CITY PIANO CO.

(Supreme Court of Kansas. June 11, 1904.)

## CORPORATIONS — DISSOLUTION — POWERS — REPLEVIN—JUDGMENT FOR PLAINTIFF.

1. After the dissolution of a corporation it no longer possesses power to do any business, maintain any action, or enforce any judgment theretofore rendered in its favor, except in virtue of some statute authorizing it, or some principle of equity requiring it.

2. In an action in replevin, where the defendant gave a redelivery bond and retained possession of the property in controversy, judgment was rendered in favor of the plaintiff for the recovery of possession of the property, and, in the event plaintiff was unable to obtain possession, or the defendant should fail to deliver it, plaintiff to recover a money judgment. *Held*, that it was the duty of the defendant to tender back the possession of the replevied property, and not the duty of the plaintiff to demand it as a prerequisite to the enforcement of the money judgment.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by the Kansas City Piano Company against J. D. MacRae and one Naftzger. Judgment for plaintiff. Defendants bring error. Reversed.

Adams & Adams, for plaintiffs in error. S. B. Amidon and J. F. Conly, for defendant in error.

CUNNINGHAM, J. The Kansas City Piano Company brought its action against MacRae in replevin to recover the possession of a piano. A redelivery bond was given by MacRae, with plaintiff in error, Naftzger, as surety, and the piano remained in the custody of MacRae. The plaintiff had judgment that it recover the possession of the piano, and, in the event it was unable to obtain such possession, or the defendant should fail to deliver it to the plaintiff, that the plaintiff recover in the sum of \$200. To reverse this judgment MacRae brought proceedings in error in this court, where the same was affirmed. *MacRae v. Kansas City Piano Company*, 64 Kan. 580, 68 Pac. 54, 56 L. R. A. 924, 91 Am. St. Rep. 236. After the determination of the action here, the piano company duly caused garnishment summons to be issued and served on Naftzger. In this garnishment proceeding MacRae filed his answer, setting out two reasons why the funds in the hands of Naftzger belonging to him should not be subjected to the payment of the money judgment against him as spoken of above. The first, briefly summarized, was that after the commencement of the action, and prior to the rendition of the judgment, the piano company, which was a Missouri corporation, had been dissolved in accordance with the law of its domicile; that more than one year had elapsed since its dissolution; and that the action had not been revived in the name of the real parties in interest, or the

successors in interest of the company, or in the name of any one authorized to further prosecute the case. It set out the statute of the state of Missouri in force at the time of the dissolution of the corporation, which, in so far as it relates to the persons who are authorized to carry on pending litigation on behalf of the stockholders thereof, is substantially what the Kansas statute is. Section 1312, Gen. St. 1901. This provides that the directors or managers of a dissolved corporation shall be trustees for the creditors and stockholders thereof, and as such may maintain judicial proceedings for the purpose of collecting debts due to such corporation; the Missouri statute specifically providing that such proceeding shall be "by the name of the trustees of such corporation, describing it by its corporate name." The second defense pleaded that no demand had been made upon MacRae for the possession of the piano in question after the rendition and affirmance of the judgment, and claimed that, inasmuch as the money judgment was in the alternative, it could be enforced only if possession of the replevied piano could not be had, and that no proceeding to collect the money judgment could be maintained until after a demand had been made and refused. The defendant Naftzger adopted the answer of MacRae, and added that the money in his hands belonging to MacRae was deposited with him for the purpose of securing him as surety upon the redelivery bond and as surety for costs in the proceeding in this court. No issue was taken by any pleading upon the truth of these answers by the piano company. The court, however, proceeded to render judgment directing the payment of the money in the hands of Naftzger into court to be distributed in a manner that should protect him. This disposition of the matter could only be had upon the theory that none of these defenses had merit in law, so that the question now here is, did either of the defenses noted present a legal reason why the Kansas City Piano Company might not at that time and in that manner seek satisfaction of its judgment?

We find that the first defense does, and for these reasons: The dissolution of a corporation operates as to it the same as the death of an individual. All its powers, prerogatives, and authority—its life—ceased. All legal proceedings then pending were at once suspended. At the common law this termination of corporate powers became so radical that a corporate debtor was entirely discharged of his obligation, and all actions by or against it were at once and forever abated; not even an execution on a judgment theretofore obtained could issue. *Am. & Eng. Enc. (2d Ed.)* vol. 9, p. 603; 10 Cyc. 1310. It is only in virtue of some statute authorizing it, or some principle of equity requiring it, that these results may be avoided, or pending proceedings may be farther prosecuted, or judgments already rendered enforced. It is not

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2482.

necessary now for us to decide whether the bar of the statute has run upon a proceeding to revive this action in the name of the parties whom the statute says may farther prosecute it. It is sufficient to say that after the dissolution of the corporation such substitution under authority of such statute and in pursuance of its terms must be had in order that the action might farther proceed. It could no longer be maintained in the name of the dissolved corporation. *Town Co. v. Kurtz*, 22 Kan. 725; *Eagle Chair Co. v. Kelsey*, 23 Kan. 632. The defendants could raise this question. They could well say that there is no one authorized to receive the fruits of this action. Had there been, the money judgment could have been avoided by the turning over of the replevied property to the persons authorized to receive it. In face of the undenied facts pleaded relative to the dissolution of the company and the failure to substitute the parties whom the statute authorizes to farther carry on the litigation, we are of the opinion that the court erred in proceeding with the case without such substitution.

We do not think that the second defense, as set out, had any merit. A defendant who has given a redelivery bond in a replevin action, and against whom a judgment has thereafter been rendered in the alternative, as in this case, must tender back the replevied article in as good condition as when he obtained its possession by reason of his redelivery undertaking, or else he may be made to respond in the amount of the money judgment upon his redelivery undertaking; the burden resting upon him to restore possession to the plaintiff, and not upon the plaintiff to demand or enforce possession. *Peck v. Wilson*, 22 Ill. 205; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Metc. (Mass.) 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792; *Arthur v. Sherman*, 11 Wash. 254, 39 Pac. 670; *Am. & Eng. Enc. vol. 24*, p. 535.

The judgment of the lower court will be reversed, and the cause remanded for farther proceedings. All the Justices concurring.

#### STATE v. GREEN.

(Supreme Court of Kansas. June 11, 1904.)

#### INTOXICATING LIQUORS — ILLEGAL SALE — INSTRUCTIONS.

1. In a prosecution for illegally selling intoxicating liquors, an instruction that the law provides that any "shift or device" to evade its provisions shall be deemed an unlawful selling, within the provisions of the prohibitory act (Gen. St. 1901, §§ 2451-2500), was not objectionable on the ground that defendant was not on trial for a "shift or device," but for an unlawful selling.

2. In a prosecution for the illegal sale of intoxicating liquors, failure of the court to charge what constituted a sale was not error, the word "sale" being too well known to require explanation.

3. In a prosecution for illegally selling intoxicating liquors, an instruction that the state had

elected to ask a conviction on the testimony of certain witnesses, and that if the defendant was convicted the jury must do so on the testimony of those witnesses, and on the particular count which the jury believes, beyond a reasonable doubt, the evidence of such witnesses sustains, was not objectionable as only requiring the jury to believe beyond a reasonable doubt that the evidence sustained to some extent the charge on which the state elected to try defendant, the court having also charged that the prosecution must prove the sales charged beyond a reasonable doubt.

Appeal from District Court, Butler County; G. P. Alkman, Judge.

Frank Green was convicted of the illegal sale of intoxicating liquors, and he appeals. Affirmed.

E. N. Smith, for appellant. C. C. Coleman, Atty. Gen., and W. M. Rees, for the State.

PER CURIAM. Appellant was charged with and convicted of a violation of the prohibitory law (Gen. St. 1901, §§ 2451-2500), in two counts, for the selling of intoxicating liquors. The evidence upon which he was convicted indicated that he was what is commonly known as a "bootlegger." Upon the request of the witnesses, and the giving to him of money by them therefor, he procured and brought to them intoxicating liquors.

The court charged the jury that the law provides that any "shift or device" to evade its provisions shall be deemed an unlawful selling within the provisions of the prohibitory act. Gen. St. 1901, § 2467. Objection is made to this for the reason, in the language of appellant's brief, "that the defendant was not on trial for shift or device, but for an unlawful selling." This, with some cognate questions relating to the introduction of evidence, is urged as error, with an apparent degree of seriousness. It, however, lacks substance.

Another ground of error, equally diaphanous, is that the court did not instruct the jury as to what constituted a sale. No such instruction was requested, and neither was it required. The meaning of the word "sale" in this connection is too well known to require explanation.

Again, complaint is made of the giving of the following instruction: "The state has elected to ask for a conviction of the defendant on the testimony of certain witnesses, and if the defendant is convicted by the jury it must be upon the testimony of those witnesses, and on the particular count which the jury believes, beyond a reasonable doubt, that the evidence of such witnesses sustain." The objection urged is that this only required the jury to believe, beyond a reasonable doubt, that the evidence sustained to some extent the charge upon which the state elected to try the defendant. We think this criticism is hypercritical. The court elsewhere instructed the jury that the prosecution must prove the sales charged beyond reasonable doubt, or the jury should find the defendant not guilty, and we think that the

language used in the criticised instruction was substantially the same.

We find no error in the entire case, and hence direct the affirmation of the judgment.

## STATE BANK OF CHASE v. CHATTEN.

(Supreme Court of Kansas. June 11, 1904.)

### FRAUDULENT CONVEYANCE — SETTING ASIDE — SUBSEQUENT CREDITORS.

1. A creditor whose claim originated after the making of a conveyance which he attacks as fraudulent has the burden of proving actual fraud before he can derive a benefit from section 7881 of the General Statutes of 1901, which provides that a trust shall result in favor of creditors when a conveyance is fraudulently made to one person upon a consideration paid by another.

2. A subsequent creditor, who at the time he extends credit knows that a deed has been made to a third person upon payment of the consideration by his debtor, cannot attack such conveyance as fraudulent.

3. A debtor paid the consideration for a deed of real estate made to his wife. Afterwards the creditor sued him, and caused garnishment process to be issued and served. Thereupon, the defendant disputing the amount demanded, an adjustment was had, and an agreement made to settle the claim for a less amount by payments made at intervals in the future, for which certain security was to be given, the garnishment action to be dismissed. Notes for the payments were given and accepted, and the action was dismissed in pursuance of the agreement. The new notes, not being paid, were placed in judgment, which the plaintiff sought to have declared a charge upon the real estate. *Held*, that he was to be considered a subsequent creditor. *Lanphear v. Ketcham*, 37 Pac. 119, 53 Kan. 799.

(Syllabus by the Court.)

Error from District Court, Rice County; Ansel R. Clark, Judge.

Action by the State Bank of Chase against Fannie Chatten. Judgment for defendant, and plaintiff brings error. Affirmed.

Adams & Adams, Samuel Jones, and C. F. Foley, for plaintiff in error. C. W. Burch and O. E. Hopkins, for defendant in error.

MASON, J. The State Bank of Chase brought an action against Fannie Chatten seeking to subject real estate standing in her name to the payment of a judgment against her husband, E. L. Chatten. The bank was denied relief, and brings this proceeding to review the judgment.

The facts as found by the trial court, so far as necessary to exhibit the disputed questions of law, were as follows: In 1891 E. L. Chatten owed the bank \$5,196, due not later than June of that year. On January 11, 1892, the real estate here involved was bought at a sheriff's sale by E. L. Chatten in the name of his wife, he paying the consideration, \$3,375, by a check drawn upon another bank. Soon after this the cashier of the State Bank of Chase had information

that such a check had been given by Chatten for the land, and expressed surprise that he had that amount with which to pay for it. A sheriff's deed naming "Mrs. E. L. Chatten" as grantee was executed on March 8, and recorded on May 27, 1892. In June, 1893, Chatten's debt to the bank was renewed by the giving of several notes, including one due August 15, 1893, for \$896.32, and two due September 15, 1893, for \$900 and \$984 respectively. As early as March, 1894, the bank cashier had actual notice that Chatten had bought the land in the name of his wife, and that the deed had been taken to her. On May 23, 1894, the bank sued upon the notes for \$896.32 and \$900, and caused garnishment process to be served upon two other banks. On the next day a written agreement was entered into between the bank and Chatten. It recited that the bank held the three notes just described, which embraced all its demands against Chatten, and that Chatten disputed the correctness of the amount claimed. It then provided for an adjustment of all such claims and disputes, and the settlement of the indebtedness, in consideration of \$2,000, to be paid at various times in the future, for a part of which certain security was to be given, and that the garnishment action should be dismissed. Notes partially secured were given at once for the agreed payments, and the action was dismissed in pursuance to the agreement, September 4, 1894. At the time of this settlement Chatten was insolvent, and the bank knew of the fact. His financial condition before this was not shown. On December 4, 1894, the bank sued Chatten upon the new notes, and, upon obtaining judgment, began the present action to subject the real estate in controversy to its payment. It was not found that the conveyance was fraudulent, and there was a general finding for the defendant.

Plaintiff in error claims that under these circumstances it was entitled to recover in virtue of sections 7880 and 7881 of the General Statutes of 1901, reading as follows:

"Sec. 7880. When a conveyance for a valuable consideration is made to one person and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections.

"Sec. 7881. Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor; and where a fraudulent intent is not disproved, a trust shall in all cases result in favor of prior creditors to the extent of their just demands, and also in favor of subsequent creditors if there be sufficient evidence of fraudulent intent."

These sections are in effect the same as those adopted in several other states, from which they differ only in being somewhat more specific, the language employed having

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 634.

the evident purpose to cover by express declaration matters elsewhere left to implication. For references to such statutes and declarations under them, see 15 A. & E. Encyc. of L. (2d Ed.) 1168. The purpose of the first section quoted is to prevent the trust that would otherwise arise in favor of one paying the consideration upon the conveyance of land to another. In the absence of the statute, property so conveyed would, in consequence of such trust, be liable to seizure upon execution against him who paid the purchase price. *Bank v. Olcott*, 46 N. Y. 12, 16. The two sections correspond with those discussed in the case cited, in which it is said (pages 18 and 22, 46 N. Y.): "After adopting the fifty-first section (our section 7880) it was indispensable to make some provision to preserve the rights of creditors, otherwise the grantee would have held the title absolutely against creditors and all others. Hence the fifty-second section (our section 7881) was adopted, which placed the property in the same relation to creditors as it would have been if the debtor himself had fraudulently transferred it, and the words used were appropriate for that purpose. The object of the statute was to cut off all interest in the person paying the consideration, and then to declare property liable for his debts. \* \* \* It is difficult to perceive any distinction, or any reason for it, between the rights of creditors as to property fraudulently transferred by the debtor himself, and property paid for by him and transferred to a third person. Why should creditors have different and superior rights to enforce their debts, in the latter case, to those enjoyed in the former? I can see no reason for any distinction, and I do not believe the statute has created any."

A subsequent creditor who seeks to set aside a voluntary conveyance made by his debtor encounters a presumption that the deed was made in good faith, which he must overcome by sufficient evidence before he can succeed. 14 A. & E. Encyc. of L. (2d Ed.) 309. By the statute quoted the rule is the same where a subsequent creditor seeks to impress a trust for his benefit upon property conveyed to a third person, the consideration being paid by the debtor. So in either case a subsequent creditor can obtain no relief if at the time he gave credit he knew of the facts regarding the conveyance he seeks to have declared fraudulent. 14 A. & E. Encyc. of L. (2d Ed.) 282. Here there was no finding of fraud, and at the time of the dismissal of the first action the bank had a full knowledge of the circumstances of the deed to Mrs. Chatten. The important inquiry, therefore, is whether plaintiff is to be considered a subsequent or a prior creditor. Chatten was indebted to the bank at a time prior to the execution of the sheriff's deed to his wife. But after that time the bank, after having sued upon its claim and issued garnishment process to enforce it, made a settlement with him, accepted new notes and

securities, and dismissed its action. It is held that no remedy against the fraudulent transfer of property is lost by accepting a renewal note, unless the transaction amounts to a payment, judged by the ordinary tests. *Bank v. Lesser* (N. M.) 58 Pac. 345, and cases cited. But see *Elgleberger v. Kibler*, 1 Hill, Eq. 113, 26 Am. Dec. 192, where it is said: "Were it necessary for the purposes of the case, I should have little hesitation in saying that each renewal of the debt, and taking a new security, was a satisfaction of the antecedent one, and that these renewals could not operate to keep in existence a charge on the land which had been, previous to them, conveyed away."

It is not necessary, however, to review the authorities further, or to consider their application here, as the precise question presented has already been determined by this court. The facts in the case at bar and those of *Lanphear v. Ketcham*, 53 Kan. 799, 37 Pac. 119, are so similar that they may be considered, for the purpose of the present discussion, absolutely identical. It was there said: "If the first action had been dismissed at the instance of the plaintiff for defects in the petition only, or without prejudice to a future action, many of the questions discussed on the part of the plaintiffs would be entitled to serious consideration; but the first action was settled as well as dismissed. It was dismissed because it was settled. It was settled for the consideration of the \$1,800 note given by William Ketcham to the plaintiffs. This is the note sued on. With full knowledge of all the facts attending the transfer by William Ketcham to his wife of the real estate in dispute, Jewett settled the former action, and discharged the attachment, under an agreement with the parties. The plaintiffs cannot assail now the transfer of the real estate from Ketcham to his wife, upon a transaction prior to the settlement, even if any wrong existed originally concerning the same. The plaintiffs received the note in settlement of the former action, and therefore do not stand in the position of prior or existing creditors, with power to attack the transfer as a fraud upon their rights. *Brooks v. Hall*, 36 Kan. 697 [14 Pac. 236]. Their status is rather that of a creditor subsequent to the transfer, with full knowledge, at the time of accepting the note in settlement, that Mrs. Ketcham held the title of and claimed the real estate in question. *Shepard v. Thomas*, 24 Kan. 780." Within the authority of that case it must be held that the bank was a subsequent creditor, and therefore could not recover.

Other questions have been argued, relating to the statute of limitations and the effect of the dormancy of the judgment against Chatten, but in view of the conclusion already reached it will be unnecessary to pass upon them.

The judgment is affirmed. All the Justices concurring.

**MITCHELL v. MITCHELL.**

(Supreme Court of Kansas. June 11, 1904.)

**HOMESTEAD — DESCENT — RIGHTS OF NONRESIDENT CHILDREN.**

1. The title to a homestead does not descend to the widow and children of the deceased owner, who may occupy the land at the time of his death, to the exclusion of other heirs who may reside elsewhere, but it descends in the same manner as the title to other real estate, subject only to the right of occupancy by the widow and children residing there, until the widow remarry or the children all become of age.

(Syllabus by the Court.)

Error from District Court, Osborne County; R. M. Pickler, Judge.

Action by Charles Mitchell against H. R. Mitchell. Judgment for defendant, and plaintiff brings error. Reversed.

J. K. Mitchell and L. A. Linville, for plaintiff in error. Smith & Nicholas and Reed & Sample, for defendant in error.

**BURCH, J.** William Charles Mitchell died intestate in March, 1898. At that time he was the owner of a tract of land in Osborne county, which was occupied by himself and his wife, Anna Mitchell, as a homestead. He was survived by an adult son, H. R. Mitchell, who, together with his wife, also occupied the homestead as a residence. Another adult son, Clay Mitchell, died before his father, leaving a widow, Fannie Mitchell, and four children, named respectively Charles, William, Mable, and Ira, all of whom resided in another state. After the death of William Charles Mitchell, his widow and his son H. R. Mitchell continued to occupy the homestead. In an action of partition brought by Charles Mitchell the children of Clay Mitchell claimed the share of their grandfather's land which their father would have taken had he been alive. H. R. Mitchell contended that the land descended in equal shares to himself and his mother, and resisted partition on that ground. Anna Mitchell took no part in the controversy, and no claim was made that the land was not partitionable if the heirs of Clay Mitchell had any title with which to support the action. The facts having been agreed to, the district court denied partition under a very liberal interpretation of a single section of the statute of descents and distribution (section 2, Gen. St. 1901, p. 534), which reads as follows: "A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied by the intestate and his family, at the time of his death, as a residence, and continued to be so occupied by his widow and children, after his death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of the debts of the intestate, but shall be the absolute property of the said widow and

children: provided, however, that the provisions of this section shall not apply to any incumbrance given by the consent of both husband and wife, nor to obligations for the purchase of said premises, nor to liens for the erection of improvements thereon."

The judgment of the district court is directly opposed to the decision of this court in the case of *Dayton v. Donart*, 22 Kan. 256, which has been cited and approved many times, and which has always been regarded as containing a definite and final exposition of the law upon the question under consideration. It was held in that case that the title to a homestead does not descend to its occupants to the exclusion of heirs residing elsewhere, but that it descends in the same manner as the title to other real estate, subject only to the right of occupancy by the widow and the children who may reside there when the owner dies, until the widow remarry, or such children all become of age. No good reason appears for disturbing this decision, and the children of Clay Mitchell are entitled to the share of the land which he would inherit if he were alive.

A motion to dismiss the proceedings in this court because of a defective case-made must be denied, the record having been properly certified as a transcript, in due time.

The judgment of the district court is reversed, with direction to enter judgment upon the agreed facts in accordance with this opinion. All the Justices concurring.

**GREER et al. v. NEWLAND et al.**

(Supreme Court of Kansas. June 11, 1904.)

**CHATTEL MORTGAGE—RIGHTS OF MORTGAGEE—SALE OF MORTGAGED PROPERTY.**

1. A commission merchant who receives mortgaged cattle sent to him for sale without the consent of the mortgagee, and in violation of the terms of the mortgage, and who sells them, and pays the proceeds to the consignor, without actual notice of the mortgage, but with constructive notice imparted through its record, is liable to the mortgagee in an action upon an implied contract to pay him the proceeds of such sale.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by J. W. Newland and others against J. E. Greer and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Muckle, Hayward & McLane, for plaintiffs in error. Botsford, Deatherage & Young and McFadden & Morris, for defendants in error.

**MASON, J.** The owner of certain cattle in Wilson county executed chattel mortgages upon them securing two notes. The mortgages were properly recorded. Afterwards the mortgagor turned the cattle over to another person, who, without the consent of the mortgagee, and in violation of the terms of the mortgage, shipped them to Greer, Mills & Co., commission merchants at East

St. Louis, for sale. The commission company sold the cattle and remitted the proceeds, less charges and expenses, as directed by the consignor, without actual notice of the mortgages. The notes and mortgages remained unpaid, and were transferred to J. W. Newland and D. R. Newland, who sued the commission company, not for damages resulting from the conversion of the cattle, but upon the allegation of an implied promise by the company to pay to plaintiffs their net proceeds, the tort being expressly waived. Plaintiffs recovered a judgment, which defendants seek to reverse.

Upon the facts stated it is clear that defendants would have been liable in an action for conversion, and the fact that they had no actual notice of the claim of the mortgagees would have constituted no defense. *Brown v. Campbell Co.*, 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274. But defendants claim that they were not liable in an action upon contract for the reason that in the transaction they acted only as the agents of the real wrongdoer, the person who shipped the cattle to them, and that their own estate was not intended to be benefited, and was not in fact benefited, by the sale; that they never acquired or claimed the beneficial title to the cattle or their proceeds. It is true that the rule is well established that: "If no benefit accrues to the tortfeasor by reason of the tort committed, assumpsit will not lie. He cannot be charged as on an implied contract unless some benefit has actually accrued to him." 15 A. & E. Encyc. of L. (2d Ed.) 1115. See, also, chapter 3, *Keener on Quasi-Contracts*, and *Fanson v. Linsley*, 20 Kan. 235, and cases cited. It is also true that the title of property consigned by the owner to a commission merchant for sale, and of its proceeds, is in the consignor, and no title vests in the factor except as trustee. 12 A. & E. Encyc. of L. (2d Ed.) 695, 696.

In considering whether these principles protect the defendant from an action upon an implied contract to pay the mortgagee the price of the cattle it must be borne in mind that no distinction is to be made between an actual knowledge by the consignee that goods sent to him belong to another than the shipper and the constructive knowledge of that fact given him by the public records. The effect of the notice imparted by the record does not depend upon the form of action. In the case cited it was held equivalent to actual notice in an action for conversion. It is so in an action upon an implied contract. The case must therefore be treated as though defendant had had actual notice of the existence of the mortgages. If a factor, while still holding the proceeds of goods sold by him, knows they were stolen, he cannot assert, as a protection against the claims of the real owner, what is untrue in fact, that the title is in the one who has stolen them. And having in his hands money belonging to another, in the absence of a reason to justify

his holding it himself, or making some other disposition of it, he is liable to the owner upon an implied contract to pay it to him. "Where the defendant is proved to have in his hands the money of the plaintiff, which, *ex æquo et bono*, he ought to refund, the law conclusively presumes that he has promised to do so. \* \* \* The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may, in general, be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. \* \* \* And where the defendant has tortiously taken the plaintiff's property, and sold it, or, being lawfully possessed of it, has wrongfully sold it, the owner may ordinarily waive the tort, and recover the proceeds of the sale under this count. So, if the money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort, and bring assumpsit upon the common counts." 2 Greenleaf on Evidence, §§ 102, 117, 120. "Where money has been paid to a factor for the use of the principal, to which the latter is discovered afterwards not to be entitled, the factor will be liable to an action at the suit of the person from whom he received such money as for money had and received to his use, unless he has, before action brought, actually paid over the money to his principal." *Weld v. Shaw*, 2 La. Ann. 559. He who holds money that he knows belongs to one person cannot voluntarily pay it to another, and claim exemption from contractual liability on the ground that he acted merely as an agent, and derived no personal benefit from the transaction. When he knows who is entitled to receive the money in his hands, he owes that person a duty from which the law implies a contract to pay it to him; and he can no more escape that liability or alter the character of it by a payment to the person from whom he received it than by making any other disposition of it. It was said in *Hindmarch v. Hoffman*, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842, an action of assumpsit: "As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control, he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these circumstances it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so, but, in disregard of his duty in the premises, he paid

it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner, and there is no good reason why it should not be recovered in the present form of action." "Where a factor is notified that cotton consigned to him by a third person was made on plaintiffs' plantation, and belongs to them, and is directed not to pay over the proceeds without their consent, the notice will render the factor liable for any subsequent payment made to the consignor, not depending on a superior right." *Syllabus, Ledoux v. Anderson*, 2 La. Ann. 558. The situation is substantially the same as though cattle belonging to plaintiffs had been stolen and shipped to defendants for sale, and defendants had sold them, and paid the proceeds to the consignor, after learning of the theft. In such a case the defendants could say with as much force as they do now that they derived no personal benefit from the transaction, that their estate was not benefited by it; but under such circumstances this statement would not be a sufficient answer to plaintiff's claim upon the implied contract to pay the money to the real owner; neither is it here.

The judgment is affirmed. All the Justices concurring.

#### THOMPSON v. BEELER.

(Supreme Court of Kansas. June 11, 1904.)

PLEADING—AMENDMENT—CHANGING CAUSE OF ACTION—LIMITATIONS.

1. The petition in an action brought by a going partnership to recover damages for the conversion of property belonging to it cannot be so amended as to wholly abandon the action by the partnership and the cause of action stated in the petition, and state a cause of action in favor of one of the members of the dissolved partnership for an accounting of the partnership business between such member and such defendant. It is also held that the plaintiff's right of action was barred by the statute of limitations.

(*Syllabus by the Court.*)

Error from District Court, Marion County, O. L. Moore, Judge.

Action by J. W. Thompson against C. W. Beeler. Judgment for defendant, and plaintiff brings error. Affirmed.

Keller & Dean, for plaintiff in error. F. Dumont Smith, for defendant in error.

GREENE, J. This action was brought December 18, 1897, by J. W. Thompson against C. W. Beeler. The petition, in substance, alleged that the plaintiff and one W. E. McCrea were copartners doing business under the firm name and style of McCrea Bros. & Thompson; that the firm was engaged exclusively in the business of raising cattle; that in January, 1893, the firm was the owner of 500 head of cattle; that plaintiff had a one-third interest, and W. E. McCrea a two-thirds interest, therein, and each was in like por-

portion liable for the debts and liabilities of the firm; that in January, 1893, without the knowledge or consent of plaintiff, and for the purpose of securing his individual debt, W. E. McCrea gave a mortgage to the First National Bank of Kingsley, Kan., for \$3,200, upon all the cattle belonging to the firm; that on the 10th day of May, 1893, without the knowledge or consent of plaintiff, McCrea gave a second mortgage to defendant, for \$2,500, upon 373 head of said cattle, to secure his individual debt; that in October, 1893, Beeler purchased the mortgage given to the bank, with full knowledge that it had been given to secure the individual indebtedness of W. E. McCrea; that afterwards Beeler took possession of the cattle, and pretended to sell them to himself under said mortgages, shipping them to Kansas City, Mo., where he sold them on his own account, and received the money therefor, without the knowledge, consent, or authority of the plaintiff or the firm, and by reason of such acts Beeler became liable to account to the plaintiff for the proceeds of said cattle in the same manner and to the same extent as W. E. McCrea would have been liable, had he sold the cattle. The plaintiff prayed for an accounting of the affairs of McCrea Bros. & Thompson, and for a judgment against the defendant for what might be found due him by reason of his interest in the firm. For the purpose of tolling the statute of limitations, it was alleged that on the 6th day of April, 1896, the plaintiff, under the name of McCrea Bros. & Thompson, commenced an action in the district court of Edwards county against the defendant to recover on the same cause of action described in this petition, which action failed, otherwise than on its merits, October 7, 1897. The present action was referred to Hon. J. D. Milliken, as sole referee, who found there was due the plaintiff from the defendant the sum of \$5,246.77 by reason of his interest in the partnership property, but held, as conclusion of law, that the present action was barred by the statute of limitations. This report was approved by the court, and judgment rendered thereon for the defendant for costs.

The one question is, was the present action barred by the statute of limitations? If the first action tolled the statute, the present one was not barred. The petition in the former action was entitled "W. E. McCrea, Robert McCrea, and J. W. Thompson, Partners as McCrea Bros. & Thompson, Plaintiffs, v. C. W. Beeler, Defendant." After alleging the partnership of the plaintiffs, and the interest of each in the firm, the petition proceeded as follows: "That in the month of October, 1893, the said plaintiffs were the owners of and in the possession of the following personal property, situated and kept in the counties of Edwards and Pawnee, in the state of Kansas, to wit, five hundred steer cattle, of various ages and brands. That in the month of October the said defendant, without any



right or authority, willfully and unlawfully took possession of said cattle, and converted the same to his own use and benefit, and to this day keeps and retains the same, whereby the defendant became and is liable to these plaintiffs for the value thereof. That by reason of the foregoing facts the said defendant is indebted to plaintiffs in the sum of ten thousand dollars (\$10,000). Wherefore the said plaintiffs pray judgment against said defendant for the said sum of ten thousand dollars and costs of this suit."

It is not claimed that the first action would toll the statute unless the petition could have been so amended as to plead the cause herein sued on. No such amendment was made or offered. In order that the plaintiff might have obtained in that action the relief sought in the present one, it would have been necessary to have amended the petition in the following particulars: By striking out the plaintiff, and substituting in lieu thereof J. W. Thompson, and striking out the allegations of the continuance of the partnership of McCrea Bros. & Thompson, and the conversion of the property by Beeler, and inserting the affirmative allegations that the firm had been dissolved, and that Thompson was the owner of an undivided one-third interest of the firm property, and that Beeler owned the other two-thirds interest; that Beeler was in possession of all the partnership property, and denied plaintiff the right to participate therein—and such other formal allegations as are necessary in such pleading to have the debts of the partnership ascertained and paid out of the partnership property, and the remainder distributed equally between those entitled to participate therein according to their respective interests. The first action was by the firm to cover into the partnership treasury the value of certain property belonging to the partnership, which it was alleged had been converted by Beeler. If that action had succeeded, the proceeds would have gone into the funds of the firm, and been used in payment of its liabilities, or, if none existed, distributed between the partners. If the petition had been amended as suggested, and the action on the amended petition succeeded, the recovery would have gone into the pockets of Thompson. The necessary amendments would have substituted Thompson for the plaintiffs, and a cause of action for an accounting between partners for a cause of action for the conversion of partnership property, and would have changed the subject of action from a herd of cattle to the winding up of a partnership. The original action was not Thompson's. It was the action of McCrea Bros. & Thompson, composed of the three people. By what right could Thompson have had himself substituted as plaintiff in an action to which he was not a party, except by representation, and only as a member of a firm? If the theory advanced by plaintiff, that a member of a firm may, upon

his own application, procure himself to be substituted as plaintiff in an action, instead of the partnership, and so amend the petition as to plead an entirely different cause of action in his own behalf, then each member of the firm could do the same thing. A defendant sued by a partnership may be subjected to as many different lawsuits as there are members of the firm, if by chance each had, or thought he had, some claim against him, and each cause of action be different from that stated in the original petition, involve a different subject, and require different relief. Notwithstanding the liberal provisions of the Code in regard to amendments, it is not possible that it contemplated such a departure from the original action by way of amendment as is contended for by the plaintiff.

The judgment of the court is affirmed. All the Justices concurring.

#### MILLER v. McDOWELL.

(Supreme Court of Kansas. June 11, 1904.)

#### EVIDENCE—DECLARATIONS—LIMITATIONS—PAYMENTS.

1. Statements and admissions made during life by the deceased to a stranger, that he is liable for one-half of a certain indebtedness, evidenced by the promissory note of another, is admissible in an action against the administrator of the deceased to recover one-half of such indebtedness.

2. A payment made to the cashier of a bank, which holds a note for collection, with the statement by the person making such payment that he is obligated for one-half of the note and interest, although such person is neither the maker nor indorser of the note, is sufficient to toll the statute of limitations as to him.

(Syllabus by the Court.)

Error from District Court, Chase County; Chas. B. Graves, Judge pro tem.

Proceeding by C. C. McDowell against Arch Miller, administrator of John McDowell. On appeal to the district court, judgment was rendered against the administrator, and he brings error. Affirmed.

See 64 Pac. 980.

Edwin A. Austin and J. G. Egan, for plaintiff in error. Kellogg & Madden, for defendant in error.

GREENE, J. C. C. McDowell and John McDowell were brothers, and sons of Charles McDowell, deceased. During the lifetime of the latter he was the owner of two tracts of land, one containing 98 and the other 160 acres. The 98-acre tract was incumbered by a mortgage to Chase county, upon which \$1,000 was due at the time of the transactions hereinafter stated. On July 29, 1881, Charles McDowell borrowed from J. K. Carter \$1,000, with which to pay the Chase county mortgage, and secured Carter by a mortgage on the 160-acre tract. On April 3,

¶ 2. See Limitation of Actions, vol. 33, Cent. Dig. §§ 622, 623.

1883, Charles McDowell conveyed to John McDowell the 98-acre tract, which was at the time clear of incumbrance, and to C. C. McDowell 100 acres of the 160-acre tract, which entire tract was incumbered by the Carter mortgage given by Charles McDowell and wife and C. C. McDowell and wife. These conveyances were gifts from the father to his sons. It is agreed that the 98-acre tract and the 100-acre tract were of equal value. Plaintiff alleges that, when these conveyances were made, in order to make the gifts equal between the sons, the father exacted an agreement from John McDowell that he would pay one half of the Carter mortgage, and that C. C. McDowell should pay the other half; thus equalizing the value of the gifts, and leaving the 60 acres retained by the father clear of all incumbrance. The two sons paid the accruing interest annually upon the Carter debt until it matured, when it was renewed by Charles and C. C. McDowell executing their note and mortgage upon the 160-acre tract. It is alleged that at this time the former agreement was exacted of John, and by him renewed. After the renewal of the Carter note, John paid his proportion of the interest upon this debt until the time of his death, which occurred August 1, 1888. Shortly after the death of John, the plaintiff was appointed administrator of his estate. The present action originated in a proceeding in the probate court by C. C. McDowell to have one-half of the Carter debt charged against and collected from the estate of John. The cause was appealed from there to the district court, where judgment was rendered against the administrator for one-half of the amount of the Carter claim, to reverse which, the administrator prosecutes his action. This cause has been in this court before, and is reported in 63 Kan. 75, 64 Pac. 980.

The first error alleged is in the admission of the testimony of W. D. McDowell, W. W. Sanders, and Robert Clements. The testimony of these witnesses related to statements made to them by John McDowell concerning his liability for the Carter indebtedness. It is claimed this testimony was introduced to toll the statute of limitations, and that it was erroneously admitted for that purpose, because made to strangers who had no interest in the matter. It is not clear that this was the only purpose for which this testimony was introduced. It was competent for another purpose. The administrator denied that John McDowell had agreed to pay any portion of the Carter debt. The testimony of these witnesses of statements made by John that he was liable for one-half of the Carter debt was admissible, as tending to prove the fact.

It is contended that more than three years had elapsed between the time of the original agreement and the time when this proceeding was commenced, and therefore the statute of limitations had barred any right of action,

and the court should have sustained defendant's demurrer to the evidence offered by plaintiff. We think counsel overlooked the testimony of J. F. Kirker, the cashier of the Strong City Bank, which was to the effect that the bank held the Carter note and mortgage for collection, and that some time within a year before the death of John McDowell he came to the bank and inquired of Kirker about his note. When informed that the bank held no note against him, he referred to the Carter note, and stated that he was liable for one-half of that note and interest, and he desired to pay his proportion of the interest, which he did, and the cashier credited it on the note. This statement to the cashier while acting as the agent of Carter is equivalent to a statement made to Carter himself. *Sibert v. Wilder*, 18 Kan. 176, 22 Am. Rep. 280; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Investment Co. v. Bergthold*, 60 Kan. 813, 58 Pac. 469.

Of course, a verbal admission of a debtor of his liability will not toll the statute, but payment made to the agent of the creditor, to be applied on the debt, accompanied by a statement by the person making the payment that he is liable for one-half of the debt, is a sufficient acknowledgment of his liability to toll the statute as to him. Section 4452, Gen. St. 1901, provides that "in any case founded on contract, when any part of the principal or interest shall have been paid \* \* \* an action may be brought in such case within the period prescribed for the same after such payment."

A contention is made that the court erred in excluding the testimony of Margaret McDowell. It was the purpose of the defendant to prove by this witness that there was another and different agreement between John and Charley, by which John had agreed to pay one-half the interest on the Carter debt. It was not the purpose of such evidence to show that the agreement relied upon by plaintiff did not exist, nor that the money paid by John to the cashier was not under such agreement, but to establish a theory different from that claimed by plaintiff. This evidence did not tend to dispute or deny any material contradicted fact. At best, it could only have raised a very remote inference against the claim of plaintiff. In view of the evidence in this case, the defendant was not prejudiced by the exclusion of such evidence.

The judgment of the court below is affirmed. All the Justices concurring.

#### CUDAHY PACKING CO. v. SEDLACK.

(Supreme Court of Kansas. June 11, 1904.)

#### INJURY TO EMPLOYÉ—DEFECTIVE APPLIANCES.

1. Where, in the cooking room of a packing company, the master furnished a cooking resort, and failed to provide it with a waste pipe sufficient in capacity to carry off the hot water formed from the condensation of steam in the

process of cooking, or permitted said waste pipe to become obstructed and failed to properly inspect it, and the servant in the discharge of his duty, without negligence on his part, sustained injury because thereof, *held*, the master is liable.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Andrew Sedlack against the Cudahy Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McFadden & Morris and Warner, Dean, McLeod & Holden, for plaintiff in error. W. E. Flynn, for defendant in error.

ATKINSON, J. Andrew Sedlack was an employé of the Cudahy Packing Company at Kansas City, Kan. The business of the packing company was to slaughter animals, and cure, cook, and pack the meats to be used for food. Plaintiff was employed in the cook-room of the canning department. The meats to be canned were in this room cooked by the use of steam. In the cooking room where plaintiff was employed were six retorts. Into these retorts the meats to be cooked were placed. The retorts were then securely closed, and steam, under pressure, turned into the retorts until the meats were thoroughly cooked. It was the duty of plaintiff to assist in bringing meats to be cooked from the canning room to the cooking room, to assist in placing the meats in the retorts, and to assist in removing them therefrom when the process of cooking had been completed. While removing the cap from retort No. 2, plaintiff sustained the injuries complained of. The retorts used were of metal, and consisted of two distinct parts, a base and a cap. The base was fixed, and rested upon or close to the floor of the room. The cap fastened down securely upon the base when in use. The caps, being very heavy, were raised from the base by the use of ropes and pulleys suspended above each. Retort No. 2, at which plaintiff, with his co-employé, Bascha, was working when he sustained injury, was in form cylindrical, about 2½ feet in diameter, and the cap, when on the base, stood about 6 feet high, and weighed 700 or 800 pounds. The base was somewhat concave, and about three inches deep. There was a small waste pipe leading from the base of the retort to the sewer, called a "bleeder pipe." The object and purpose of this pipe was to provide a means to carry off the hot water which had formed in the base of the retort from the condensing of steam in the process of cooking. A valve was provided in this pipe, to be opened before raising the cap from the base to remove the cooked meats from the retort. On the day of the injury plaintiff and Bascha had placed in retort No. 2 25 two-pound cans of tripe to be cooked. Steam had been applied to the retort for nearly three hours. Plain-

tiff and Bascha were told by Greenwood, an employé of defendant, that the meat in retort No. 2 was cooked, and he directed them to take it out. Greenwood turned off the steam. It was also his duty to open the valve in the bleeder pipe, that the hot water which had accumulated from the condensation of steam in the base of the retort might escape to the sewer. Plaintiff and Bascha removed the fastenings that secured the cap to the base of the retort. Plaintiff, standing close to one side of the retort, and Bascha, standing close to the opposite side, then pulled down upon the ropes suspended from above the retort, to raise the cap from its base. As the cap was raised from the base, hot water passed out from the retort and scalded plaintiff's left foot. An action for damage was commenced by plaintiff. Negligence was charged to defendant, in substance, that the bleeder pipe was insufficient in capacity to carry off the hot water, and that the pipe was obstructed, and defendant failed to properly inspect it. Defendant in its answer claimed the injury was the result of an accident, charged that the negligence imputed to defendant was the negligence of Greenwood, a co-employé of plaintiff, and also charged contributory negligence to plaintiff. A trial resulted in judgment for plaintiff. Defendant prosecutes error to this court.

Whether or not the bleeder pipe was insufficient in capacity, or was obstructed and defendant failed to properly inspect it, was a question for the jury. There was some evidence to support the verdict. It was approved by the trial court, and we cannot disturb it. It is the duty of the master to furnish the servant with reasonably safe instrumentalities to work with and a reasonably safe place in which to work. *City of Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232; *Kelley v. Rtyus*, 48 Kan. 120, 29 Pac. 144; *A., T. & S. F. Rld. Co. v. Moore*, 29 Kan. 633. The verdict of the jury is in effect a finding by the jury that defendant failed in these particulars or one of them. It becomes unnecessary, under the view we take of the case, to determine whether Greenwood was a co-employé of plaintiff or a vice principal.

The judgment of the court below is affirmed. All the Justices concurring.

#### O'BRIEN v. FOULKE.

(Supreme Court of Kansas. June 11, 1904.)

#### STATUTE OF FRAUDS—SALE OF REALTY—POSSESSION—INSTRUCTIONS.

1. A possession, to be effective and to take an oral contract out of the statute of frauds, must be not only actual, notorious, and exclusive, but it must have been taken and held in pursuance of such contract.

2. Where the court, in charging the jury, correctly states the issues in the case, and the gen-

¶ 1. See *Frauds, Statute of*, vol. 23, Cent. Dig. § 307.

eral rules of law applicable thereto, the failure to amplify or to particularize or to state other correct principles of law is not, in the absence of a request, a ground of error.

(Syllabus by the Court.)

Error from District Court, Rooks County; Charles W. Smith, Judge.

Action by Enos C. Foulke against Thomas J. O'Brien. Judgment for plaintiff, and defendant brings error. Affirmed.

A. D. Gilkeson, for plaintiff in error. W. B. Ham, for defendant in error.

**JOHNSTON, C. J.** This was an action of ejectment brought by Enos C. Foulke to recover from Thomas J. O'Brien the possession of a tract of land in Rooks county. Foulke had a complete paper title, as shown by a connected chain back to the government, while O'Brien claimed under an oral contract of purchase, and of possession and improvements made in pursuance of the alleged purchase. Each asserted title from a common grantor, named Houpt. O'Brien claimed that he purchased the land from Houpt at a stipulated price, and that he was to have until a fixed time to raise and pay \$500, the amount of the first payment; that he obtained the money within the time, and otherwise complied with the terms of the purchase; and that he took and has held possession under the contract of purchase. Houpt did not accept the money, but conveyed the land to one Foster, who in turn formally conveyed it to Foulke. Houpt died before the trial, and hence the testimony as to the transaction between Houpt and O'Brien was mainly that of O'Brien himself. On the testimony produced, however, the jury found in favor of Foulke. There is testimony to the effect that there was a conditional sale of the land; but some of it tends to show that O'Brien did not comply with the conditions of the proposed sale within the specified time, and also that the possession of O'Brien was taken under a lease, and not in pursuance to the oral contract of purchase.

To sustain his contention, it was necessary for O'Brien to prove that he complied with the requirements of the oral contract, and, if he failed in that, as the jury must have found, he failed to establish his right of possession. Again, the possession essential to his defense was that it should not only be actual, notorious, and exclusive, but also that it should have been taken in pursuance of the oral contract of purchase, with the consent of Houpt. *Baldwin v. Squier*, 31 Kan. 284, 1 Pac. 501. Since there was testimony tending to show noncompliance with the requirements of the contract, and also that the possession was not effective, there is basis for the findings of the jury. While the evidence is in some respects quite meager, we cannot say that the verdict and judgment are without support.

The contention that the instructions were misleading is not good. The character of the

action and the claims of the respective parties were fairly presented to the jury, and, while some of the principles of law claimed to have been erroneously omitted from the charge would not have been inappropriate, they were not requested by the plaintiff in error, nor do we regard them to be essential to a fair submission of the case. Having correctly stated the issues and the general rules of law applicable thereto, the failure to amplify or to state other correct principles of law is not, in the absence of a request, a ground for reversal. Nor is there anything substantial in the so-called variance, or in the claim that Foulke's deed did not convey the land in controversy. The deed itself is not set out in the record and in the partial statement of its character there is some confusion as to the description of the property, but this is rendered immaterial by the specific admission made during the trial that the deed was "in every way sufficient to convey the land in question."

The judgment of the district court will be affirmed. All the Justices concurring.

#### MARLATT v. ELLIOTT.

(Supreme Court of Kansas. June 11, 1904.)

##### REAL ESTATE AGENT—RIGHT TO COMMISSION.

1. It is sufficient to entitle a real estate agent to recover his commission for the sale of land if he, under a contract with the owner thereof, has been the procuring cause of such sale. He need not conduct it to a final and successful conclusion.

2. If a real estate agent, under a contract with the owner, shall call the attention of a prospective buyer to the land of such owner, and thereafter, moved by the efforts of such agent, the proposing buyer and the owner shall consummate the purchase and sale of such real estate, then the agent will be entitled to his commission, even though the purchaser, at the time the agent solicited him to buy, was not ready, willing, and able to purchase.

(Syllabus by the Court.)

Error from District Court, Riley County; Sam Kumble, Judge.

Action by F. B. Elliott against A. N. Marlatt. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. J. Brock and Alvin R. Springer, for plaintiff in error. Jno. E. Hessin and John Clarke Hessin, for defendant in error.

**CUNNINGHAM, J.** F. B. Elliott recovered judgment against A. N. Marlatt in the sum of \$240 for services rendered as a real estate agent in selling a farm belonging to Marlatt to J. E. Conroy; the recovery being 2 per cent. of \$12,000, the amount for which the land was sold. The theory of the plaintiff, upon which he based his right of recovery, was that he had brought to the attention of the purchaser the land of the defendant, and that, although subsequently the defendant had himself consummated the sale,

¶ 1. See *Brokers*, vol. 8, Cent. Dig. §§ 73, 74.

still his services were the procuring cause of the sale, and that therefore he was entitled to his commission. The theory of the defense, as expressed in his answer, was "that the plaintiff has never found and made known to the defendant that he had a purchaser who was ready and willing and able to purchase the land." There is but little variance between the parties as to the facts of the case, which, stated as briefly as possible, are these: Marlatt, who was a nonresident of the state, desiring to dispose of a half section of valuable land, placed the same with Elliott for that purpose; instructing him to sell at \$40 per acre, upon certain terms as to deferred payments, and agreeing to give him 2 per cent. of the price for which the land sold as his commission. This was about the 1st of June, 1901. Elliott listed the land upon his books and advertised it for sale. He called the attention of several parties to the matter. Learning that Mr. Conroy wished to purchase land of that quality in that neighborhood, he gave him the price and terms at which this land could be obtained, and solicited him to buy. He offered to take Mr. Conroy out to look at the land, but Conroy said that, as he had a relative living in the neighborhood of the land, he would go and look at it some time when he was out there. At different times up to August or September, Elliott spoke to Conroy about the purchase of the land, and Conroy at one time made an offer of \$10,000 in cash for it. This offer was submitted to Marlatt, and by him rejected. Conroy told Elliott that he would not purchase until he had sold some land which he owned in an adjoining county. Elliott at one time communicated to Marlatt the fact that he was seeking to sell the land to Conroy. About the 1st of December the same year, Conroy, having become ready and desiring to purchase, opened up negotiations with Marlatt through an agent of his own; and these negotiations resulted in the sale by Marlatt to Conroy of the farm at the price of \$12,000, being a reduction of \$800 upon the price at which it was listed with Elliott. The jury returned its general verdict in favor of Elliott, and also found, in answer to special questions, that, while the consummation of the sale was not participated in by plaintiff, the land was first brought to Conroy's attention by him, and that the representations which plaintiff had made were the moving cause of the sale. This specific question was asked the jury: "Did the plaintiff, under the contract sued on, bring to the defendant a purchaser who was ready, willing, and able to purchase the land of the defendant in accordance with the terms under which the plaintiff was authorized to make a sale? Ans. The plaintiff did bring the defendant a purchaser, but purchaser was not ready or willing to pay the price asked for in contract, as shown by subsequent negotiations." In brief, the claim of the plaintiff is that he is entitled to recover, if, after having called the attention of

the purchaser to the land, the purchaser and the defendant thereafter, without the plaintiff's interference, consummated the sale, even though it was closed upon different terms and at a different price from those given to the plaintiff. The defendant, however, claims that unless the plaintiff had procured a purchaser who was ready, willing, and able to buy at the price and upon the terms given by the defendant, the plaintiff would not be entitled to his commission.

The errors complained of rest in the refusal to permit many questions to be asked by the defendant, and the giving and refusing to give instructions by the court, all in pursuance of this theory of the case. We are not required to speak of these specifications in detail. It will be sufficient to examine the theories upon which they are based. It is true that many cases are found in which the language used, baldly stated, supports the defendant's claim. From *Aigler & Co. v. Carpenter Place Land Co.*, 51 Kan. 718, 33 Pac. 593, the plaintiff in error, in his brief, quotes the following: "Where a real estate agent contracts with a landowner for a commission for the sale of his land, in order to recover for his services he must produce to the owner a purchaser ready, willing, and able to buy upon the terms proposed." But he fails to add the balance of the quotation, found below, which fully illustrates the want of application of this principle to the peculiar facts of the case at bar: "But if the purchaser is only willing to make an option contract, and prefers, under such a contract, as he has a right to do, to forfeit a small sum paid upon the execution of the contract, rather than to accept the property, and the contract is thereby annulled, the real estate agent cannot recover his commission, as if an actual sale had been made or agreed upon." In like manner we are cited to *Davis v. Lawrence & Co.*, 52 Kan. 383, 34 Pac. 1051, where the law is laid down in the syllabus as follows: "Real estate agents authorized to sell the land of another at a stated price and for a certain compensation have earned their commission when they produce a purchaser able, ready, and willing to purchase the land upon the terms and conditions agreed upon." This was a proper pronouncement of the law under the facts of that case, where it appeared that the sale which the agent had negotiated in accordance with the terms given him by the owner failed only because the owner was unable to furnish a good title to the property sold. These two cases are sufficient to illustrate the proper application of the bald rule of law upon which the plaintiff in error depends, and also well illustrate its inapplicability to the facts of the case now under consideration. These facts call for the application of that other rule so often announced by this court, and so thoroughly grounded in the law of equity, and responsive to our sense of fair dealing. In *Plant v. Thompson*, 42 Kan. 664, 22 Pac. 726, 18 Am. St. Rep. 512,

it is said: "It is sufficient to entitle real estate agents to their commission if a sale is effected through their agency, as its procuring cause, although the sale may be made by the owners of the property, if by their exertion the purchaser and owner are brought together, and the sale results therefrom." As supporting this view, see, also, *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Dreisback v. Rollins*, 39 Kan. 268, 18 Pac. 187; *Betz v. Land & Loan Co.*, 46 Kan. 45, 26 Pac. 456, and many cases cited therein.

While the main contention was in accordance with the theories as above indicated, it is also complained that the court refused to permit the introduction of evidence showing that, between the time negotiations had ceased between Elliott and Conroy and the time the sale was made by Marlatt, Conroy had given up the thought of buying, and the sale made by Marlatt was wholly independent of such negotiations. Of course, had this been the fact, and had Elliott not been the procuring cause of the sale, then no recovery could be had. The purchaser, Conroy, was, while a witness, asked this question: "Well, were or were not the negotiations between you and the plaintiff entirely broken off before and unsuccessful before you made up your mind to buy this land?" An objection to this was sustained because it was incompetent, irrelevant, immaterial, and in the nature of a conclusion. We think it a conclusion, and, if so, incompetent. The answer to this question was the ultimate fact to be found by the jury. This was followed by an offer of proof from the same witness even more faulty than the question itself, an objection to which was correctly sustained.

The defendant requested the giving of an instruction covering the view of the case last indicated. Its refusal is assigned as error. Admitting there was evidence requiring such instruction, we think the theory was sufficiently presented in a negative form by an instruction which was given, and which required the jury to find by a preponderance of the evidence that the sale finally consummated was by reason of the negotiations instituted by the plaintiff.

Upon the entire case, we are of the opinion that no substantial error was committed by the court. Its judgment will therefore be affirmed. All the Justices concurring.

#### ST. PAUL FIRE & MARINE INS. CO. v. HASKIN et al.

(Supreme Court of Kansas. June 11, 1904.)

##### HARMLESS ERROR.

1. Any error in the admission of improper evidence is cured by instructions excluding it from the jury.

Error from District Court, Smith County; R. M. Pickler, Judge.

Action by E. L. Haskin against the St. Paul Fire & Marine Insurance Company.

Judgment for plaintiff. Defendant brings error. Affirmed.

Fyke Bros., Snyder & Richardson, and L. C. Uhl & Son, for plaintiff in error. Webb McNail and Quinton & Quinton, for defendant in error.

PER CURIAM. This is a proceeding in error brought to review a judgment rendered in favor of the plaintiffs in an action upon a fire insurance policy. No questions are presented except such as relate to the admission of evidence at the trial.

Complaint is made that, under the guise of showing that proofs of loss had been properly made, plaintiffs were permitted to introduce incompetent evidence of the value of the goods destroyed. As the court instructed the jury not to consider this evidence in estimating the value of the property, there is nothing substantial in the claim.

Further complaint is made of the admission of the prices shown by a certain invoice, but these were also withdrawn from the jury by instructions.

Other assignments relating to evidence admitted are not made with sufficient definiteness to require consideration. *Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060.

Error is also alleged in the giving of instructions, but the record fails to show that any exceptions were taken to them.

The judgment is affirmed.

#### ATCHISON, T. & S. F. RY. CO. v. SPAULDING.

(Supreme Court of Kansas. June 11, 1904.)

##### INJUNCTION—TRESPASSING ON RAILWAY TRACK.

1. One who constantly rides upon the rails of a railroad company's track by means of a bicycle is a continuing menace to the safety of public travel, and may be perpetually enjoined. *Held*, also, that the petition in the present case states sufficient facts to entitle the plaintiff to the relief sought.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by the Atchison, Topeka & Santa Fe Railway Company against James A. Spaulding. Judgment for defendant, and plaintiff brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error. C. D. Walker and J. L. Berry, for defendant in error.

GREENE, J. The plaintiff is a railroad corporation owning and operating a line of railroad from the city of Atchison to the city of Cummings, in Atchison county, over which it transports passengers and freight. It brought this action to perpetually enjoin the defendant from riding over its track from Atchison to Cummings on a bicycle so constructed as to enable him to run it on the rails. A temporary injunction was granted.

To the petition the defendant filed a demurrer, which was overruled; he pleaded a general denial, and that the petition did not state facts sufficient to entitle the plaintiff to the relief sought. The trial resulted in a judgment for defendant. The plaintiff prosecutes this proceeding.

The defendant in error moves to dismiss the action for want of jurisdiction of this court. It is true that neither the petition in the court below nor the evidence upon the trial stated or proved what amount was in controversy, but after the case was tried the plaintiff in error procured, and filed with the case-made, affidavits which showed that the amount exceeded \$100. It is the common practice of this court to show any jurisdictional fact by evidence outside of the record, and has been such practice since the decision of the case of *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 907, 37 Am. St. Rep. 278. The motion is overruled.

It appears that upon the final hearing the court concluded the plaintiff's petition was not sufficient to entitle it to any relief. The material part of the petition reads as follows: "That it is now, and for a number of years last past has been, the owner of a line of railroad running through the county of Atchison and into and through the city of Atchison, in said county, over which line of road it operates continuously freight and passenger trains, both day and night, and that it is necessary for the protection of its trains, passengers, and employes that it have the exclusive use of its tracks, roadbed, and right of way. That the said defendant has for a considerable length of time, without any authority of law, and without the assent or permission of this plaintiff, used its track and roadbed between the station of Cummings and the city of Atchison, in said Atchison county, Kan., for the purpose of transporting himself thereover on a vehicle called a bicycle, so constructed as to run along and upon the tracks of said plaintiff, and propelled by himself. That this plaintiff has repeatedly warned and notified said defendant that he must not use its said railroad track and roadbed in the manner and for the purposes stated, but that he refuses to desist from the use of its said track in the manner aforesaid, and informs the plaintiff that he will not obey the notice and warning given him as aforesaid. The plaintiff avers that the use of its said railroad track and roadbed by the defendant in the manner aforesaid does and will greatly endanger the operation of its trains thereover, and is liable to cause collision between the defendant and his bicycle and the plaintiff's trains, and, by reason of collisions which are likely and probable to occur, its property and the lives of the plaintiff's passengers and employes are constantly menaced and endangered, and that, if said defendant shall be permitted to continue the use of the said track and railroad of the plaintiff in the manner heretofore stated, said

plaintiff will suffer irreparable damage and injury by reason of collision between the defendant and his bicycle and plaintiff's trains, and that it is without a plain and adequate remedy at law." The objections urged to this petition, as stated by defendant in his brief, are as follows: "The length of the track so used by defendant is not stated, nor its condition; there is no statement of the number of trains passing over that portion of the track each day, nor the respective times of their passage, nor that defendant's use of the track with his bicycle was at such times that trains were due or likely to pass over it, nor how nor in what way a collision with a man on a bicycle could or would derail a train or interrupt its passage over the track; neither are any facts stated to show how or in what manner a collision might occur, or how such collision could or would occasion any interference with the operation of trains, or endanger plaintiff's property and the lives of its passengers and employes." These objections cannot be sustained. If the plaintiff can maintain the action at all, its petition states sufficient facts to entitle it to a perpetual injunction. It is pertinent to say that the right of a railroad company to the exclusive use of its tracks does not depend wholly upon the actual damage done or likely to be done to its tracks or right of way, or the financial ability of the person committing such damage to respond in damages. A railroad company is a quasi public corporation. *St. Joseph & D. C. R. Co. v. Joel Ryan*, 11 Kan. 603, 15 Am. Rep. 357; *State v. D. C. M. & T. Ry. Co.*, 53 Kan. 378, 36 Pac. 747, 42 Am. St. Rep. 295. Plaintiff's duties with reference to carrying freight and passengers are subjects of legislative regulation and control. It is properly held to the highest degree of care for the safety of the lives and property thus intrusted to it, commensurate with the business in which it is engaged. The damage to plaintiff's track by reason of the defendant's constant use thereof, or the danger to his life by his foolhardy persistence in riding thereon, are not the most important questions, nor are they determinative of plaintiff's right to an injunction. If these were all the questions, the plaintiff might be required to seek other relief. The rights of the public are involved; the safety of public travel demands a clear track. It is the duty of railroad companies to provide such a track.

It has been ruled again and again by this court that a railroad company is entitled to the uninterrupted and exclusive possession and occupancy of its tracks and all of its right of way necessary for conducting its business, except where built on the public highway or over public crossings. *Mo. Pac. Rly. v. Manson*, 31 Kan. 337, 2 Pac. 800; *Kansas Cent. Ry. Co. v. William A. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Tennis v. Rapid Transit Rly. Co.*, 45 Kan. 503, 25 Pac. 876; *K. C. Rly. Co. v. Com'rs of Jackson Co.*, 45 Kan. 716, 26 Pac. 394; *Dillon v. Kansas City,*

**Ft. S. & M. R. Co.**, 67 Kan. 687, 74 Pac. 251. It is not only the right, but the duty, of a railroad company to keep its tracks clear, and if it is unable to keep trespassers therefrom, who, by their constant presence, are liable to endanger the lives of the public, who constantly use these thoroughfares, it may apply to the court for assistance. The petition in this case shows that the defendant was a constant trespasser upon the company's track, and was a menace to the safe and speedy operation of its trains, and dangerous to public travel.

The judgment of the court below is reversed, and the cause remanded. All the Justices concurring.

(69 Kan. 522)

**ROACH et al. v. ROACH et al.**

(Supreme Court of Kansas. June 11, 1904.)

**WITNESS — COMPETENCY — TRANSACTIONS WITH DECEDENT.**

1. Where the party on one side of a controversy is the executor, administrator, heir at law, or next of kin of the deceased person, and has acquired title to the cause of action directly through said deceased person, the adverse party is incompetent to testify to any transaction or communication had with such deceased person.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Aikman, Judge.

Action by Olive Roach and others against Mary Roach and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Redden & Kramer and H. W. Schumacher, for plaintiffs in error. I. P. Campbell & Son, for defendants in error.

**GREENE, J.** This was an action in partition and ejectment. Judgment was for defendants. C. A. Roach and G. H. Roach were partners engaged in the grocery business, and jointly owned the lot in dispute. The plaintiffs are the widow and children of C. A. Roach, deceased, and the defendants are the widow and children of G. H. Roach, deceased. Plaintiffs claimed, as the heirs of C. A. Roach, deceased, the undivided one-half of this lot, and asked that it be partitioned, and they be placed in possession of their proportion. The defendants claimed that prior to the death of C. A. Roach he sold his interest to G. H. Roach.

On the trial, Mary Roach was permitted to testify to a conversation between herself, her husband, and C. A. Roach, which, according to her testimony, was a sale by C. A. Roach of his undivided half of this lot to her husband. This evidence was admitted over the objections of the plaintiffs. This is the first error alleged. Section 4770, Gen. St. 1901, reads: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person when the

adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person." Under this statute, when the parties on one side of a controversy are the executors, administrators, heirs at law, or next of kin of a deceased person, and have acquired title to the cause of action immediately from such deceased person, the adverse party cannot testify to any transaction or communication had personally with such deceased person. Argument could not make this statute plainer. The plaintiffs in this action were the heirs at law and next of kin of C. A. Roach, deceased. Mary Roach was one of the adverse parties, and is clearly excluded by this statute from testifying to any conversation she had with C. A. Roach, or to any conversation between him and another in which she took part, concerning the cause of action.

On the trial, plaintiffs introduced one O. E. Ashenfelter, and undertook to examine him concerning the sale by C. A. Roach to G. H. Roach of his one-half of the partnership business. The defendants objected to this witness testifying to any such transaction on the ground that Ashenfelter was acting at that time as an attorney and counselor for the parties. Without embodying the testimony of this witness in the opinion, suffice it to say, his testimony does not establish that he was acting in such capacity. He was not an attorney at law. He was merely called in to reduce the agreement of the parties to writing. He gave no legal opinion or advice. His testimony should therefore have been admitted.

Objections are also made to certain instructions submitted and refused. An examination of these instructions satisfies us that those refused were fairly covered by those given.

For the reasons herein suggested, the judgment of the court is reversed, and the cause remanded. All the Justices concurring.

(69 Kan. 564)

**ALLIANCE CO-OPERATIVE INS. CO. v. CORBETT.**

(Supreme Court of Kansas. June 11, 1904.)

**INSURANCE—APPLICATION—CONTRACT—POLICY—ACTION—COSTS.**

1. A statement in a written application for insurance, subsequently approved, that it is for insurance for a term of years from a date named, is a sufficient embodiment, in the application of an agent's agreement that the insurance shall take effect on that day, to satisfy a condition of the application that the company will not be bound by any representation, agreement, or promise of the agent not contained in the application itself.

2. Criticisms of an instruction to the jury held to be invalid.

3. In the absence of a controlling provision of its by-laws, or an agreement of the parties to the contrary, a binding contract of insurance may be consummated with a mutual fire insurance company without the issuance of a policy of insurance.

¶ 2. See Insurance, vol. 23, Cent. Dig. § 204.



4. Under section 3410, Gen. St. 1901, providing that in certain suits against insurance companies the court, in rendering judgment, shall allow the plaintiff a reasonable sum as an attorney's fee, to be recovered as a part of the costs, the question of the amount of such award is not determinable by the jury.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by William E. Corbett against the Alliance Co-operative Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Redden, McKeever & Gilluly, for plaintiff in error. W. H. Holmes and Garver & Larimer, for defendant in error.

BURCH, J. The defendant is a corporation, organized on the mutual plan, for the purpose of insuring its members against loss of property by fire. Its by-laws provide for the appointment of agents, but state that no agent shall take any risk until he has given a bond and such bond has been approved. The by-laws further provide that an agent shall act as surveyor of the company, and shall be authorized to receive money and notes as premiums and to receipt therefor, but that, if applications be rejected at the office of the company, the agent shall refund the commissions he may have retained.

Prior to June 3, 1901, E. A. Shankle was appointed an agent of the defendant. He gave a bond, which was duly approved, and his authority to represent the company continued until after the loss occasioning this litigation. On June 3, 1901, the agent, Shankle, took a written application of the plaintiff for insurance, upon sundry articles of personal property, in the aggregate sum of \$2,750. The premium charged by the company on its risks is \$2 per hundred. Under the by-laws, premiums are settled by the note of the insured, 40 per cent. of which is payable in cash, to be indorsed on the note. Through an error in addition, the agent footed the several items of the application as \$2,550, and computed the premium upon that sum. The plaintiff settled for his insurance by giving his note for \$51 and paying \$20.40 in cash, when he should have given his note for \$55 and should have paid \$22 in cash. The application was dated and signed June 3, 1901, and stated that it was for insurance for the term of five years from June 3, 1901. At the time it was taken the agent agreed that the insurance would begin on that day. The application incorporated a copy of the company's by-laws, and provided that the company would be bound by no representation, agreement, or promise of the agent not contained in the application itself. The plaintiff was already a member of the defendant company, and the holder of a policy of insurance expiring June 13, 1901, on a part of the property described in the application, and, as a part of the transac-

tion of June 3d, this policy was surrendered and canceled. The plaintiff also held another policy of the company, covering property which he had inherited from his lately deceased wife.

The agent delivered the plaintiff's application, premium note, and cash premium to the proper officer of the company, who on June 5, 1901, stamped the application as approved. Soon afterward the agent's mistake was discovered. By direction of the secretary of the company the agent corrected, by erasure and interlineation, the amount of the insurance, as computed in the application, to \$2,750, and made the date at which the insurance should commence read June 13th, instead of June 3d. He then wrote up, ready for signature, a new application (which, however, stated that the insurance should run from June 3d), prepared a new note for the proper amount, and sent them, together with the old note and application, to the plaintiff, inclosing with them a letter in the following terms:

"Alliance Co-operative Insurance Company. Home Office, Topeka, Kansas. Fire, Lightning and Windstorms. 2,750,000.00 at Risk. Agency at Topeka, Kansas, June 8, 1901—Dear Bro. Corbett: I find that your application calls for \$2750 insurance on your home property. We made a mistake in adding it and fixing the premium note and cash payment. The note for \$2750 ought to be \$55.00. You signed one for \$51.00. See enclosed application and note. Please sign the new note and application and return to me with \$1.60 more to make up the \$28.00, which is two-fifths of the two notes (15.00 and 55.00) which added together make 70.00,  $\frac{2}{5}$  of which was to be paid in advance. You can compare the amounts on the two places—2750 on home place, 750 on the other one. Notes \$15.00 and \$55.00. You may keep the old note and application. I will send you receipt for balance on payment. Yours in Co-operation, E. A. Shankle, 1243 Lane St., Topeka, Ks.

"The old note was \$51.00. You paid \$20.40. The new one is \$55.00—22 to be paid on it, when \$1.60 more is paid. The other application, note and payment are all right."

After the receipt of this letter the plaintiff made some effort to rectify the mistake, but was not wholly diligent in the matter, and no policy was issued to him. The company continued to retain the money the plaintiff had paid. On July 10, 1901, the property described in the application was destroyed by fire. In a suit by the insured to recover for his loss the foregoing facts were established by the evidence, and some of them were found specially by the jury. The jury further found that the minds of the parties did meet upon a contract of insurance for \$2,750, that the plaintiff's application was accepted and approved for that amount on the day it was stamped "Approved," and that the plaintiff had been able and willing to pay the balance due from him, although he had not done

so. The jury also returned a general verdict for plaintiff, upon which judgment was entered. In this court the company criticises the conduct of the trial court in a number of particulars.

The plaintiff attached to his petition an incorrect copy of the application. The allegations in the body of the petition were correct, however, and a document, conceded to be the original application, was introduced in evidence as a part of plaintiff's proof of his right to recover. When introduced, the application appeared in the form it presented after it had been changed by the agent. Parol evidence was admitted to explain the appearance of the writing and to establish the transaction as it actually occurred, and the company complains that a written instrument was contradicted. Clearly, such is not the case. Alterations of written instruments, and clerical errors in their preparation of the character described, may be shown by parol. In establishing the facts with reference to the application as actually made, it was unavoidable that oral testimony should be given concerning the agreement that the insurance should date from June 3d, and it is said the condition of the application as to representations, agreements, or promises of the agent not contained therein was thereby violated. The statement in the application, however, that it was for insurance for the term of five years from the 3d day of June, 1901, was a sufficient embodiment of the agreement in the application to satisfy the condition.

The policies the plaintiff already held on June 3d were introduced in evidence. The one which was canceled was clearly admissible to establish the plaintiff's theory of the case. The bearing of the other policy upon the issues to be tried was very remote, if it were pertinent at all; but the findings of fact show that the jury was not confused or misled or diverted from the main question, and hence the error, if any were committed, does not appear to be material.

The company requested the court to instruct the jury that in order to constitute a binding contract the minds of the parties should meet upon the terms and subject-matter of the insurance, and that such a misunderstanding as would prevent a meeting of minds would prevent the formation of a contract. The instruction was correct in law, but was not given. The court, however, was not bound to instruct the jury in any particular form, and instead of instructing abstractly, as requested, it summarized the conduct of the parties from different points of view, and instructed the jury as to the conclusion it should draw if it found the facts to be as the court hypothesized. The court's summary of facts involved, as a necessary conclusion, an agreement of the parties upon all the essential elements of the contract, and therefore sufficiently covered the subject.

It is said that the court's instructions al-

lowed the company to be bound by verbal statements of its agents in opposition to the plaintiff's written application. This is but a reassertion of the matter disposed of in considering the objection to the oral evidence introduced.

It is said that the instruction ignored the right the company had to reject applications. From the by-laws referred to, such a right is only inferentially reserved, but, conceding the company to have such power, it never did reject the plaintiff's application. It simply asked that its agent's mistake be corrected, and at all times treated the agent's agreement with the applicant as binding. Therefore there was no occasion to point out to the jury what the company might have done had it desired to reject the risk.

It is said that it is a policy of insurance which makes the contract. Such is not the law. The conduct of the parties, including the retention of the plaintiff's money by the company, together with the application, was sufficient to establish a contract, in the absence of a controlling provision of the by-laws or an agreement to the contrary. *Insurance Co. v. Stone*, 61 Kan. 48, 58 Pac. 986. No such condition or agreement appears in the record, and the plaintiff was entitled to recover without any policy having been issued.

It is said that the court's instruction made the company liable because it did not return the plaintiff's cash payment. Instead of this, the court submitted all the facts to the jury, and made a verdict in favor of the plaintiff to depend upon a finding of the entire series.

Authorities cited with respect to the effect of the plaintiff's delay in rectifying the agent's mistake are not apposite, and other criticism upon the court's theory of the law of the case and the manner in which it was applied at the trial are invalid.

After the jury had been discharged, and at the time of pronouncing judgment, the court heard evidence as to what would be a reasonable fee for plaintiff's attorneys. Believing the fees established by the testimony as reasonable to be too great, it reduced the amount to \$150, and adjudged a recovery by the plaintiff of that sum as an attorney's fee, to be included in the costs of the case. The company questions the right to collect attorney's fees at all, and claims that, if they may be recovered, the performance of services and their value should be pleaded and proved as other facts, and that the jury should fix the amount of recovery as any other item of damage. The court proceeded under section 3410, Gen. St. 1901, which provides as follows: "The court in rendering judgment against any insurance company on any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee to be recovered as a part of the costs." The constitutionality of this statute was sustained in the case of *Assurance Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335,

and the view of the law there announced has since been promulgated by the Supreme Court of the United States in the case of *Fid. Mut. Life Assn. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 682, 46 L. Ed. 922, and in other decisions. The doctrine of those cases is that attorney's fees may be imposed upon a delinquent company, under the police power of the state, as a kind of penalty incurred in the conduct of business affected with a public interest, and its correctness is no longer open to debate. The Legislature has chosen to make important distinctions in the imposition of burdens, of the character mentioned, in different cases. In actions against railroads for damages by fire, attorney's fees are recovered as a part of the judgment itself, and inhere in the general cause of action for damages. Section 5024, Gen. St. 1901; *Railroad Co. v. Ludlum*, 63 Kan. 719, 66 Pac. 1045. And in other statutes the fees allowed for the plaintiff's attorney are identified with the damages for which the action is primarily brought. In such cases the punitive character of the award is quite conspicuous, and it should be determined as any other item of the plaintiff's claim. In suits against insurance companies, however, the Legislature has indicated that the allowance is to be made as an indemnity for an outlay occasioned by the company's fault, and recovery is limited to a reimbursement of the successful party for the necessary expense incurred in the prosecution of his claim. The award, therefore, falls strictly within the category of costs, is taxed as such, and the court is not bound by the testimony of witnesses as to the amount to be allowed. 11 Cyc. 24, 106. The question is not therefore properly determinable by the jury.

The record is free from material error, and the judgment of the district court is affirmed. All the Justices concurring.

#### FIDELITY & CASUALTY CO. v. BROWN et al.

(Supreme Court of Kansas. June 11, 1904.)  
INSURANCE AGENT—ACTION ON BOND—EVIDENCE.

1. In an action on the bond of an agent of an insurance company to recover the amount of certain collected and unremitted premiums, it is error for the court to sustain a motion to strike from the petition certain premiums charged in the account, because collected outside the agent's territory, where the language describing his territory is ambiguous and susceptible of different interpretations.

2. Under such circumstances, whether the premiums were collected within the agent's territory is a question of fact.

(Syllabus by the Court.)

Error from District Court, Cherokee County; A. H. Skidmore, Judge.

Action by the Fidelity & Casualty Company against E. E. Brown and W. F. Sapp. Judgment for defendants, and plaintiff brings error. Reversed.

A. & C. S. MacDonald and C. B. Skidmore, for plaintiff in error. Sapp & Wilson, for defendants in error.

GREENE, J. The plaintiff is an insurance company. It appointed one E. E. Brown as agent, with power to solicit insurance, issue policies, and collect premiums. Brown gave a bond, with W. F. Sapp as surety, for the faithful performance of his duties. This action was brought on this bond to recover defaults made by Brown. The plaintiff prosecutes error to reverse a judgment in favor of defendant.

Plaintiff's first contention is that the court erred in striking from the petition certain premiums collected by Brown for risks taken by him in Emporia and Wichita. These items were stricken out on the ground that Emporia and Wichita were outside the territory for which Brown was bonded. The contract of appointment is as follows: "The Fidelity and Casualty Company of New York \* \* \* has appointed the said E. E. Brown its agent for the following territory: Southeastern Kansas, including Parsons and Galena, with headquarters at Galena, Kansas." The language used in defining the territory is ambiguous and susceptible of more than one interpretation. The court could not therefore say, as matter of law, that Emporia and Wichita were not within Brown's territory. This is a question of fact which should have been submitted to the jury.

Plaintiff contends that it should have judgment on the pleadings, or, rather, that defendant should not have been permitted to introduce any evidence tending to show the items set out in the charges made against Brown were not true, for the reason that plaintiff's petition was sworn to and the answer was not verified. We find attached to the petition, as an exhibit, this itemized account, to which is attached a form of an oath signed by Robert J. Hillas, secretary and treasurer of the Fidelity & Casualty Company, but to this there is no jurat. The original petition was subsequently amended twice, but in neither amendment do we find any reference to the exhibit. Upon this question we think no error was committed.

For the reason assigned, the judgment of the court is reversed, and the cause remanded for further proceedings. All the Justices concurring.

#### TARMAN et al. v. CITY OF ATCHISON et al.

(Supreme Court of Kansas. June 11, 1904.)

MUNICIPAL IMPROVEMENTS—GRADING STREETS—NECESSITY OF PETITION.

1. The mayor and council of a city of the first class having a population of less than 25,000 inhabitants have the power to contract for the grading of streets and alleys, and to levy a special assessment upon the abutting property to pay the expense of bringing said streets and al-

lays to grade, without having been first requested by petition signed by the resident owners of the abutting property.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by J. M. Tarman and others against the city of Atchison and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

C. D. Walker, J. L. Berry, and Henry Keeler, for plaintiffs in error. A. F. Martin and J. W. Orr, for defendants in error.

GREENE, J. The plaintiffs were the owners of certain lots abutting upon Main street, in the city of Atchison, between Fifth and Fifteenth streets. In 1892 the mayor and council adopted a resolution authorizing the grading of said Main street between Fifth and Fifteenth streets, and entered into a contract therefor, and levied a special assessment upon the abutting property to pay the cost. The plaintiffs commenced this action to restrain the city and its mayor and council from making such assessment, and to enjoin the issuing of improvement bonds, and from certifying such assessment to the county clerk. The plaintiffs based their right to an injunction on the ground that the resolution passed by the city council authorizing the grading of said street and the levy of the special assessment to pay the expense thereof was unauthorized, because the owners of the adjoining property had not requested the mayor and council by petition to grade said street and assess the cost to the adjoining property. The petition alleged "that no petition signed by the property owners upon said street was presented to the mayor and council asking that such improvement be made, and that the cost thereof be levied as a special assessment upon the property abutting upon the street." To the petition the defendants filed a general demurrer. For the purpose of raising the question it was admitted that the city of Atchison was a city of the first class, with a population of less than 25,000 inhabitants. The court sustained the demurrer, and rendered judgment for costs against the plaintiffs.

The only question for our determination is, did the mayor and council have the power to grade the street, and levy a special assessment upon the abutting property, without first having been requested so to do by a petition signed by the owners of the property abutting upon such street? It appears to have been the policy of the state to withhold from the mayor and council of cities of the first class the power to open, widen, or grade any street or alley, and levy a special assessment upon abutting property to pay the expense or cost thereof, without having been requested so to do by a petition signed by the owners of said property. Commencing with section 4, c. 99, p. 139, Laws 1887, the provision reads: "Provided, that in case a peti-

tion of a majority of the resident property owners of a majority of the front feet on any street, or part thereof, shall petition the mayor and council to grade any street, and to grade and pave the intersections thereof, at the cost of the owners of the lands fronting upon the street described in the petition, and if such petition shall be ordered spread upon the journal of the council by a majority of the council elect, the mayor and council shall thereafter have the power to assess the cost of such improvement against the lots and parcels of land abutting on such street so improved." This provision was re-enacted in section 6, c. 73, p. 130, Laws 1891, and again in section 1, c. 274, p. 433, Laws 1895. In 1899, however, this policy was changed in so far as concerns cities of the first class with a population of less than 25,000 inhabitants. Section 1, c. 81, p. 169, Laws 1899, entitled "An act in relation to cities of the first class and to repeal chapter 274 of the Laws of 1895," reads as follows: "When the mayor and council shall deem it necessary to curb, gutter, pave, macadamize, or grade, or recurb, regutter, repave, remacadamize, or regrade, any street, lane, avenue, or alley, or any part thereof, or build or construct any sewer, within the limits of the city, for which a special tax is to be levied, such mayor and council shall by resolution declare such work or improvement necessary to be done; and such resolution shall be published for six days in the official paper of the city if the same be a daily, or for two consecutive weeks if the same be a weekly; and if a majority of the resident owners owning a majority in square feet of the lots or real estate liable to taxation therefor shall not within twenty days thereafter file with the clerk of said city their protest in writing against such improvement then such mayor and council shall have power to cause such improvement to be made, and to contract therefor, and to levy taxes as provided by law, and the work may be done before, during or after the collection of the special assessments, as may be deemed proper by the mayor and council; but none of the provisions of this act shall prevent the mayor and council from grading or regrading any street, lane or alley or part thereof and pay therefor out of the general improvement fund of such city; provided, that in cities of the first class having a population over twenty-five thousand no resolution to pave, macadamize, or grade, or repave, remacadamize, or regrade, any street, lane or alley shall be valid unless a petition asking such improvement has been ordered spread upon the journal, which petition must be signed by the resident owners of not less than one-half of the feet fronting or abutting upon such street, lane or alley to be improved; and provided further, that the feet fronting or abutting upon such street, lane or alley owned or held by persons not residents of said city shall not be taken into account in determining the sufficiency of any

such protest or any such petition. In case of paving, such petition shall state the width of the paving, and a specific description of the material to be used." It is quite apparent that the Legislature intended that all cities of the first class with a population of less than 25,000 might dispense with the petition as a condition precedent to the power of the council to pass a resolution authorizing the grading of streets and the levy of a special assessment upon the abutting property to pay the expense. The reason for removing this limitation on the powers of the mayor and council in cities with less than 25,000 inhabitants, and continuing it on such officers in cities having a population of more than 25,000 inhabitants, is not quite clear.

Plaintiffs in error contend that section 4, c. 99, p. 139, Laws 1887, which requires the petition referred to, has not been repealed, therefore the special assessment in this instance is void. Without deciding this question, but conceding that it has not been repealed, what does it avail the plaintiffs in error? The act of 1899 excepted from the provisions all cities with a population of less than 25,000, and limited the necessity for such petition to cities with a population of more than 25,000. The city of Atchison is within the exception. Sections 7 and 8, c. 73, p. 131, Laws 1891, confer authority upon the mayor and council of all cities of the first class to grade streets and alleys and levy a special assessment upon the abutting property to pay the expense. Possessing this power by legislative grant, the mayor and council of the city of Atchison had the power to grade its streets, and levy a special assessment upon the abutting property, without being requested so to do by a petition signed by the owners of such property.

The judgment of the court below is affirmed. All the Justices concurring.

(45 Or. 197)

### THOMPSON v. PURDY.\*

(Supreme Court of Oregon. June 27, 1904.)

NOTES—JOINT MAKERS—CONTRIBUTION—EVIDENCE—INSTRUCTIONS—WITNESSES—CROSS-EXAMINATION—MISCONDUCT OF COUNSEL—APPEAL—REVIEW—HARMLESS ERROR.

1. Where the court promptly sustained objections to certain objectionable remarks made by plaintiff's counsel during the examination of witnesses, and counsel's conduct was not further persisted in, and it was hardly possible that defendant's case was prejudiced thereby, such misconduct was not ground for reversal.

2. Where, in an action for contribution between joint makers of a note for the benefit of a corporation, defendant relied on an agreement to release him from liability on his making further contributions to the corporation to the amount of \$4,000, and testified to such agreement, it was proper to permit him to be asked on cross-examination whether such agreement was to borrow money with which to complete the mill belonging to the corporation.

3. Where defendant claimed to have made further advances to a corporation to an amount exceeding \$4,000 under an agreement that he

should thereby be relieved from liability to contribute to the payment of certain notes, and plaintiff denied that such additional amount had been advanced, it was proper to permit the secretary and bookkeeper of the corporation, who was also a stockholder and member of its board of directors, to be asked on cross-examination concerning the manner in which the business of the corporation was transacted, he having previously explained without objection that sometimes the company had money and sometimes it had not, and that if it had no money in the bank, or not sufficient, and "if a farmer wanted to sell his wheat," defendant "backed it."

4. Where, after charging on the general features of the case, the court gave the statutory injunctions touching the effect of evidence prescribed by B. & C. Comp. § 857, and in so doing charged that oral admissions and declarations of parties should be received with caution, "but that evidence of oral admissions and oral contracts, when proven, declarations of parties, constitute very strong testimony," such instruction was not erroneous as in effect charging that evidence of oral contracts should be received with caution.

5. Where it was not clear from the bill of exceptions what admissions and declarations were shown in the course of the trial, an instruction that oral admissions and declarations of parties should be received with caution could not be objected to on appeal.

6. Where the verdict rendered was below the amount actually due on the basis of 6 per cent. interest, an instruction permitting the allowance of 8 per cent. on a part of the debt which had accrued prior to the enactment of Laws 1898, p. 15, reducing the rate to 6 per cent., if error, was harmless.

Appeal from Circuit Court, Washington County; T. A. McBride, Judge.

Suit by T. W. Thompson against B. F. Purdy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff and defendant, by their joint notes, three in number, borrowed \$4,000 for the use and benefit of the Gaston Co-Operative Milling Company, and plaintiff, being compelled to pay the amount due, sued the defendant for contribution. The defendant answered that after the payment of the first note, he having theretofore advanced certain sums of money to the milling company, it was agreed between him and the plaintiff that he would continue to make advances to said company as they were needed until the total amount thereof should equal the said sum of \$4,000, and that thereafter the plaintiff should pay the remaining two notes, and release defendant from any claim for contribution arising on account of his having to pay such joint obligations; that defendant complied with the agreement on his part, and made the stipulated advances, exceeding said sum of \$4,000. The sole issue at the trial was upon the answer, and, judgment having been given and rendered for plaintiff, defendant appeals.

S. B. Huston, for appellant. J. C. Moreland, for respondent.

WOLVERTON, J. (after stating the facts). The bill of exceptions shows that defendant gave evidence in his own behalf tending to support the agreement set out in his answer,

\*Rehearing denied October 2, 1904.

and that he had complied on his part by making the stipulated advances to the milling company. On cross-examination plaintiff's counsel produced the books of the concern, and interrogated the witness with reference to certain entries made therein. Among other things, he was asked if he had not continued as president and manager of the concern until he put it into bankruptcy. Answering an objection made to the question, counsel for plaintiff stated that the witness acted as president and manager, ran the business, paid himself, and then carried it on, and "milked it till it was dry." These remarks, on motion of opposing counsel, were stricken out by the court, and the jury directed to disregard them. Without being answered, the question was superseded by another. Later on, while another witness was under examination, plaintiff's counsel again remarked, "I would like to bring out all the facts concerning this matter, but counsel is afraid of them." This language was also stricken out. The first error is predicated upon these several remarks of counsel as being calculated to prejudice the minds of the jury unfavorably to defendant. The objectionable tactics of counsel were not further persisted in, and, in view of the prompt action of the court, on its attention being called to the matter in each instance, in directing the jury to disregard the exceptional remarks, thereby giving it the stamp of its positive disapproval, it is hardly possible that defendant's cause could have been affected adversely. The alleged error cannot, therefore, be maintained.

While the defendant was still undergoing cross-examination, plaintiff's counsel, over objection as immaterial and irrelevant, further inquired: "This agreement with Thompson was to borrow the money and complete the mill, wasn't it?" to which he answered, "Yes, sir; it was for the purpose of putting the mill in operation." The examination appears to be relevant to the agreement relied on by defendant in his answer, and was proper cross-examination, being germane to the matter elicited in chief.

Another exception relates to the cross-examination of E. H. Jeter, who was secretary and bookkeeper of the milling company, also a stockholder and member of its board of directors. He was asked, "Who was treasurer of this concern?" to which he was permitted to answer, "Not having the record, I cannot state positively whether it was Mr. Hibbs or Mr. Raymonds." He further testified: "When persons came in to pay their bills, if Mr. Purdy was there and settled with them, he took the money. If Mr. Purdy wasn't there, I usually received the money." All this was responsive to a general inquiry as to the manner in which the business of the company was transacted. The witness had explained without objection that sometimes the company had money and sometimes it had not. If it had no money in the

bank, or not sufficient, and if a farmer wanted to sell his wheat, Purdy "backed it." At times he had checks given to him by various parties. Sometimes he would turn these over, and at others give his individual check for the difference, or give cash. The purpose of the inquiry seems to have been to sift defendant's account for advances which he claims to have made the company in pursuance of his alleged agreement, and it is not perceived in what respect it was not a perfectly legitimate inquiry. The purpose of cross-examination is to arrive at the truth, and when, under the exercise of a liberal discretion of the trial court, the witness speaks within the legitimate compass of the examination in chief, there can arise no pertinent exception.

In the course of its instructions the court said to the jury: "Oral admissions and declarations of parties should be received with caution, remembering the liability of the human mind to err in remembering the statements and declarations of parties. When the declaration of a party is brought in, we should cautiously receive it. Evidence of oral admissions and oral contracts, when proven, declarations of parties, constitute very strong testimony, of course. There can't be anything stronger when they are established." In saving an exception to this language, counsel said: "The court instructed, with reference to oral statements or contracts of parties, that they should be received with caution. I know that is the rule in reference to admissions, but I don't think that is the rule in reference to oral contracts." And the court replied, in the presence of the jury, "I think declarations of this character should be cautiously received." Error is assigned in this relation. What the court meant is not far to seek. After charging upon the general features of the case, the court was giving the statutory injunctions touching the effect of evidence (B. & C. Comp. § 857), as that they were the sole judges of the facts; that they were not bound to find in conformity with the declarations of any number of witnesses whose evidence did not satisfy the mind as against a less number; that every witness is presumed to speak the truth until discredited; that a witness shown to be false in one part of his testimony should be distrusted in others; that evidence is to be estimated not only by its intrinsic weight, but also by the evidence which it is apparently within the power of one side to produce and the other to contradict, etc.; and, lastly, that the admissions and declarations of the parties should be received with caution. As explanatory, the court further said: "When the declaration of a party is brought in, we should cautiously receive it. Evidence of oral declarations and oral contracts, declarations of parties, constitute very strong evidence, of course. There can't be anything stronger when they are established." The matter was further developed when counsel

made his objection. But there was certainly no attempt on the part of the court to instruct that evidence of oral contracts should be received with caution. If there were oral admissions and declarations shown to have been made with reference to such contract or otherwise, those the court enjoined the jury to receive with caution, but not, as we interpret the instructions, to receive with caution the evidence touching the oral contract itself. It is not clear from the bill of exceptions what admissions and declarations were shown in the course of the trial, and the relevancy of the instructions is not, therefore, entirely manifest, so that no error is disclosed by the record in the particular complained of.

The next assignment of error is with reference to the instruction of the court whereby the jury were directed, if they found for plaintiff, to allow 8 per cent. interest on the first two notes, they having been paid by plaintiff before the act of the Legislature reducing the legal rate of interest to 6 per cent. per annum went into effect. Laws 1898, p. 15. But whether this be error or not, it is, in any event, harmless, as a careful computation of the notes at the rate of 6 per cent. only will show that the verdict is below the amount actually due upon that basis.

Affirmed.

#### GENTRY v. PACIFIC LIVE STOCK CO.

(Supreme Court of Oregon. June 20, 1904.)

#### EQUITY PRACTICE—APPEAL—DECREE—EFFECT— RES JUDICATA—MATTERS CONCLUDED— EXAMINATION OF OPINION.

1. Under B. & C. Comp. §§ 406, 555, providing that, on an appeal from a decree in equity, the case shall be tried de novo and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court, the rights of the parties and the questions adjudicated must in subsequent litigation be ascertained from the decree on appeal, and not from that of the court below.

2. B. & C. Comp. §§ 406, 555, requires the trial court in an equity suit to set out in writing its findings of fact and conclusions of law, which must be separate from the decree, filed with the clerk, and incorporated in the judgment roll, and have the same effect as the verdict of a jury, except that on appeal the cause is tried anew without reference to such findings. *Held*, that a suit in equity is on appeal tried on the transcript and evidence accompanying it, without reference to the findings of fact or conclusions of law of the trial court, and they form no part in the decree, unless incorporated therein or made a part thereof by reference.

3. Plaintiff sued to enjoin defendant from trespassing on or interfering with its possession of certain land, alleging that defendant went into possession as the agent and servant of plaintiff and afterwards wrongfully took possession in his own behalf. The trial court issued a preliminary injunction, but on trial found that, when defendant entered on the land, it was unsurveyed public land which he intended to enter as a homestead, and that, though the entry was by the advice of plaintiff, it was not under any contract with it, and that

defendant did not hold possession for plaintiff's benefit, or as its agent or employé. A decree was entered dismissing the suit and vacating the preliminary injunction. On appeal the court found that there was no error, and decreed that the decree below be affirmed, the temporary injunction dissolved, and the suit dismissed. The opinion rendered showed that the Supreme Court concluded that defendant did enter into possession under the contract alleged in the complaint, but was of the opinion that this contract was illegal and void, and the decree below was affirmed on this ground. *Held* that, as affirmation of the trial court's decree did not involve approval of its conclusions of fact, the decree on appeal was not res judicata as to defendant's right to recover from plaintiff the value of hay cut from the premises by plaintiff during the pendency of the preliminary injunction.

4. Where the decree rendered on appeal in a suit in equity is ambiguous, the opinion may be examined to determine what point was actually decided, for the purpose of determining the extent of the decree as res judicata.

5. A decree on appeal in a suit in equity that the decree of the lower court be affirmed, and that appellant is not entitled to the relief prayed for, and that the complaint is without merit and should be dismissed, and a temporary injunction issued by the court below dissolved, is ambiguous, so as to justify examination of the opinion to determine what point was actually decided.

Appeal from Circuit Court, Malheur County; M. D. Clifford, Judge.

Action by James Gentry against the Pacific Live Stock Company. From a judgment for plaintiff, defendant appeals. Reversed.

John L. Rand, for appellant. Dalton Biggs, for respondent.

BEAN, J. In June, 1899, the Pacific Live Stock Company commenced a suit in equity in the circuit court for Malheur county against James Gentry to enjoin and restrain him from trespassing on or interfering with its possession of certain real property in that county, known as the "Rinehart Springs Ranch." In its complaint it alleged, in substance, that it was the owner in fee and entitled to the immediate possession of the property in question; that in 1895 it employed the defendant to reside upon and care for the property, cultivate and harvest the hay crop growing and to be grown thereon, to keep the place in repair, and generally to do any and all things needful and necessary to protect its possession and enjoyment thereof; that, in pursuance of such employment, Gentry went into possession as its agent and servant, and so remained until 1898, when he wrongfully and unlawfully, and in violation of his contract, pretended to take possession of the property in his own behalf, ousted the servants and employes of the live stock company, and threatened to appropriate to his own use large quantities of hay and grain growing thereon, its property. Gentry, for his answer, denied all the allegations of the complaint, except his possession of the property, and for an affirmative defense alleged that in October, 1894, the land in controversy

¶ 4. See Judgment, vol. 30, Cent. Dig. § 1323.

was unsurveyed public land of the United States; that he settled upon the same with the intention of entering it under the homestead law, as soon as it should be surveyed, and had ever since continued to reside upon, cultivate, and improve the same. The reply put in issue the new matter in the answer, and upon the trial the court found that on or about October 21, 1894, Gentry, with the consent and by the advice of the live stock company, settled upon the land in controversy, which was then unsurveyed public land of the United States, with the intention of entering it as a homestead; that at the time of his settlement an oral agreement was entered into by and between him and the live stock company, whereby he promised and agreed to harvest and put up the hay growing and raised annually on the land, and deliver the same to the company, and to establish and maintain a camp or stopping place for the accommodation and board of its employes and for the feeding of its cattle, in consideration of which it was to pay him \$25 a month and supply him with all necessary tools, machinery, labor, etc.; that Gentry did not enter into possession of the premises under or by virtue of any contract with or employment by the live stock company, and did not hold possession for its benefit or as its agent or employé; that it was not the owner or entitled to the possession of the property; that ever since October, 1894, except when prevented by the preliminary injunction, Gentry occupied and cultivated the land, with the intention of entering the same under the homestead law, and made valuable improvements thereon. As conclusions of law the court found that Gentry was entitled to the exclusive possession of the property and that plaintiff's complaint should be dismissed. A decree was thereupon entered, ordering and adjudging that plaintiff's complaint, "filed herein, be, and the same is hereby, dismissed, and that the temporary injunction existing herein against the defendant be, and the same is hereby, dissolved and vacated." From this decree an appeal was taken, and on a trial de novo this court found that there was "not error as alleged," and "considered, ordered, and decreed that the decree in this cause in the court below rendered be, and the same hereby is, in all things affirmed; and, it appearing to the court and the court further finding that the appellant is not entitled to the relief prayed for, or any part thereof, and that the complaint herein is without merit and should be dismissed, and the temporary injunction issued by the court below dissolved and vacated." Thereafter Gentry commenced this action against the live stock company to recover the value of the hay taken by it from the premises in controversy after the issuing of the preliminary injunction. The

court below held that the decree in the equity suit was a conclusive adjudication in favor of Gentry as to his right to the possession of the property and to the hay sued for, and that the only issue for trial was the question of value.

Under our statute, on an appeal from a decree in a suit in equity, the case is tried de novo, and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court. B. & C. Comp. §§ 406, 555. The rights of the parties and the questions adjudicated must therefore be ascertained from the decree on appeal, and not from that of the court below. The statute requires the trial court, in rendering its decision in an equity suit, to set out in writing its findings of fact and conclusions of law. Such findings of fact and conclusions of law, however, must be separate from the decree, filed with the clerk, and incorporated in the judgment roll. They are to have the force and effect of, and to be equally conclusive as, the verdict of a jury in an action at law, "except on appeal to the Supreme Court the cause shall be tried anew without reference to such findings." B. & C. Comp. § 406. Under this statute and section 555, B. & C. Comp., a suit in equity is tried in this court upon the transcript and evidence accompanying it, without reference to the findings of fact or conclusions of law of the trial court, and they form no part of the decree, unless incorporated therein or made a part thereof by appropriate reference. The appeal in an equity suit is from the decree, which is required to be separate from the findings of fact and conclusions of law.

In the suit of Pacific Live Stock Company v. Gentry, 38 Or. 275, 61 Pac. 422, 65 Pac. 597, the decree of the court dismissing the complaint was affirmed, not the findings of fact upon which the decree was based, which were not incorporated in or made a part of the decree, and therefore were in no way approved or affirmed. Indeed, the opinion shows that this court did not agree with the trial court's construction of the evidence. Instead, it concluded that Gentry entered into possession of the property under the contract as alleged in the complaint, but that such contract was illegal and void, and the court would refuse to enforce it, because both parties contemplated the acquisition of the title to public land in violation of the laws of the United States. The decree was a final adjudication as to the right of the company to maintain the suit, and is a bar to a subsequent prosecution of another suit by it against Gentry upon the claim or demand. In an action between the same parties upon a different claim or demand, however, it can operate as a bar or estoppel only as to matters in issue and which were actually litigated and determined. *La Follett v. Mitchell*, 42 Or. 465, 69 Pac. 916, 95 Am. St. Rep. 780; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195. Neither the title to the hay grown on the disputed premises



nor the question of the rights of the respective parties thereto was in issue on the former suit, or litigated or determined thereby. The only question was the right of the live stock company to enjoin and restrain Gentry from violating the contract alleged in the complaint, and from trespassing on the premises and interfering with its possession and right thereto. The plaintiff was denied the relief sought, not because the contract was not made as averred, but because it was against public policy and good morals. The court refused to enforce the contract because of its illegality, and dismissed the suit, without determining any other issue in the case. It is true the decree itself is silent as to the ground upon which it was rendered, but resort may be had to other parts of the record to ascertain that point. As a general rule, an estoppel by judgment resides in the judgment itself, and not in the reason for rendering it, and, when the decree is definite and certain, the opinion of the court cannot be used to show what matters were considered or determined. 1 Van Fleet, Former Adjudication, § 278. Where, however, the decree is ambiguous, as in this case, or fails to show upon which of several issues it is founded, the opinion may, we think, be examined to determine what point was actually decided. Strong v. Grant, 2 Mackey, 218; Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441; Legrand v. Rixey's Adm'r, 83 Va. 862, 3 S. E. 864.

It follows that the judgment of the court below must be reversed, and a new trial ordered.

(5 Or. 208)

**EASTERN OREGON LAND CO. v. ANDREWS.\***

(Supreme Court of Oregon. June 20, 1904.)

**PUBLIC LANDS—GRANT—LOCATION OF GRANT—EVIDENCE—PRIMA FACIE EVIDENCE.**

1. Where, on an issue as to the exterior limits of a land grant, plaintiff introduced in evidence a diagram from the office of the Secretary of the Interior, certified to by the acting Commissioner of the General Land Office, showing the primary limits of the land, the diagram was to be taken prima facie to correctly indicate the limits of the grant.

2. On an issue as to the exterior limits of a land grant in aid of the construction of a military road, which grant was of alternate odd-numbered sections, to the extent of three sections in width on each side of the road, plaintiff introduced in evidence a diagram from the office of the Secretary of the Interior, certified to by the acting Commissioner of the General Land Office, showing the primary limits of the land, and defendant introduced a plat from the office of the Secretary of State of the state, accompanied by a certificate of the Governor, to the effect that the plat showed the location of the line of the road, and the testimony of a surveyor was introduced to show the limits of the grant based on such plat, but it did not appear that either the act of Congress or that of the Legislative Assembly of the state, relative to the grant, had required that any such map or plat should be filed in the office of the Governor or of the Secretary of State. Held, that defendant's evidence was insufficient to overcome the prima facie case made by the diagram.

\*Rehearing denied October 8, 1904.

Appeal from Circuit Court, Sherman County; W. L. Bradshaw, Judge.

Action by the Eastern Oregon Land Company against William G. Andrews. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This case comes here on a cross-bill in equity, so treated by stipulation of the parties, although in form an answer interposed as a defense to an action in ejectment instituted by the above plaintiff against defendant to recover the possession of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , otherwise described as lot 3, and the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , of section 7, township 1 N., range 17 E. of the Willamette meridian. The plaintiff claims title through grant by the general government by act of Congress approved February 25, 1867 (14 Stat. 409, c. 77), to The Dalles Military Wagon Road Company. The land lies within the limits of the old Northern Pacific Railroad grant, which was afterwards forfeited by act of Congress approved September 29, 1890 (26 Stat. 496, c. 1040 [U. S. Comp. St. 1901, p. 1508]); and the defendant claims to have acquired the equitable title thereto through settlement by invitation and license of the Northern Pacific Railroad Company, and continuation of such settlement and purchase from the general government in pursuance of the forfeiture act and acts supplementary thereto. He alleges that, after due and regular proof of settlement, he being qualified thereto, and the payment of all legal and necessary fees, including the purchase price required by law, the Register and Receiver of the local Land Office at The Dalles, Or., on December 22, 1896, duly issued to him a final cash receipt and certificate for the land; that thereafter the Secretary of the Interior, without warrant or authority of law, canceled the same; and that the United States still holds the purchase money and fees so paid. He further alleges that he has since 1886 been in the quiet, peaceable, and lawful possession of said premises, and that since the issuance to him of said final certificate he has been and now is the equitable owner and entitled to the possession; that said premises are entirely outside of and beyond the limits of the company's grant, and for that reason the patent to the company under which plaintiff claims is void and without legal effect, in so far as it pertains thereto. The defendant being successful in the trial court, the plaintiff appeals.

B. S. Huntington, for appellant. J. F. Moore, for respondent.

WOLVERTON, J. (after stating the facts). To support his cross-bill, the defendant introduced in evidence, over objection, a certified copy of the original map and plat of The Dalles military wagon road, embraced within townships 1 and 2 S., ranges 16 and 17 E. of the Willamette meridian, on file in the office of the Secretary of State at Salem, Or.

The accompanying certificates show the original to have been calculated and platted from the field notes of the survey made by D. P. Thompson, the surveyor for the road company, certified to by him June 8, 1869, among which is one by George L. Woods, Governor of the state, attested by the Secretary, showing that the plat had been duly filed in his office, and that the road had been built and completed in all respects as required by the act of Congress and by the act of the Legislative Assembly of the state of Oregon, approved October 20, 1868, and that the same had been accepted. The road is indicated on this map by two lines, in the main parallel, although at some points they seem to diverge, and at others to converge, so that the distance between them is not altogether uniform. Where it passes the land in dispute, the government survey sectionizing the public lands is indicated, showing the location of the road with reference thereto. A. W. Mohr, a civil engineer, being called on behalf of defendant, produced a map, which he testifies is an enlargement 12 times according to scale of the certified map from the Secretary of State's office, indicating the location of the land in dispute with reference to the line of the road. Upon this map appear produced tangential curves, three miles distant from points on the road nearest to the land. One set of curves is extended from points designated on the northerly margin, and another set from points at the center of the road. Those extended from the margin touch the southwest corner of the fractional S. W.  $\frac{1}{4}$  of section 7; one cutting the corner squarely, and the other standing inside perhaps a tenth of a mile, but neither of them touching the land in dispute. Those extended from the center of the road, however, do not reach section 7 at any point. Mohr further testifies that the margin of the road is 15 chains distant from the center, and that the road is 30 chains wide at the points designated. This map was also allowed to go in evidence over objections. Defendant then produced and introduced in evidence a certified diagram from the Department of the Interior, showing the primary limits of the wagon road grant as it affects the premises in question. This diagram shows the S. W.  $\frac{1}{4}$  of section 7 to be within the adjusted primary limits of the grant; the adjustment appearing to have been made with reference to the smallest legal subdivisions of the government survey. Other testimony was adduced, showing the settlement of defendant upon the land, his continuous residence thereon, the payment by him of the regular fees, including the purchase price as required by law, the issuance to him of the final cash certificate therefor, and the subsequent cancellation thereof by direction of the Secretary of the Interior; and, finally, a certified copy of the United States patent No. 10, to The Dalles Military Wagon Road Company, was introduced, which comprises the disputed prem-

ises. Such, for all practical purposes, is the case made for defendant, and the especial and signal contention of counsel is that the land in controversy lies beyond the limits of the wagon road grant, and that, although patent has issued to that company, the defendant, by reason of his settlement and the payment of the purchase price to the general government, has become the owner in equity, and by reason thereof is entitled to have the patent declared void as it affects the defendant, and he decreed to be entitled to hold the legal title.

By the act of Congress of February 25, 1867 (14 Stat. 409, c. 77), there was granted to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Canon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Ft. Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road, which act also authorized the state, with a view to subserving the purposes of the grant, to dispose of such lands. Section 3 of the act prescribed that the road should be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may direct; and section 6 directed the Surveyor General for the district of Oregon to cause the lands to be surveyed when the state should have enacted the necessary legislation to carry the act into effect. By an act of the Legislative Assembly of the state of Oregon, approved October 20, 1868, all such lands, rights, and privileges accruing to the state by reason of such act of Congress were donated to The Dalles Military Road Company. Sess. Laws 1868, p. 3. By a later act of Congress, approved June 18, 1874 (18 Stat. 80, c. 305 [U. S. Comp. St. 1901, p. 1517]), Congress authorized the issuance of patents for such lands where the road has been shown by the certificate of the Governor of the state to have been constructed and completed as in the original grant provided. The Surveyor General has, of course, made the contemplated survey of the public lands along the course of the located road as it passes the premises demanded, as no map could otherwise have been made of the primary limits of the grant; and the diagram certified to by the acting Commissioner of the General Land Office must be taken prima facie to indicate correctly the exterior limits thereof. How the adjustment of the grant was made does not appear. Presumably it was by the Secretary of the Interior, whose duty it was to make all such adjustments with relation to the public domain and to administer the grant; and, manifestly, from an inspection of the diagram, it was made with reference to the smallest legal subdivisions, which was probably in accord with the rules and practice of the Interior Department of the general gov-

ernment. 28 Am. & Eng. Encyc. Law, 877; *Altshul v. Clark*, 39 Or. 815, 65 Pac. 901; *Knight v. U. S. Land Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. Ed. 931; *Scott v. Kansas Pacific Ry. Co.*, 5 Land Dec. Dep. Int. 468; *In re Missouri, Kansas & Texas Ry. Co.*, 11 Land Dec. Dep. Int. 130. Prima facie, at least, this diagram shows that the road company, from which plaintiff declaims title, was entitled to all lands designated by odd sections within the designated exterior boundary, and consequently that the patent was regularly issued to the company.

Such being the record of the Interior Department, it entails upon the defendant the burden of impeaching it. To do this, counsel rely upon the certified plat from the Secretary's office, and the measurements and deductions made therefrom by the witness Mohr, as demonstrated by his enlarged plat, showing the three-mile limit by tangential lines drawn from points nearest the premises. The plat from the Secretary's office appears from accompanying certificates to have been made from the field notes of the survey of the road; but it is unaccompanied by the field notes. The certificate of Gov. Woods attests that the plat shows, in connection with the public surveys so far as then made, the location of the line or route as actually surveyed, and upon which the road company's road was constructed, and that the road had been built and completed in all respects as required by the acts of Congress and the Legislature of the state. Neither the act of Congress nor of the Legislative Assembly of the state required that any such map or plat should be filed in the office of the Governor or of the Secretary of State; nor does it appear that the plat so filed was the one approved by the Secretary of the Interior, representing the final survey and definite location of the road, much less that the Secretary of the Interior made use of the plat, or made his adjustment from it as the basis for determining the limits of the grant. Mr Mohr seems to have treated the two parallel lines shown on the plat from the Secretary of State's office as indicating the outside marginal limits of the road, as well as the route of location, and, pursuing the idea, has made it 30 chains, or three-eighths of a mile, in width at the points located nearest the land in dispute, selected as the bases of his tangential measurements. It is hardly possible that the road should have been surveyed and located at any point of this width; the more reasonable hypothesis being that the two lines were used together to indicate the route of the surveyed line, with no intention of designating thereby the marginal limits, and that the witness has mistaken the very basis of his deductions. If wrong in his premises, he is inevitably wrong in his conclusions.

But, with all this, giving full credence to the plat as indicating the final location of the road as constructed, and conceding that Mohr is correct in his premises, it does not appear to us that it is sufficient to impeach the official record of the Land Department of the general government; that is to say, it is not the better evidence as to the regularity of the adjustment of the grant. If the land in dispute was without the grant, the Secretary of the Interior was without power or authority to place it within, much less to issue a patent therefor to the road company. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; *Burfenning v. Chicago, St. Paul, etc., Ry. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175.

But to show that fact there needs be competent proof of it, and to show it against the prima facie records of the Land Department the proofs must not only be competent, but clear and convincing. A patent of the United States is presumptive evidence that the department had jurisdiction and that it rightfully exercised it, and, if there could have been any state of facts which under the laws would have given the department jurisdiction to dispose of the land comprised in the patent, the presumption is that such state of facts existed. *King v. McAndrews*, 111 Fed. 860, 50 C. C. A. 29; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875. There is undoubtedly a map of definite location of this road on file with the Land Department and approved by that department (see *Wilcox v. Eastern Oregon Land Company*, 176 U. S. 51, 57, 20 Sup. Ct. 269, 44 L. Ed. 368), which forms the real basis for the adjustment of the grant and constitutes the best evidence upon the subject, and, until that is produced and shown to be inaccurate, or the adjustment made from that as a basis is proven unwarranted, we cannot presume to set aside and nullify the action of the Secretary of the Interior, and declare void a patent issued by the general government. The defendant must therefore fail upon his proofs, as not having overcome by competent evidence the prima facie title of the plaintiff, exhibited by the records of the Land Department.

It follows that the decree of the trial court must be reversed, and the cross-bill dismissed; and it is so ordered.

(46 Or. 211)

#### ANDERSON v. OREGON R. CO.

(Supreme Court of Oregon. June 27, 1904.)

RAILROADS — FIRES — EMISSION OF SPARKS —  
SPARK ARRESTERS—CARE REQUIRED—  
EVIDENCE—INSTRUCTIONS.

1. While a railroad company is bound to adopt the most approved mechanical inventions and appliances to prevent the escape of fire from its locomotives, when it has exercised reasonable diligence in "obtaining" and putting them into practical use it is not liable for damages incident to the escape of fire therefrom.

2. Instructions that a railway company was bound to use the best appliances to prevent fire

from escaping from its engines, and that the railroad's duty to use reasonable care was performed when the company had equipped its engines with the most approved spark-arresting appliances, and had used reasonable care to keep them in such condition as to properly perform their functions, etc., were erroneous in further defining the reasonable care required to be "the actual adoption of the most approved and best-known spark-arresters and appliances," instead of the "procuring" of such most approved appliances.

3. Where defendant railroad company procured the court to give an instruction that the jury should find for defendant, unless defendant failed to use the best and most approved appliances to prevent the unnecessary escape of fire from its locomotives, it was not entitled to object to another instruction requiring the railroad company, in the exercise of reasonable care, to actually adopt the most approved and best known spark-arresters and appliances, instead of to exercise reasonable care in procuring the same.

4. Where there is no evidence of certain facts in a case, the mere statement of the court that, if the jury find such facts to exist, they may draw certain inferences therefrom, is erroneous, as misleading and abstract.

5. In an action for the destruction of property by sparks communicated from a railroad locomotive, it is sufficient, to establish a prima facie case, for the plaintiff to show that the fire was communicated from an engine of the railroad company to his property, resulting in the damage or destruction thereof.

6. In an action for damages by fire set out by a railroad locomotive, evidence that sparks escaped from the engine in large showers, or that sparks of unusual size were emitted and carried to a great height, or that an unusual volume was emitted, was admissible to show that the engine was not provided with proper spark-arresters, was out of repair, or was carelessly and negligently managed.

7. Where, though the bill of exceptions certified that there was no evidence offered tending to prove that there was a heavy grade at the point where the fire alleged to have been communicated from a railroad engine occurred, there was evidence that the engine which emitted the sparks was laboring heavily at the time, and that the train was then "making the run" for a hill just beyond, and also that the engine was already affected by the beginning of the grade at the time the fire was emitted, such evidence was sufficient to justify in submitting to the jury whether there was a heavy grade at the point where the alleged fire occurred, the term "point" as used in the instruction not being limited to the exact place of the fire.

8. Where, in an action for damages by fire emitted from a railroad locomotive, three witnesses testified that the engine was working hard at the time, that it threw fire and heavy cinders through black smoke, and that the cinders were scattered all over the track, such evidence warranted an instruction submitted to the jury whether the engine emitted an unusual quantity of sparks at the time, though one of the witnesses testified that there was nothing unusual about the puffing of the engine, or the cinders emitted, on the instance in question.

9. It is not error to refuse a requested instruction substantially covered by an instruction given.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Action by Louis Anderson against the Oregon Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff seeks by this action to recover damages for loss of wheat by fire while in storage in a warehouse at Cayuse Station, in Umatilla county, which it is alleged was caused by the negligence of defendant in the operation of a train of cars. The negligence stated, in brief, is that the engines of defendant were unskillfully and improperly constructed, and improperly, carelessly, and negligently managed and overloaded, by reason whereof large quantities of sparks, burning cinders, and coals were emitted and ejected from such engines while passing in the vicinity, and were thrown upon said warehouse and other buildings in proximity thereto, which ignited and set them on fire, whereby they, together with their contents, were destroyed. The defendant is the appellant here.

H. F. Conner, for appellant. S. A. Lowell, for respondent.

WOLVERTON, J. (after stating the facts). The first assignment of error relates to the first clause of paragraph No. 4 of the court's charge to the jury, which is as follows: "I instruct you that a railroad company is bound to use the best or most approved appliances for the purpose of preventing sparks or fire from escaping from its engines and being communicated to property of others rightfully lying upon or along the right of way." The objection to this instruction proceeds upon the idea that the company was not absolutely bound to provide its engines with the most approved appliances for preventing the escape of sparks and cinders, but only to exercise reasonable care and diligence in supplying and annexing such appliances. The general rule seems to be that the company must adopt the most approved mechanical inventions and appliances to prevent the escape of fire, but that, when it has exercised reasonable diligence and precaution in obtaining and putting them into practical use, it has discharged its duty to those who are subject to the dangers incident to the escape of fire. If the company has in good faith sought to procure the best appliances, and has exercised reasonable care and diligence in obtaining them, and if, under all attending and surrounding circumstances, it has acted in the premises as a reasonable, prudent, and cautious person, having due regard to the rights of others, would have acted, then it has discharged its whole duty, and would not incur liability for damages arising from the escape of fire. The basis of the action is negligence, consisting in the want of the exercise of due care in providing the most approved appliances in known practical use. "The true rule is," says Judge Sanborn, with commendable perspicuity, "that, where the defendant has exercised reasonable care to provide the most effective machinery in known practical use to prevent the burning of private property,

¶ 5. See Railroads, vol. 41, Cent. Dig. §§ 1710, 1781.

it has fully discharged its duty in that regard." *Lesser Cotton Co. v. St. Louis, etc., Ry. Co.*, 114 Fed. 133, 141, 52 O. C. A. 95. See, also, 13 Am. & Eng. Encyc. Law (2d Ed.) 473; *Pierce, Railroads*, 433; 2 *Thomp. Comm. Law Neg.* § 2253; *Gulf, etc., Ry. Co. v. Reagan* (Tex. Civ. App.) 82 S. W. 847; *Missouri, etc., Ry. Co. v. Mitchell* (Tex. Civ. App.) 79 S. W. 94; *Flinn v. Railroad Co.*, 142 N. Y. 11, 36 N. E. 1046; *Railroad Co. v. Nelson*, 51 Ind. 150; *Hoyt v. Jeffers*, 80 Mich. 181. This instruction, therefore, states the law in the abstract, but, as applied in practice, the railroad company discharges its whole duty when it uses reasonable care and diligence in supplying and putting into practical use such most approved appliances. The court, however, gave another instruction at the request of defendant, which counsel for plaintiff claims cures the evil, if one exists. It is No. 12, and reads as follows: "The duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, when it uses reasonable care to keep them in such a condition as to properly perform their functions, when it places its locomotives in charge of competent and skillful engineers, and when its locomotives are operated so as not to unnecessarily scatter fire." The two instructions read together tell the jury, in effect, that the company is not liable unless the fire is communicated through its negligence, and that the duty to use reasonable care is performed when the company has equipped its engines with the most approved and best known spark-arresting appliances which are approved by the best practice of modern railroad managers, and when it uses reasonable care to keep them in a condition to perform their functions properly. But these do not eradicate the vice. It defines the reasonable care required to be the actual adoption of the most approved and best known spark-arresters and appliances, whereas the care and diligence required under the rule is in procuring such most approved appliances. Of course, the duty to exercise reasonable care is discharged when the appliances have been adopted and furnished, but it is also discharged when the company has exercised reasonable care and skill in its endeavor to furnish such appliances. The instructions are manifestly inaccurate in their statement of the law. But the defendant asked and procured to be given still another instruction, incorporating precisely the same idea as the first paragraph of No. 4. We allude to instruction No. 14, which reads: "I instruct you that, if you find that the wheat described in the complaint was burned by a fire communicated from the locomotive of the defendant, you must nevertheless find for the defendant, unless you further find, either that the defendant has failed to use

the best and most approved appliances to prevent the unnecessary escape of fire from its locomotives, or unless the engines were overloaded," etc., so that, whatever error there appears to be in the statement of the law, the defendant was actively instrumental in bringing it about, hence it cannot be heard to complain, and the case ought not to be reversed because of it.

The second and third assignments of error, which may be considered together, relate to the latter paragraph of instruction 4, which reads as follows: "And if it is proved that an engine, at a particular time, threw an unusual quantity of sparks or coals of fire, you may consider that fact as to whether or not the engine, at such particular time, was either not in good order, or not properly constructed, or not skillfully and carefully managed, or otherwise"—and to the fifth instruction, namely: "I instruct you that it is the duty of the railroad company to see to it that its engines and trains are skillfully and carefully managed. And in this connection I instruct you that if you should find from the evidence that there was a heavy grade at the point where the alleged fire occurred, and that a train passing said point just prior to the discovery of the fire was so heavily loaded as to require the engines to be worked hard, and to cause them to emit an unusual quantity of sparks, these are circumstances which you have a right to consider in determining whether or not the engines attached to said train were skillfully and carefully managed." The bill of exceptions shows that the following is all the testimony offered or received at the trial relating to the amount of sparks or coals of fire emitted from the locomotive or locomotives which it is claimed communicated the fire to the buildings. *Martin Madison*, being called as a witness, testified on direct examination: "The train which was east-bound passed Cayuse Station soon after noon on the 30th day of March, 1903. After doing some switching, the train backed up to the west end of the station yard, and, after stopping there from two to five minutes, went east past the warehouse, which was burned, and then took a run for the hill which is east of Cayuse Station. When they passed the warehouse the front engine was all right, but this back engine, the little one, was doing its best. That is a common occurrence. They all do that. It is a heavy grade east of the station, and the engines have to work hard. The hind engine threw a little fire. It worked all it could when it passed the warehouse. I do not know anything about the grade opposite the warehouse, but I do know that the engines have to work pretty hard to get up the grade east of the station." And on cross-examination: "Q. You say the head engine was all right? A. Yes, it went all right, to my notion. The hind engine threw a little fire. It worked all it could." *Mrs. Sarah Strahn*: "I was cooking for the sec-

tion boss at Cayuse on March 30, 1903. I was seated in the section house (referring to Exhibit A). I saw the train come in. I do not know how large the train was. I know it was a heavy, loaded train, but do not know the number of cars. It was switching there. I heard the engine puffing and sending the heavy cinders through the heavy smoke. I always sit there and watch the cinders as the train is backing in and out. These cinders are scattered all over the track. I saw the cinders and heavy puffing when the train was pulling out, and cinders going through the smoke. I saw a good deal of smoke coming out of the rear engine that did the switching. It was dark blue or black, and I saw some cinders. The engine was puffing quite hard when it went by, but there was nothing unusual in that, not for that place, because they always do that. I saw cinders coming out of the engine when it was switching. I did not count them." Questioned by defendant's counsel: "Were there a very large number? A. Only as they usually come out. Q. There was nothing unusual about that place? A. No, sir." And Jeremiah Galvin: "Q. You saw black smoke come out of the engine? A. There was black smoke sweeping over the warehouse. It was from the engine." And, continuing: "Was at Cayuse Station on March 30, 1903. Was there at the time of the fire. I noticed, as I drove up to the warehouse, there was a train standing on the track close to the warehouse, down the track from the warehouse, and I noticed a train near the bridge soon after I got in the warehouse; that train pulled up and passed, I noticed also. I concluded it was a very heavy train from the way the engine exhausted. I had a team tied at the back part of the warehouse, so I stepped out at the time and noticed that the engines were working very hard." And on cross-examination: "I was on the north side of the warehouse, looking after my team. The warehouse was between me and the train. There was black smoke sweeping over the warehouse. I presume it was from the engine. It was pretty black. I think the engine on the rear end of the train was the heaviest smoke. The train was moving slow." The bill of exceptions also certifies that there was no evidence offered during the course of the trial tending to prove that there was a heavy grade at the point where the alleged fire occurred.

The objection to these instructions is that they are misleading and abstract, because it is insisted there was no evidence introduced tending to show that there was a heavy grade at the point where the alleged fire occurred, or that defendant's engines emitted an unusual quantity of sparks. If, as a matter of fact, there was no evidence in the case tending to prove these conditions, the mere statement of the court to the jury that, if they found them to exist, they could draw certain inferences therefrom, is the assump-

tion of a fact in evidence contrary to the truth, making the instruction both misleading and abstract—misleading, because it submits to the jury a matter as if there were evidence to support it; and abstract, because in reality there is no question of the kind in the case, and it would constitute error. *Breon v. Henkle*, 14 Or. 494, 13 Pac. 289; *Woodward v. O. R. & N. Co.*, 18 Or. 289, 22 Pac. 1076. It may be further premised that railroad companies engaged in a lawful business, although they employ a dangerous element to generate the propelling force of their engines, can only be held accountable for loss or damage occurring to others by the communication of fire to their property because of the want of proper care and precaution, or, in other words, through their negligence in allowing it to escape. When, therefore, damages are sought to be recovered of the companies for the destruction of property by fire, the gist of the action is negligence, which must be sustained by proof, and they cannot be held accountable for unavoidable or unusual consequences of the proper operation of the enterprise; that is, of their locomotives and trains. *Flinn v. Railroad Co.*, *supra*; *Peck v. Railroad Co.*, 165 N. Y. 847, 59 N. E. 206; *Rosen v. Railroad Co.*, 83 Fed. 300, 27 C. O. A. 534; *Railroad Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57. It is sufficient to establish a *prima facie* case, however, for the plaintiff to show that fire has been communicated from an engine of the railroad company to his property, resulting in the damage or destruction thereof. Such proof raises a presumption of negligence in the construction or management of the engine, and casts upon the defendant the burden of rebutting it. Such is said to be the uniform holding of the courts of England and of many of the states of the Union, and is now the established doctrine of this court. *Koontz v. Railroad Co.*, 20 Or. 3, 23 Pac. 820; *Richmond v. McNeill*, 31 Or. 842, 358, 49 Pac. 879; *Spaulding v. Railway Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Railroad Co. v. Westover*, 4 Neb. 268; *Railroad Co. v. Mills*, 42 Ill. 407. Although the plaintiff may thus make out a *prima facie* case, it is pertinent and perfectly competent for it to produce other proofs, showing negligence, that may have a tendency in that direction. Thus, it may show that sparks were observed to escape from the engine in large showers, or in large and unusual size, or were carried to a great height and far away, or in unusual volume or quantities, from which the inference may be deduced that the engine was not provided with the proper spark-arresters, or was out of repair, or was carelessly or negligently managed; such manifestations not being the probable result of the ordinary working of an engine in good order and skillfully managed. *Railroad Co. v. Taylor*, 92 Ky. 55, 17 S. W. 198; *Townsend v. Langles* (C. C.) 41 Fed. 919; *Johnson v. Railway Co.* (Minn.) 16 N. W. 488; *Henry v. S. P. R. Co.*, 50 Cal.

176. The trial court in giving the instructions complained of had in mind, no doubt, some conditions of the kind, and the question recurs, was there evidence having a tendency to their support? The court has certified that there was no evidence tending to prove that there was a heavy grade at the point where the alleged fire occurred. It is not to the purpose that there was not a heavy grade at the exact point; that is, immediately opposite. The evidence does tend to show that there was a hill or heavy grade east of the station, for Madison testified that the train went east, past the warehouse, and then took a run for the hill, which is east of the station; that it is a heavy grade; that the first engine was all right, but that the back engine, the little one, was doing its best; that it worked all it could when it passed the warehouse. From this testimony the very natural inference would be that the grade was just east of the station, and that the train had begun to ascend before its entire length had passed, as the hind engine was seen to be doing its best when it passed the station. It would be quite technical to construe the words "at the point" to mean at the very or exact point, when the grade was in such proximity that the train had begun its ascent before it had cleared the warehouse, and to require some tendency of proof upon that construction, when for all practical purposes, as it relates to the case in hand, the grade was at the station, not opposite, we should think, but at the station or point where the fire occurred, its foot resting at the station, or so near it that its effect was fully produced upon the rear engine before or as it was passing the station. In this view there was evidence to support this feature of the instruction.

As to the other objection, that there was no evidence tending to show that the engines were ejecting unusual quantities of sparks, the instruction must again receive a reasonable interpretation in connection with the facts of the case as developed. By a reference to the testimony of the three witnesses called upon the subject in hand, it will be observed that one of them testified that the little or hind engine was doing its best, was being worked all it could, when it passed the warehouse, and that it threw a little fire; another, that she heard the engine puffing and sending the heavy cinders through the heavy smoke, that she saw the cinders going through the smoke, and they were scattered all over the track; and the other, that he concluded the train was very heavy from the way the engine exhausted, that the engines were working very hard, and that he saw black smoke ("it was pretty black") sweeping over the warehouse, and "the train was moving very slow." Within the cases last above cited, this evidence was of a nature competent to go to the jury, from which they could rightfully infer that the engines were either not in good order or were not skillfully and

carefully managed. It is very apparent, if the testimony is to be believed, that the hind engine was working very hard, doing its best, and that a large volume of smoke and quantities of heavy cinders were emitted therefrom, so much so that the cinders were scattered all over the track. That it ejected an unusual quantity of sparks or coals of fire may be fairly inferred when viewed in the light of the ordinary workings of the train under similar conditions. True, one of the witnesses said there was nothing unusual about the puffing of the engines, or the cinders coming out of the little one at that place, yet this did not preclude the effect of the entire testimony that there were large quantities of heavy cinders ejected, and, while the expression of the court may have been somewhat inapt, yet we cannot think that the jury were misled by it or induced to take a wrong view of the situation. Indeed, they could not have been misled, considering the reasonable intentment of the instructions, which were manifestly germane to the subject-matter of the controversy.

This leaves for our consideration the fourth and fifth assignments of error. The fourth relates to the interpolation of the phrase "and did so do" in an instruction asked by the defendant before giving it. By a grammatical construction of the latter instruction, however, the language complained of does not change its meaning in a material sense, serving only as reiteration of the preceding expression. The fifth relates to an instruction requested but not given. This was, for all practical purposes, covered by instruction 12 of the general charge, hence there was no error in refusing it.

The judgment of the trial court will be affirmed, and it is so ordered.

#### FIRE ASS'N v. ALLESINA.

(Supreme Court of Oregon. June 27, 1904.)

INSURANCE — AWARD — VACATION — ACTIONS —  
EQUITABLE DEFENSES — CROSS-BILL.

1. Where appraisers are appointed to adjust a fire loss, the award cannot be impeached or set aside for fraud in a court of law.

2. B. & C. Comp. § 391, provides that in an action at law, if the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity, he may, on filing his answer therein, also file a complaint in the nature of a cross-bill, which shall stay the proceedings at law, and the cause thereafter shall proceed as a suit in equity, in which the law action may be perpetually enjoined, or allowed to proceed in accordance with the final decree. *Held* that, where a defendant in an action at law was entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he was entitled to file a cross-bill, though he filed an answer to the action at law alleging a complete defense thereto.

3. Where, in an action on a fire policy, after an award by appraisers, insurer filed an answer denying the validity of the policy by reason of a misstatement of interest, and also by reason of insured's fraud in obtaining an agreement

of submission, and in submitting false testimony to the arbitrators, and also claimed that the award should be set aside for misconduct of assured and one of the arbitrators in privately discussing the merits of the case, and also because the umpire and one of the appraisers made the award without hearing any evidence or obtaining any information, except the inspection of the insured's false inventories, etc., such defenses affecting the award not being available at law, insurer was entitled to plead the same in a complaint by way of cross-bill in equity in the law action, as authorized by B. & C. Comp. § 391.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by John Allesina against the Fire Association of Philadelphia. From a decree dismissing the cross-bill, defendant appeals. Reversed.

In 1903, the defendant, Allesina, brought an action at law against the plaintiff to recover on a policy of insurance for \$2,000, covering loss or damage by fire to a stock of umbrellas and parasols belonging to him in the city of Portland. The complaint, after alleging the incorporation of the plaintiff and the issuance of the policy, averred that on the 28th of April, 1903, the property covered thereby was destroyed and damaged by fire; that at the time there was \$11,500 concurrent insurance thereon; that soon after the fire and within the time named in the policy Allesina made due proof of loss as required, but that, as he and the plaintiff were unable to agree as to the amount thereof, an agreement for an appraisal was entered into as provided in the policy, an appraiser duly selected by each of the parties, and an umpire thereafter chosen by the two appraisers; that the appraisers, with the assistance of the umpire, determined the amount of the loss and damage sustained by Allesina on account of the fire to be \$13,562.18; that the plaintiff company refused to pay its portion of the loss, and denied liability under its contract. The plaintiff answered the complaint, denying the validity of the policy and the amount of the loss, and for an affirmative defense alleging that the policy was void (1) because of a chattel mortgage on the property at the time it was issued and (2) the fraud and false swearing of the assured after the loss. At the same time plaintiff filed a complaint in equity in the nature of a cross-bill to set aside and cancel the award. The bill alleges, in brief, that in and by the policy it is provided that the entire policy shall be void in case of fraud or false swearing by the assured concerning any matter regarding the property or the nature thereof; that after the fire the insurance company by its agent entered upon an investigation of the circumstances of the fire and the amount of the defendant's loss, with a view to determining, in accordance with the terms of the policy, the extent of its liability; that for the purpose of such investigation the agent requested the defendant to furnish him all the in-

formation he possessed regarding the amount, kind, and quality of the goods insured and destroyed, together with his books, bills, invoices, and other vouchers; that there were lost and destroyed by the fire 3,351 umbrellas, 505 parasols, and other goods in stock, amounting in value in the aggregate not to exceed \$7,109.26, notwithstanding which the assured stated under oath, as part of his proof of loss, and on his examination in reference thereto, that the actual cash value of the property in the store at the time of the fire was between \$18,000 and \$19,000, and at various times during the investigation repeated such claims and demands; that for the purpose of inducing the company to believe his statements to be true he exhibited to it false and fraudulent inventories, and false entries in his books; that such statements, inventories, and entries were made and exhibited by the assured for the purpose of causing the company to believe the amount of the loss to be much greater than the true amount thereof; that by reason of such excessive claims the assured and the company were unable to agree as to the amount of the defendant's loss, and the company, because of its ignorance concerning such false and fraudulent claims and demands, was induced to enter into the agreement for submission to the appraisers; that by such submission it was agreed that the amount of the loss should be ascertained by Grant Phegley and H. R. Ramsdall, who should first select a competent and disinterested umpire to act with them in matters of difference only, and that the award of any two should be binding upon the parties; that the appraisers were unable to agree upon a mode of procedure, and referred the books and papers in their hands to the umpire, without having agreed upon any point, and without having made any investigation or taken into consideration any evidence, except the sworn statement of the assured and his inventories, books, and invoices; that the appraisers explained their differences to the umpire and then withdrew, and thereupon the umpire, without hearing any evidence or making any investigation, excepting an inspection of the sworn statements and inventories of the assured, made and signed an award, which was subsequently agreed to by Phegley; that after the selection of Phegley as an appraiser, and before the award, the assured falsely and fraudulently stated and represented to him, without the knowledge, presence, or consent of the other appraiser, or the umpire, or of any representative of the company, that there were 810 parasols on hand in the store on January 1, 1903, that none of them had been sold since that date, but that all of them were lost and destroyed by the fire; that such statement was considered by Phegley and influenced his award, but plaintiff had no notice thereof, nor any opportunity to refute it; that the statements and alleged



inventories of the assured were false and fraudulent, and were exhibited by the assured to the appraisers and umpire as evidence of the amount of his loss, with the purpose and intent thereby to cause them to make an award greatly in excess of his actual loss; that the appraisers and umpire were thereby deceived and misled, and based their award upon such false and fraudulent evidence; that the insurance company did not know, and could not with reasonable diligence until after the award was made have ascertained, that the statements and inventories so exhibited were false and fraudulent, but that, immediately after discovering such fraud, it notified the assured that it would not be bound by the award, or pay any sum whatever on account of the loss. On motion of the defendant, the cross-bill was stricken out and the suit in equity dismissed. From this decree the insurance company appeals.

J. Clarence Veazie and Wm. T. Muir, for appellant, Henry E. McGinn, for respondent.

BEAN, J. (after stating the facts). It is conceded that the cross-bill states facts sufficient to entitle the plaintiff in an independent suit to a decree setting aside and annulling the award of the appraisers selected by the company and the assured to determine the amount of the loss; but the contention is that, because the company answered in the law action brought against it by Allesina on the policy of insurance, setting up facts which, if true, would avoid the policy, it is not entitled to file a cross-bill to cancel the award. There are two issues presented in the action at law: (1) The validity of the policy and the liability of the insurance company thereunder, and (2) the amount of the loss. The insurance company has a defense to the first at law, but as to the second it has no defense which it can make in the law action. The award of the appraisers cannot be impeached or set aside for fraud in a court of law. 1 Bigelow, Fraud, 96; 2 Story, Equity (13th Ed.) § 1452; Robertson v. Scottish Union, etc., Ins. Co. (C. C.) 68 Fed. 178; North British, etc., Ins. Co. v. Lathrop, 70 Fed. 429, 17 C. C. A. 175. The only remedy of the company, so far as the amount of the loss is concerned, is in equity, and we think it had a right to file a complaint in the law action in the nature of a cross-bill to set aside and annul the award, so that it might be permitted to litigate the amount of the loss, if it failed to establish its defense against the policy.

The statute provides that in an action at law, if the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may, upon filing his answer therein, also file a complaint in equity in the nature of a cross-bill, which shall stay the proceedings

at law, and the cause thereafter shall proceed as a suit in equity, in which the law action may be perpetually enjoined, or allowed to proceed in accordance with the final decree. B. & C. Comp. § 391. It is sometimes urged that the approved practice under the statute denies a defendant in a law action the right to file a cross-bill if his answer sets up a defense, even though he may be entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. But we do not so interpret the provision of the statute authorizing a defendant in a law action to file a cross-bill. It was incorporated in the Code of Civil Procedure by the amendment of October 22, 1870 (Laws Or. 1870, p. 30), and was thought necessary because the distinction between law and equity had been retained, so that a defendant in a law action could not assert an equitable defense, but, if entitled to relief in equity, was compelled to resort to an independent suit. The purpose of the amendment was to obviate this inconvenience, and to enable a defendant in a law action to make a defense, either entire or partial, not cognizable at law. The only condition to the exercise of the right is that he is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. The right to file a cross-bill is not made to depend upon whether he had a defense at law, but whether such defense is as full, complete, and adequate as that in equity. The law provides that upon filing his answer a defendant may, as plaintiff, file a complaint in equity in the nature of a cross-bill whenever he is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense. He is thus obliged to answer in the law action before he can file a cross-bill, and in so answering he may, we think, set up any defense that he may have. The mere filing of the answer will not deprive him of the benefit of the facts stated in the cross-bill, if they are otherwise sufficient to entitle him to relief in equity. The statute does not require him to file a statement that he has no defense at law, and such a pleading would not be an answer.

Section 73, B. & C. Comp., provides that the answer of the defendant shall contain: (1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. This statute was in force at the time of the amendatory act of 1870 giving a defendant in a law action the right to file a cross-bill, and it would seem logically to follow that the answer referred to in the act of 1870 means the ordinary answer required of a defendant and made legally necessary by the statute. Such an answer may tender upon its face a full or

partial legal defense, but the cross-bill may show that there are facts necessary to a full and complete defense to the relief sought which require the interposition of a court of equity and which cannot be successfully invoked in the law action. In such case the defendant is entitled to relief in equity, and may file a complaint in that forum in the nature of a cross-bill. Under our system a defendant is entitled to set up as many defenses as he may have, and, if one of them is at law and another in equity, he may, if he sees proper, set his legal defense up by answer and at the same time file a complaint in equity in the nature of a cross-bill, setting forth his equitable defense, or he may depend alone upon his legal defense, and, if unsuccessful, resort to an original suit to enforce his equitable rights. *Hill v. Cooper*, 6 Or. 181; *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818; *McMahan v. Whelan (Or.)* 75 Pac. 715. In most jurisdictions a defendant is entitled to plead in one answer all the defenses he may have, whether legal or equitable. With us, however, the distinction between law and equity prevails, and an equitable defense cannot be joined with a legal one. If, however, in a law action, a defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may accomplish practically the same purpose by filing a complaint in equity in the nature of a cross-bill. When a proper equitable defense is filed, the action is immediately stayed or suspended until the suit in equity is disposed of, and it is then permitted to proceed, if at all, in accordance with the decree. *Flinney v. Egan*, 43 Or. 1, 72 Pac. 136. The only other substantial difference between our practice and that of other states is that with us the action at law and the proceedings in equity must, for the purpose of trial, appeal, etc., be treated as distinct proceedings. *Oatman v. Epps*, 15 Or. 437, 15 Pac. 709; *Scheffelin v. Weathered*, 19 Or. 172, 23 Pac. 898.

We are of the opinion, therefore, that the defendant in the law action of *Allesina* against the Fire Association was entitled to file its cross-bill for the purpose of canceling and annulling the award on the ground of fraud, in order that it might be permitted to litigate in the law action the issue as to the amount of the loss. Nor do we think the previous decisions of this court are to the contrary. The act permitting a defendant in a law action to file a cross-bill was first noticed in *Dolph v. Barney*, 5 Or. 191. That was an action of ejectment. The defendant denied plaintiff's title and set up title in himself, at the same time filing a cross-bill, which was stricken out on motion. The plaintiff had judgment in the law action, and the defendant appealed, assigning as one of the errors the striking out of the cross-bill. In the opinion of the court it is said that the motion was properly sustained, and that a "cross-bill can only be allowed when the an-

swer does not set up a complete legal defense." In the light of subsequent decisions, the question now under discussion was not before the court, as the appeal was from the judgment in the law action, which did not bring up for review the order striking the cross-bill from the files. Such was the decision in *Oatman v. Epps*, 15 Or. 437, 15 Pac. 709, and *Scheffelin v. Weathered*, 19 Or. 172, 23 Pac. 898; *Oatman v. Epps* was an action in ejectment. The defendant answered, denying plaintiff's title, and also filed a complaint in equity in the nature of a cross-bill. A demurrer to the cross-bill was sustained, and the complaint dismissed. The law action was then tried, resulting in a judgment for the plaintiff, and the defendant appealed. It was held that the order sustaining the demurrer and dismissing the cross-bill could not be reviewed upon an appeal from the judgment in the law action; Mr. Justice Thayer, speaking for the court, saying: "But an examination of the Code will show that when such complaint is filed it stays the proceedings at law, and the case thereafter proceeds as a suit in equity, in which said proceedings at law may be perpetually enjoined by final decree or allowed to proceed in accordance with such final decree. The effect of filing such a complaint is the commencement of a suit in equity, which subordinates the proceeding at law until the relief arising out of the facts requiring the interposition of a court of equity, and material to the defense of the action at law, is obtained." It will be noted that in this case the answer filed by the defendant in the law action set up a complete defense, but, notwithstanding this, Mr. Justice Thayer says: "A technical view in such cases serves no purpose, except to deny a party justice, or, at least, impress him with a belief that he has been unfairly dealt by. It would have been much more in consonance with equity in this case to have retained the complaint filed by the appellant and ascertained whether or not the allegations contained therein were true. If they were true, the appellant was clearly entitled to relief. It would have been a denial of justice to hold otherwise. If the fact of Jane Epps not being a party to the litigation interfered with or embarrassed the adjudication of the rights of the parties, the court should have required that she be brought in and made a party. Equity is no narrow, cramped affair. It is expansive in its nature, and adapts itself to all manner of complications."

*Hatcher v. Briggs*, 6 Or. 31, was also an action in ejectment. Defendant answered at law, at the same time filing a cross-bill, which on the trial in equity was dismissed and the law action allowed to proceed. On the appeal taken from this decree, the court discusses at some length the proper construction of the section of the statute allowing a defendant in a law action to file a cross-bill, and the proper practice thereunder, concluding that the relief sought by the

cross-bill may be either complete or partial, defensive or affirmative, and that the cases in other jurisdictions, where the distinction between actions at law and suits in equity has been abolished, may without impropriety be regarded as authority in determining the right of a defendant to file a cross-bill under our statute and the sufficiency of such pleading. *Hill v. Cooper*, 6 Or. 181, was a suit for the specific performance of an imperfect deed. *Cooper* had previously sued *Hill* in ejectment to recover possession of the property described therein. *Hill* had set up a defense to the legal title, and the case had gone against him. *Cooper* pleaded the judgment in the law action as a bar to the suit in equity, but the court held that the fact that *Hill* had relied upon his legal defense did not debar him from afterwards demanding equitable relief in an independent suit. In the course of the opinion, by way of argument, the dictum in *Dolph v. Barney* is referred to with approval, although it was not necessary to a decision therein. The same may be said of *Scheland v. Erpelding*, 6 Or. 258, which was an action in assumpsit for the recovery of wages. The defendant denied liability, and for an affirmative defense alleged that plaintiff was not an employé of his, but that he and the plaintiff were partners, and at the same time filed a complaint in equity for a dissolution of the alleged partnership and for an accounting. The plaintiff answered the cross-bill, and the court held that, although a motion to strike out ought to have been sustained, he had by answering waived his right to insist upon the motion, and the suit was properly heard and determined as an original suit in equity. The matter set up in the cross-bill in this case was in no way material to the defense of the law action, and therefore could not properly have been entertained under our statute; hence the allusion to the rule in *Dolph v. Barney* could not give added force to the statement or make it authority. The action was on an account; the defense that the parties were partners, which was a good and complete defense at law. The condition of the partnership account, if they were partners, or whether the partnership should be dissolved, were matters wholly irrelevant to the law action, and in no way material to a defense therein.

*South Portland Land Co. v. Munger*, 36 Or. 457, 54 Pac. 815, 60 Pac. 5, is the latest and most thorough consideration of the right of a defendant in a law action to file a cross-bill. This was an action of ejectment. The answer denied the plaintiff's title, and pleaded title in the defendant by adverse possession. The defendant filed a cross-bill, making the plaintiff and other parties defendants, for the purpose of obtaining a decree curing a defect in one of the deeds in the chain of his record title. A motion and demurrer to the cross-bill were overruled, and the defendant answered. The court, speaking through Mr. Justice Wolverton, held on authority of

*Scheland v. Erpelding*, 6 Or. 258, that the motion and demurrer were waived by answering over; but the objection that the question was jurisdictional and could not be waived, because the defendant had a good defense at law, was considered at length, and the conclusion reached that the practice inaugurated by the statute authorizing a defendant in a law action to file a cross-bill and the remedy afforded thereby are "as broad as that which may be invoked by original bill, permitting even the use of such facts as constitute a partial defense only to the cause of action. \* \* \* By statutory intendment, therefore, the defendant in the law action is afforded such relief, either defensive or affirmative, entire or partial, as he would be able to insist upon in a court of equity, and, if the facts are such as to invoke equitable cognizance, the action at law may be stayed until the equities are disposed of in the appropriate forum. The remedy at law to which the statute alludes must be plain, adequate, and complete, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. It is not enough that there is a remedy at law."

We conclude, therefore, that the previous opinions of the court, when construed with reference to the subject-matter of the litigation and the question actually under consideration, are not in conflict with, but, on the contrary, tend to support, the doctrine that whenever a defendant in a law action is entitled to relief, either partial or entire, defensive or affirmative, arising out of facts requiring the interposition of a court of equity and material to his defense, he may, upon filing his answer, also as plaintiff file a complaint in the nature of a cross-bill, which shall stay the proceedings at law until the issues presented by the cross-bill are disposed of. And it is no objection to such cross-bill that the defendant may have set up in his answer in the law action a defense to the action as full and complete as he may have in that forum; the vital question being whether the law defense is as adequate and complete as that in equity. It is argued in this case, however, that the matters alleged in the cross-bill are also set up as a defense to the law action, and, if true, would defeat the policy, and therefore there is no need of a resort to equity to avoid the award. As we read the cross-bill, however, it sets up three grounds for avoiding the award: (1) Fraud in obtaining the agreement of submission, and false and fraudulent inventories, statements, books, and testimony submitted by the assured to the company and the arbitrators; (2) the misconduct of the assured and one of the arbitrators in privately discussing the merits of the case; and (3) that the award was made by the umpire and the appraiser, without hearing any evidence or obtaining any information as to the amount of the loss, except the inspection of the false

inventories, books, accounts, and statements of the assured. The first of these grounds is also set up as a defense in the law action, and, if true, would, under the terms of the contract of insurance, avoid the policy. The other two, however, are not pleaded in the law action, and would not constitute a defense therein, so that the cross-bill sets up two grounds for avoiding the award that are not presented and could not be litigated in the law action.

We are of the opinion, therefore, that the motion to strike out the cross-bill was improperly sustained, and that the decree of the court dismissing the bill must be reversed, and the cause remanded for such further proceeding as may be proper, not inconsistent with this opinion.

#### WOOD et al. v. FISK et al.

(Supreme Court of Oregon. June 27, 1904.)

JUDGMENTS — LIENS — DOCKET — ENTRIES —  
FRAUDULENT CONVEYANCES—DEFENSES —  
EQUITY—CROSS-BILL.

1. Where a judgment did not become a lien on real property because of a failure to state the time when it was docketed in the lien docket, the filing of a transcript of such lien docket in another county was ineffectual to create a lien on land located in such county.

2. While the fact that a certain conveyance of real estate was fraudulent as to the grantor's creditors is available as a defense at law, since such defense would not relieve the land from the fraudulent deed as a cloud on the title, the defendant in the action at law was entitled to file a complaint in equity in the nature of a cross-bill, as authorized by B. & C. Comp. § 391, to have such conveyance vacated on that ground.

3. Where an appeal was perfected September 29, 1903, and the brief was filed October 28th, but was not served until three days thereafter, the delay in filing and serving was too insignificant to justify an affirmance therefor.

Appeal from Circuit Court, Wallowa County; Robert Eakin, Judge.

Action by Richard M. Fisk and another against John A. Wood and another. From a judgment dismissing defendants' cross-bill, they appeal. Reversed.

In September, 1902, the defendant Richard M. Fisk brought an action in the circuit court of Wallowa county against the plaintiffs to recover possession of certain real property, with damages for withholding the same. The plaintiffs answered, and at the same time filed a complaint in equity in the nature of a cross-bill, setting up facts which they insisted required the interposition of a court of equity and were material to their defense in the action at law. A demurrer to this cross-bill was sustained, and, the plaintiffs declining further to plead, the cross-bill was dismissed, and they appeal.

Long & Sweek and John S. Hodgins, for appellants. D. W. Sheahan, for respondents.

BEAN, J. The allegations of the cross-bill, in substance, are that in 1896, one S. A.

Miles recovered a judgment against the defendant M. Fisk in the circuit court for Gilliam county for the sum of \$1,822.02, besides attorney's fees and costs; that the judgment was entered in the judgment lien docket of that county, but the time "when docketed" was not stated therein; that a transcript of the lien docket was filed with the county clerk of Wallowa county on July 2, 1900, and at that time the defendant M. Fisk was the owner of the real property in controversy; that on the 9th of July, 1900, after the entry of the same in the lien docket of Wallowa county, Fisk, without consideration, and for the purpose of hindering, delaying, and defrauding creditors, particularly Miles, the judgment creditor, transferred and conveyed the property in controversy to his son, the defendant Richard M. Fisk; that thereafter an execution was issued on the judgment recovered by Miles against Fisk in Gilliam county, directed to the sheriff of Wallowa county, who by virtue thereof levied upon and sold the real property in controversy to the plaintiffs' ancestor, S. G. Wood, for the sum of \$600, he being the highest and best bidder therefor; that the sale was confirmed, and a sheriff's deed issued and delivered to the purchaser, who entered into possession of the premises, and so continued until the 20th of July, 1901, when he died, leaving as his heirs the plaintiffs herein, who have ever since been in possession thereof. The argument in support of the decree of the court below is that it appears from the cross-bill that the plaintiffs had a complete defense to the action of ejectment brought against them by the defendant Richard M. Fisk, and therefore were not entitled to the interposition of a court of equity. The judgment recovered by Miles against Fisk in Gilliam county was never docketed so as to become a lien upon real property, because the time "when docketed" was not stated in the judgment lien docket, as required by statute. *Hutchinson v. Gorham*, 37 Or. 347, 61 Pac. 431; *Western Sav. Co. v. Currey*, 39 Or. 407, 65 Pac. 360, 87 Am. St. Rep. 660. The filing of a transcript of such lien docket in Wallowa county was therefore ineffectual to create a lien upon the property in controversy, and hence the title acquired by the plaintiffs' ancestor at the sale under the execution issued on the judgment did not relate back to the filing of the transcript, and was not prior in time to the alleged fraudulent deed from the defendant M. Fisk to his codefendant, so that plaintiffs did not have the prior record title. The case, therefore, turns upon the question as to whether the allegation that the conveyance from the defendant M. Fisk to his son, after the rendition of the judgment and prior to the seizure of the property under the execution thereon, was for the purpose of hindering and delaying creditors, constitutes such a defense to the action of ejectment brought by the fraudulent grantee against the successors in interest of the purchaser at

the execution sale as will prevent plaintiffs from resorting to equity.

Where a debtor has conveyed his property for the purpose of defrauding creditors, it may subsequently be taken on execution against him, because as to the creditors the deed is void and the legal title remains in the grantor. The creditor in such case is not required to resort to equity to have the deed canceled, but may levy upon and sell the property under execution, and the purchaser will obtain a legal title. *Walt, Fraud. Convey. (3d Ed.) § 59; 1 Freeman, Executions, § 136; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 468; Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889*, and many of the authorities—hold he may maintain an action of ejectment thereon against the fraudulent grantee. 14 Am. & Eng. Enc. Law (2d Ed.) 812. It would seem, therefore, that the law action of *Fisk v. Wood* could probably have been defeated by proof that the conveyance to the plaintiff therein was made and accepted for the purpose of hindering, delaying, and defrauding creditors; but the defense would not have been as complete as in equity. It would have resulted in a defeat of the particular action; but the fraudulent deed would still have remained a matter of record, apparently valid, and a cloud upon the title of the plaintiffs. A purchaser at an execution sale of property fraudulently conveyed may not be required to resort to equity to have the fraudulent conveyance canceled and annulled, yet such is a common and well-recognized head of equity jurisdiction. Equity acts in personam, and fraud is one of the grounds of its interposition. The existence of a remedy at law does not interfere with the right of a purchaser at an execution sale to apply to equity to annul or cancel a fraudulent conveyance made by the execution debtor, thereby removing a cloud from his title. *Walt, Fraud. Convey. (3d Ed.) § 60; Eaton v. Trowbridge, 38 Mich. 456*. Indeed, equity alone can disentangle the title from the doubt and embarrassments which would otherwise interfere with the full enjoyment of the property and the free disposition thereof. The remedy given a defendant in a law action by section 391, B. & C. Comp., of filing a complaint in equity in the nature of a cross-bill, when he is entitled to relief arising out of facts requiring the interposition of a court of equity, is as broad as that which he might invoke by an original bill, if it is germane to the matter involved in the action at law and material to his defense, and, unless the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," he may file his cross-bill, notwithstanding he may have a defense at law. *South Portland Land Co. v. Munger, 36 Or. 457, 473, 54 Pac. 815, 60 Pac. 5; Fire Association v. Allesina (just decided) 77 Pac. 123*.

The appeal in this case was perfected September 29, 1903. The brief was filed October 28th, but was not served until three days thereafter. The delay in filing and serving the brief was insignificant, and no doubt due to excusable neglect, and is therefore no ground for an affirmance of the decree.

As the court was in error in sustaining the demurrer to the cross-bill, the decree will be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

## GOLTRA v. PENLAND.

(Supreme Court of Oregon. June 27, 1904.)

CONVERSION — EVIDENCE — ADMISSIBILITY — WITNESSES — CROSS-EXAMINATION — EXECUTORS — CLAIMS AGAINST ESTATE — PRESENTATION — ALLOWANCE — REASONABLE TIME — QUESTION FOR JURY — ACTIONS — SUFFICIENCY OF EVIDENCE — STATUTES — CONSTRUCTION.

1. In an action for conversion of sheep by one caring for them on shares, declarations of a person who delivered wool for defendant to a warehouseman as to the ownership of the sheep from which the wool was clipped were outside the scope of such person's authority as agent, and were inadmissible.

2. Where, in an action against an executrix, her attorney, on direct examination, testified for plaintiff as to the presentation of the claim for allowance, it was not proper cross-examination to elicit testimony as to a conversation between said attorney and the decedent in which decedent had denied being indebted to plaintiff, as B. & C. Comp. § 849, permits cross-examination merely as to any matter stated in direct examination or connected therewith.

3. Under B. & C. Comp. § 388, providing that no action shall be commenced against an executor until the claim has been presented, the executor has a reasonable time after presentation of a claim to act thereon, and, if he neglects to act within that time, the claim may be treated as disallowed. Therefore an instruction that the plaintiff must prove that he presented his claim for the demand sued on, and that the same was rejected before action was commenced, but the refusal of the executrix to act upon such claim after having the same in her possession for a reasonable time, and neither approving nor rejecting the same, would amount to a rejection of the claim, was erroneous as making the rejection of the claim to rest on refusal to act, and not defining a "reasonable time."

4. Where the length of time was undisputed, and no excuse was offered for delay, the question as to whether it was a reasonable time was for the court, and not for the jury.

5. Six months, without excuse for delay, was a reasonable time, as a matter of law, for an executrix to act on a claim presented.

6. B. & C. Comp. § 1161, providing that no claim which shall have been rejected by the executor or administrator shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant, applies only on the trial on the merits of a rejected claim, and not to the preliminary question as to whether there was due presentation and disallowance within a reasonable time.

7. The statute does not mean that the other evidence aside from the testimony of the claimant must of itself be sufficient, but that there must be other material and pertinent testimony supporting that given by claimant, sufficient to

go to the jury, and on which it might find a verdict.

8. Where plaintiff claimed that defendant's testator had had a number of sheep belonging to plaintiff, caring for them on shares, and that a settlement was had, determining the number of sheep belonging to plaintiff, and the lease extended for another year, during which time the testator converted the sheep, it was incumbent on plaintiff to prove that at the time of settlement the testator had sheep belonging to plaintiff; and, if he had none, the settlement would not transfer the ownership of sheep to plaintiff, unless they were selected and identified in some way.

Appeal from Circuit Court, Morrow County; W. R. Ellis, Judge.

Action by W. H. Goltra, executor of Hugh Fields, deceased, against Jane Penland, executrix of William Penland, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

This action was commenced September 28, 1901, by Hugh Fields against the executrix of the estate of William Penland, deceased, to recover the value of certain sheep alleged to have been converted by Penland to his own use. The complaint alleges, in substance, that for several years prior to June 1, 1900, Penland had in his possession a band of ewe sheep, the property of Fields, which he had been keeping on the shares; that, on or about the day named, he and Fields had an accounting and settlement as to such sheep, and it was ascertained and agreed between them that Penland then had in his possession 2,888 head of ewes and 821 lambs belonging to Fields, which he was to keep on shares for another year, and then return them to Fields, together with his share of the wool and increase; that, in pursuance of such agreement, Penland retained possession of the sheep until November, 1900, when, without the knowledge or consent of Fields, he wrongfully and unlawfully sold and disposed of them, and appropriated the proceeds to his own use, to the plaintiff's damage in the sum of \$10,300; that Penland died in February, 1901, and defendant was duly appointed executrix of his estate; that on April 18, 1901, Fields duly presented to her his claim for the value of the sheep so converted by her testator, but she has refused to pass upon the same, and has, therefore, in law, rejected it. Fields died in November, 1901, and the plaintiff, having been appointed his executor, was duly substituted in his place. Thereafter the defendant answered, denying the material allegations of the complaint, except the death of Penland and her appointment as executrix, and affirmatively alleging that on or about the 1st of April, 1901, the plaintiff pretended to present to her an alleged claim against the estate of her decedent, and that she has retained the same for investigation, but has neither allowed nor rejected it. For a further and separate defense, it is alleged that in 1897 Penland had in his possession about 800 sheep belonging to Fields, which at the

latter's request he sold, and that he accounted to him for the proceeds in full. The cause was tried before a jury, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

H. H. Hewitt, for appellant. G. W. Phelps and H. S. Wilson, for respondent.

BEAN, J. (after stating the facts). Phil Cohn, a warehouseman, testified that in the years 1899 and 1900 one Lassen delivered wool at his warehouse for the account of Penland, which Penland afterward said belonged to Fields. The witness was thereupon asked to relate any conversation he had with Lassen at the time the wool was delivered in 1900 about its coming from Fields' sheep; counsel stating that he expected to prove by the witness that Lassen said it was Fields' share of the wool clipped from the sheep belonging to him, which Penland was running on the shares. An objection to the evidence was sustained, and, we think, properly. There was no testimony that Lassen was the agent of Penland for any purpose, unless it is to be inferred from the fact that he delivered the wool at the warehouse, and that would not be sufficient to make his declarations as to the title or ownership of the wool competent evidence against Penland. *Zorn v. Livesley* (Or.) 75 Pac. 1057. Where the act of an agent will bind his principal, his declarations in respect to the subject-matter, if made at the time and forming a part of the transaction, are competent against the principal; but, if the declarations are concerning a matter not within the scope of the agent's authority, the principal is not affected by them in any way, even though they may be made at a time when the agent is lawfully transacting some business for him. *Northern Pacific Lumber Co. v. Mill Co.*, 29 Or. 221, 44 Pac. 286; *First National Bank v. Linn County Bank*, 30 Or. 296, 47 Pac. 614; *Wicktorwitz v. Insurance Co.*, 31 Or. 569, 51 Pac. 75; *Van Vechten v. Smith* (Iowa) 13 N. W. 96; 1 Greenleaf, Ev. (14th Ed.) § 114. Lassen, if he was an agent of Penland at all, had no authority to deal with the wool in any way except to deliver it at the warehouse, and any statements or declarations he may have made as to the title or ownership were entirely outside the scope of his authority, and did not explain or characterize any act he was authorized to perform by virtue of his employment.

G. W. Phelps, one of the attorneys for the defendant executrix, was called by the plaintiff for the purpose of proving due presentation of the claim sued upon. On his examination in chief, he testified that a certain identified claim was presented to him by Fields about the time it was made out, but no questions were asked him concerning any conversations he had with Fields at the time, nor did he testify on that subject. On

cross-examination, however, he was allowed to testify that at the time the claim was presented he told Fields that Penland said he did not have any sheep belonging to him, and also: "I told Mr. Fields, among other things, that Mr. Penland, about the time that this Penland Live Stock & Land Company, a corporation [was formed]—that, when the question came up as to turning over all the property to this new corporation, I asked him whether or not he had any sheep belonging to Mr. Fields, and Penland at that time said 'No,' and made some such remark as that 'The old fool is crazy. I don't owe him a cent.'" This was not proper cross-examination, and, the evidence itself being incompetent and obviously injurious to the plaintiff, the motion to strike it out should have been sustained. The right to cross-examine a witness is a valuable one, and should not be unnecessarily restricted, yet it must be limited to matter stated by the witness on his direct examination, or be connected therewith. A witness cannot upon cross-examination be questioned with regard to that which does not tend to impeach, rebut, explain, modify, or in some way qualify anything he has testified to on his examination in chief. He can only be examined on other matters by the examining party making him his own witness. The statute provides: "The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith." B. & C. Comp. § 849. "Under this statute," says this court in *Ah Doon v. Smith*, 25 Or. 89, 93, 34 Pac. 1093, 1094, "and the rule there provided, a party has no right to cross-examine a witness except as to facts and circumstances stated on his direct examination, or connected therewith; but, within this limitation, great latitude should be allowed in conducting the examination. It should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination." See, also, to the same effect, *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254; *Williams v. Culver*, 39 Or. 341, 64 Pac. 763; *Rapalje*, Law of Witnesses, § 246. Now, the only fact in this regard testified to by Phelps on his direct examination was that a certain verified claim of Fields against Penland's estate had been presented to the executrix, through him, for allowance. The plaintiff did not ask for any conversation between the witness and Fields, nor did he offer to show any declaration of either of the parties. He simply sought to prove by the witness that the claim had in fact been presented. The evidence elicited on cross-examination as to what the witness told Fields at the time about Penland's statements concerning the subject-matter of the claim was in no way

connected with the proof of its presentation; nor did it tend to limit, qualify, rebut, or explain in any manner the direct examination. It was therefore not proper cross-examination, and, as the evidence was otherwise incompetent, and obviously injurious to the plaintiff, it cannot be said that the error was harmless.

The court instructed the jury: "In order to recover in an action of this sort against the executrix of the last will and testament of a deceased person, the plaintiff must allege and prove, among other things, that he presented his claim for the demand sued upon, and that the same was rejected, before action was commenced; but the refusal of the executrix to act upon such claim, if you find from the evidence she did so refuse, after having the same in her possession for a reasonable time, and did neither approve nor reject the same, nor take action thereon, such action on her part would amount to a rejection of the claim." Objection was made to this instruction because "it failed to state what a reasonable time is, and is not a correct statement of the law applicable to the case." The instruction, we think, is erroneous for two reasons: It made the question of the rejection of the claim depend upon the refusal of the executrix to act upon it, when a mere failure or neglect to do so would have been sufficient; and it left the determination of what was a reasonable time after the presentation of the claim in which to allow or reject it as a question of fact for the jury. The statute provides that no action shall be commenced against an executor or administrator until the claim of the plaintiff has been presented and disallowed (B. & C. Comp. § 388), but if the administrator neither allows nor rejects the claim within a reasonable time after its presentation, it will be deemed disallowed, and the creditor may bring an action thereon (2 Woerner, Law of Administration [2d Ed.] § 390; 1 Abbott, Probate Law, § 473). The executor or administrator has a reasonable time after the presentation of a claim against the estate of his decedent in which to examine it and determine whether he will allow or reject it, but, if he fails to do either within such time, the claim will, in law, be disallowed, and it is immaterial whether his failure to act is due to an affirmative refusal or not. For this reason the language of the instruction was at least technically inaccurate, and may have misled the jury.

The more serious objection to the instruction, however, is that it left the question whether the defendant had a reasonable time after the presentation of the claim in which to allow or reject it as one of fact for the jury. The complaint alleges that the claim was presented to the executrix for allowance on the 18th of April, 1901, and the answer says that it was presented on or about the 1st of that month. The action was commenced September 28th following, so that it is

admitted by the record that it was almost six months from the time of the presentation of the claim to the commencement of the action; and, as there was no reason offered by the defendant for her delay in not passing upon the claim, the question as to whether she had had a reasonable time in which to do so was for the court, and not for the jury. "Generally, what is a reasonable time," says Mr. Justice Strahan in *Fleischner, Mayer & Co. v. Kubli*, 20 Or. 339, 25 Pac. 1086, "when the facts are undisputed, is a question of law for the court." The same rule is stated by Mr. Justice Wolverton in *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659. It is undisputed that the claim was presented to the executrix by the 1st of April, and was in her possession six months later, when the action was commenced. This was clearly a reasonable length of time in which to determine whether she would allow or reject it. The court should have so declared as a matter of law, and not left the question for the jury. In *Willis v. Marks*, 29 Or. 493, 45 Pac. 293, a claim against an estate was presented to the administrator on the 8th of January, a demand for its return made by the claimant on the 9th of the following April, and an action of replevin commenced about two months thereafter; and the court held that the administrator was entitled to hold the claim a reasonable length of time after its presentation for examination, to determine whether it should be allowed or rejected, but that a reasonable time had elapsed, and plaintiff could therefore maintain an action of replevin to recover possession thereof.

The deposition of Hugh Fields was taken prior to his death, and read on the trial. He testified, among other things, that the last of April or the first of May, 1901, he presented to Mr. Phelps, the attorney for the executrix, for allowance, a verified claim sued upon, and that he subsequently endeavored to get the executrix to pass upon it, but could not do so. The court instructed the jury that they "must not find for the plaintiff upon any point, except there is competent or satisfactory testimony other than the deposition of the claimant, Hugh Fields, and this is true even though you should believe the testimony of Fields upon said point." The questions as to whether the claim sued upon had been presented to the executrix and rejected by her, or had been retained an unreasonable length of time, were submitted to the jury; and, under this instruction, they were, in effect, told that they could not find in favor of the plaintiff upon such issues, except upon some evidence other than that of Fields, even though they should believe his testimony. This we conceive to be an erroneous construction of section 1161 of the statute, which provides that, when a claim has been presented to an executor or administrator, he shall indorse thereon the words "Examined

and approved," with the date thereof, and sign the same officially, if he is satisfied that the claim is just; if not, he shall indorse thereon the words "Examined and rejected," with the date thereof, and sign the same officially, and that "no claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant." The purpose of this statute is apparent. It is to protect the estates of deceased persons against false and fraudulent claims, and to guard against false testimony. The death of a contracting party often renders it difficult, if not impossible, for his representative to show the invalidity of a claim against his estate, or to defend against it; and therefore the statute has provided that, when the lips of one party are closed by death, the testimony of the survivor shall not be sufficient alone to establish a claim against the estate of the deceased. Before an action can be brought against an executor to establish a liability against the estate, however, it must be shown that the claim has been duly presented to him and disallowed, or that he has retained it an unreasonable length of time, and the statute referred to can have no application to a trial of this preliminary question. It is only on the trial of the merits of a rejected claim that it can apply. The issue as to whether the claim has been presented and rejected is not within the purpose of the statute, or the mischief intended to be remedied. It is an issue to be determined from the testimony of living witnesses, to be tried out as any other question of fact, and decided upon the preponderance of the evidence. When it comes to the trial of the merits, the statute applies. It must be first shown, however, that the claim has been presented to the executrix and rejected by her, and this can be done by any evidence satisfactory to the trier of fact. The statute says that no claim which has been rejected, etc., shall be allowed, except upon a certain character of proof, but it says nothing about the proof necessary to establish the preliminary issue of the presentation and rejection of the claim. The meaning of the statute when it applies is not easy to determine. It provides that a claim which has been disallowed by an executor shall not be allowed by any court or jury, except upon some "competent or satisfactory" evidence other than the testimony of the claimant. Whether this means that the claim shall not be allowed unless the testimony of the claimant is corroborated by other pertinent and competent testimony, or whether his evidence shall be entirely disregarded and the claim disallowed unless there is other evidence in the case sufficient to satisfy the trier of fact of the justness of the claim, is the important question. The language of the statute is contradictory. It



says the evidence shall be competent or satisfactory, and these terms are not, in law, synonymous. By "competent evidence" is meant that which the nature of the fact to be proved requires—such as the production of a writing when its contents are the subject of inquiry. 1 Greenleaf, Ev. (14th Ed.) § 2. Satisfactory evidence, on the other hand, is that evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind (B. & C. Comp. § 688), or as Mr. Greenleaf says, such as "ordinarily satisfies an unprejudiced mind beyond reasonable doubt." 1 Greenl. Ev. (14th Ed.) § 2. Evidence may therefore be competent, and not satisfactory. And it may be satisfactory to the trier of fact, and not be competent—such as secondary evidence of the contents of a writing, without the writing itself being accounted for. The statute, therefore, cannot mean that evidence other than that of the claimant, either competent or satisfactory, will be sufficient to establish the claim. Competent evidence would be such merely as the nature of the case requires, and might be very slight and insufficient, while satisfactory evidence would require proof to a moral certainty, if not beyond a reasonable doubt, and that is more than the law requires in a civil case. The statute, therefore, must be construed according to its spirit and purpose, and the evil sought to be remedied, rather than the technical meaning of the words used. Looking at it from this standpoint, and keeping in full recognition its purpose, which is to avoid the injustice which might follow from the allowance of a claim against the estate of a deceased person on the testimony of the claimant alone, the reasonable interpretation seems to be that the testimony of the claimant is not sufficient, but there must be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury and upon which it might find a verdict, so that the decision may rest upon some evidence other than that of the claimant. This is substantially the construction of the statute indicated in *Quinn v. Gross*, 24 Or. 151, 33 Pac. 535, and *Harding v. Grim*, 25 Or. 506, 36 Pac. 634, although in neither of these cases was the direct question presented. It was evidently not intended by the Legislature that the evidence of the claimant should be entirely ignored or disregarded. If such had been the purpose, it would have been so provided. In many of the states, when one of the contracting parties to a litigated obligation is dead, the other is not permitted to testify. 1 Wharton, Ev. (2d Ed.) § 466; 2 Woerner, Administration (2d Ed.) § 398; Bradner, Ev. § 14. Our statute, however, does not go to that extent. The claimant in an action against an estate is a competent witness in his own behalf (B. & C. Comp. § 722), but his testimony

is not of itself sufficient to establish his claim. Section 1161 is practically an enactment of the English equity rule, which is that "a pecuniary demand against the estate of a deceased person will not be considered and established by the oath of the person making such claim, unsupported by any other evidence." Wharton, Ev. (2d Ed.) § 467.

The remaining assignments of error are based upon instructions given. It is unnecessary to set out the instructions in full, or to notice them in detail, for they are lengthy and would unnecessarily encumber this opinion, and many of the questions involved have already been disposed of. The only point remaining to be noticed is the instruction to the effect that plaintiff could not recover in this action unless Penland, at the time of the alleged settlement between himself and Fields in May, 1900, had in his possession sheep belonging to Fields, or unless certain sheep were then set aside and appropriated to the contract, so that they could be identified, and Penland thereafter converted them to his own use. In other words, that if Penland had, prior to the alleged settlement, sold and disposed of all the sheep previously leased to him by Fields, and converted the proceeds to his own use, the plaintiff could not recover, even if he had concealed that fact from Fields, and Fields had, in ignorance thereof, made the alleged settlement and agreement of leasing in May, 1900. The theory of the plaintiff's case is that Fields was the owner of a band of sheep which Penland had been running and caring for along with sheep of his own for a number of years prior to May, 1900; that Fields had not seen the sheep for some time, and did not know the number he owned; that about that time he and Penland had a mutual accounting and settlement as to the number of sheep in Penland's possession belonging to Fields, and Penland agreed to lease them for another year on shares, at the expiration of which time he was to return the sheep to Fields, less a certain per cent. for loss, with his share of the increase and wool; that, in violation of such agreement, and before the expiration of the lease, he sold and disposed of the sheep, and appropriated the proceeds to his own use. The action is for the conversion of the sheep alleged to have occurred before the expiration of the lease. It was necessary, therefore, for the plaintiff to prove that Penland had in his possession at the time of the settlement in May sheep belonging to Fields, and that he had converted them to his own use. The settlement and agreement, if made as alleged, would be conclusive as to the number of sheep; but, if Penland had no sheep at the time belonging to Fields, the agreement would not transfer the ownership of other sheep to him, unless

they were selected and identified in some way. It would probably estop Penland and his representatives, in an action for a breach of the contract of leasing, or for a failure to return the sheep at the expiration of the time, to deny that he had the number of sheep agreed upon, but this is not an action of that character.

It follows that the judgment must be reversed and a new trial ordered.

### JONES v. JONES.

(Supreme Court of Oregon. June 27, 1904.)

#### DIVORCE—CRUEL TREATMENT—EVIDENCE.

1. Where, in an action for divorce on the ground of cruel and inhuman treatment, the evidence disclosed that plaintiff was very jealous of her husband, without cause, and that he was irritable, and that they frequently quarreled and assaulted each other, in which encounters they were quite evenly matched, and plaintiff stated to a witness on one occasion that "she thought, if it came right down to a rough and tumble fight, she could lick him," a decree dismissing the complaint was proper.

Appeal from Circuit Court, Malheur County; M. D. Clifford, Judge.

Action by Hattie Jones against William Jones. From a decree dismissing the suit, plaintiff appeals. Affirmed.

Will R. King and R. J. Slater, for appellant. John L. Rand, for respondent.

MOORE, C. J. This is a suit for a divorce instituted by the wife on the ground of cruel treatment. The defendant also sought a separation on the same ground, and the cause, being at issue, was tried by the court, resulting in a decree dismissing the suit, and the plaintiff appeals.

A careful examination of the testimony, consisting of 569 pages, including exhibits, shows that, without cause therefor, the plaintiff was very jealous of her husband; that the defendant is irritable, and during their married life the parties have frequently quarreled, resulting on several occasions in assaults committed on each other. In these encounters they have been quite evenly matched, as is illustrated by the testimony of Mrs. L. Anderson, who, in answer to a question as to what the plaintiff told her about whipping her husband, replied: "Well, she said she thought that, if it came right down to a rough and tumble fight, she could lick him." No good purpose can be subserved by quoting further from or commenting on the testimony, which, in our opinion, conclusively shows that the plaintiff was a willing and active participant in the quarrels and assaults of which she now complains, and, this being so, she is not entitled to a divorce (*Beckley v. Beckley*, 23 Or. 226, 31 Pac. 470), and hence the decree is affirmed.

### FRANK et al. v. STRATFORD-HANDCOCK et al.

(Supreme Court of Wyoming. June 27, 1904.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT—ACTIONS—CONSIDERATION—OFFER—REVOCATION—CONDITIONS PRECEDENT—CONSTRUCTION OF CLAUSES—FAILURE TO PERFORM—LANDLORD AND TENANT—TENANCY BY SUFFERANCE—EFFECT—RECOGNITION OF TENANCY—RIGHT TO POSSESSION.

1. A purchaser of real property, with notice of a prior contract to convey the same, takes it subject to the equitable rights of the original contractor to the completion of his contract, and may be compelled to perform the contract of his vendor, on a bill filed against him and his vendor by the original contractor; the proper practice in such case being to direct a specific performance of the contract by the subsequent purchaser.

2. Where a contract is intended to bind both parties, or is of such a nature that it contains mutual executory provisions, if for any reason one of the parties is not bound, he cannot compel performance by the other; but contracts unilateral in form, such as bonds and similar obligations, and optional contracts for the purchase and sale of land, founded upon a proper and sufficient consideration, may be enforced, although in the latter case no obligation rests on the option holder to purchase.

3. An optional agreement to convey land, made upon a proper consideration, or forming a part of a lease or contract, cannot be revoked by the vendor within the period granted for the exercise of the option.

4. A mere proposal without consideration creates no obligation, unless accepted according to its terms, and may be withdrawn at any time before acceptance; but, if it is allowed to remain open until accepted, it will become a binding contract.

5. Where an option given on a consideration is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale; and the same result follows the acceptance of a mere offer before its withdrawal.

6. An agreement in a lease, granting the lessee the privilege of purchasing the property within a stated period upon specified terms, is a continuing offer to sell, which is supported by the lease itself, with its affirmative covenants, and may not be revoked within the specified period.

7. Conditions precedent to the exercise of a right or privilege must be strictly complied with.

8. Whether a particular provision amounts to a condition precedent, or not, depends on the intention of the grantor, to be gathered from the whole instrument and the existing facts.

9. An agreement provided for the letting of certain property on consideration of the payment of taxes as rental, gave the lessee the privilege of purchasing the property, contained certain restrictive covenants as to the use of the premises, and concluded with an agreement for the deposit of \$500 for the faithful performance of the covenants of the lease and the payment of taxes, which would not fall due until a very short time before the expiration of the term created by the lease. *Held*, that the making of the deposit was a condition precedent, without complying with which the lessee was not entitled to exercise her option to purchase.

10. Under Rev. St. 1899, § 2772, providing that the relations of landlord and tenant, other

¶ 2. See *Specific Performance*, vol. 44. Cent. Dig. §§ 90, 95, 98.

than a tenancy by sufferance, shall not exist by operation of law, one in possession of property is, in the absence of any other showing, a mere tenant by sufferance, so that such possession cannot be regarded as imparting vitality to a lease the conditions of which have not been complied with, nor as a part performance of a contract for the occupancy of land.

11. A vendee of a lessor, who was not a party to the lease contract, could not, by recognizing the lease after her purchase, by giving notice of her right to declare it forfeited, render the lease effective, so as to make an obligation contained therein to convey the premises to the lessee binding upon her vendor.

12. A sale of property in good faith and for a valuable consideration, brought to the knowledge of the holder of a voluntary option before any attempted acceptance of the option, constitutes a sufficient revocation thereof.

13. Where a deed and contract are not connected by the evidence, the court cannot supply the omission, if any, by inference.

14. Where A. gave B. an option, and subsequently sold to C., who had knowledge of the option, a tender by B. was properly made to A., and not to C.

15. One who did not perform a condition precedent to a right of possession under a lease was not entitled to retain possession.

16. One is not entitled to possession of property in consequence of a mere option, in the absence of an express stipulation to that effect, at least until he makes a tender and demands a deed.

Error to District Court, Crook County; Richard H. Scott, Judge.

Action by S. Henrietta Carlile-Kent against Abe Frank and Grace E. McKenzie. There was a judgment for plaintiff and defendants brought error. Since the submission of the cause, defendant in error died, and Claude Stratford-Handcock, executor, and Mabel Stratford-Handcock, executrix and devisee, of her estate, were substituted. Reversed.

Nichols & Adams and Gibson Clark, for plaintiffs in error. H. A. Alden and E. E. Enterline, for defendants in error.

POTTER, J. S. Henrietta Carlile-Kent sued the plaintiffs in error, Abe Frank and Grace E. McKenzie, for the specific performance of an alleged contract for the conveyance of certain lands situated in Crook county, entered into by Frank, the grantor of Mrs. McKenzie, and damages for taking and withholding possession of the premises. The allegations of the first cause of action are substantially that on April 4, 1901, Frank was the owner of the lands, and on that date entered into a written agreement with plaintiff, which is set out in *hæc verba*; that thereafter, and on the same day, plaintiff went into possession of the premises under the terms of the agreement, and remained in possession until July 26, 1901, when Mrs. McKenzie forcibly and wrongfully evicted her; that on September 20, 1901, plaintiff tendered the purchase price to defendant Frank, and demanded a deed, which was refused; that plaintiff has duly performed all the conditions of the agreement on her part to be performed, and brings the purchase price into court, and offers it to defendant Frank, upon his executing and de-

livering a conveyance according to the contract; and that on April 17, 1901, Frank wrongfully sold and conveyed the premises to the defendant McKenzie, who had full knowledge of the agreement between the plaintiff and Frank. The second cause of action is based upon the alleged wrongful eviction of plaintiff and the withholding of possession, and charges that the same occurred under the direction of the defendant Frank, and there are certain averments of special damages.

The agreement set out in the petition, and which was introduced in evidence, is in form a lease for the period of six months from April 1st, containing a clause giving the lessee, the plaintiff below, the right to purchase the premises at any time within said six months upon the payment of \$5,000, with interest at the rate of 8 per cent. per annum. The alleged right to specific performance is based on that clause. The plaintiff, as lessee, covenanted to pay as rental the taxes on the premises for the current year, 1901, to have the fences and buildings in good repair, and not to pasture upon a certain portion of the land, designated as "the bottom pasture," to exceed ten head of saddle and work horses and two milch cows. It was agreed that she should have full use of "back pasture" for her own stock, and that she should not have the right to turn stock upon the hay meadows, nor be allowed to pasture upon certain specified "ranches." It was also agreed that, in the event she should not purchase the premises within the time granted, one-half of the hay crop and one-third of the other crops raised on the land should belong to the lessor, Frank. The lease then concludes with the following provision: "It is further agreed that the party of the second part [the lessee] shall deposit with the party of the first part the sum of five hundred dollars for the faithful performance of this lease and the payment of the taxes as aforesaid." The paper is signed by both parties.

The answer not only denied the allegations of the petition as to the eviction of plaintiff, but averred that the latter had voluntarily delivered possession to the defendant McKenzie. There was some conflict of evidence on that issue, and the trial court determined it in favor of the plaintiff, expressly finding that on July 26, 1901, Mrs. McKenzie, with the consent and connivance of the defendant Frank, took possession of the premises against plaintiff's consent, and continued to withhold possession, and that plaintiff never voluntarily surrendered it. The point of conflict in the testimony was as to whether or not the plaintiff had voluntarily surrendered possession. Upon that question the finding of the trial court will be accepted, and, so far as material, the fact will be considered as established that Mrs. McKenzie took possession of the premises against plaintiff's consent. It is not denied that she continued in possession. In the view we are constrained to take of the

case under the issues and proof: Frank's alleged connection with the act of Mrs. McKenzie in taking possession may not become material; but we deem it proper to say that the evidence totally failed to connect him with that act in any way, unless the fact that he had previously conveyed the land ought to be given that effect, which is at least doubtful. There is not the slightest evidence, outside the mere fact of his conveyance, that Frank either consented to or aided in the act of taking possession, or that he even knew of it until after it had occurred.

The remaining material averments of the answer are in substance and effect that the privilege given to the plaintiff to purchase the premises was without consideration, that there was lack of mutuality in the contract for the sale, and that the lease never became operative, for the reason that plaintiff (the lessee) failed to make the deposit required by the contract for her faithful performance of the lease and the payment of the taxes, which it is alleged was a condition precedent to the acquirement of any right by the plaintiff under the lease. The reply met these averments, first, by a general denial; second, by alleging that the defendant Frank never demanded that the \$500 mentioned in the agreement be deposited with him; and, third, that said Frank never demanded of the plaintiff that she comply with any or all the terms of the agreement, and never notified plaintiff that she had violated any of such terms. The case was tried to the court on all the issues, and there was a separate statement of the conclusions of fact and law.

Briefly stated, the conclusions of fact were as follows: That plaintiff substantially complied with the terms and conditions of the contract; that she was in possession of the premises prior to and at the time of the execution of the contract, and at the time of the execution of the deed from Frank to Mrs. McKenzie, and until July 26, 1901; that Mrs. McKenzie took her deed with full knowledge and notice of the terms and conditions of the contract set up in the petition; that plaintiff never recognized the validity of the deed to Mrs. McKenzie, but always insisted on her rights under the contract and did not voluntarily surrender possession; that with the consent and connivance of Frank Mrs. McKenzie wrongfully took possession against plaintiff's consent and continued to withhold possession; that plaintiff tendered the purchase price to Frank (\$5,300) September 20, 1901, within the life of the contract, and then demanded a deed, and has kept the tender alive by bringing the money into court; that defendant Frank had failed to execute and deliver a deed to plaintiff; that plaintiff had been damaged by the wrongful entry and withholding possession in the sum of \$1,000. Upon these conclusions of fact and the admissions in the pleadings, the conclusions of law were, to state them briefly, as follows: That the contract was during its term a valid

one, and obligated the defendant Frank to convey the lands to plaintiff upon a substantial compliance by her with its terms; that the deed to Mrs. McKenzie ought to be set aside, and the title to the lands quieted in the plaintiff; that defendant Frank should be required to execute and deliver a deed to plaintiff; that the defendants are wrongfully detaining possession of the lands from plaintiff, and she ought to recover from defendants her damages, in the sum of \$1,000. Thereupon a decree was entered in accordance with the conclusions of law.

A motion for new trial was filed and overruled, and the defendants prosecute error, assigning as error the overruling of the motion for new trial and the insufficiency of the findings to support the judgment. The motion for new trial challenged each finding of fact and conclusion of law on the ground of insufficiency of the evidence to sustain it, and as contrary to law, as well as the sufficiency of the evidence to support the judgment, and also various rulings of the court on the trial in the admission and rejection of evidence. Since the submission of the cause the defendant in error died, and the cause has been revived in the names of her devisee and legal representatives.

Before discussing the questions involved upon the errors assigned, we think attention should be called to the objectionable method adopted in enforcing the alleged right of the plaintiff to a conveyance. There was no claim that Mrs. McKenzie's deed was without consideration, and there was no necessity of adjudging it void and vacating it, nor was that theoretically proper. A purchaser of real property, with notice of a prior contract to convey the same to another, takes it subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor; and, upon a bill filed by the original vendee against the vendor and such subsequent purchaser, the proper practice is to direct a specific performance of the contract by the subsequent purchaser, in whom resides the legal title. 2 Warvelle on Vendors (2d Ed.) § 735; Waterman on Spec. Perf. § 75; 1 Tiffany, Real Prop. § 110; Pomeroy on Contracts, Spec. Perf. § 465. In the case of an executory contract for the sale of land, capable of specific performance, upon the principle that equity regards as done that which ought to be done, the equitable estate is considered as vested in the purchaser, unless a contrary intention appears, and the vendor is regarded as holding the legal title in trust for the benefit of the purchaser, while the latter is regarded as the trustee of the vendor for the unpaid purchase money, and any one thereafter taking a conveyance of the land from the vendor, with notice of the contract, takes it subject to the same equity in favor of the purchaser that controlled the title in the hands of the vendor. Waterman on Spec. Perf. § 512 et seq.;

1 Tiffany, Real Prop. § 110; Pomeroy on Contracts, Spec. Perf. § 314. If the court's conclusions as to the respective rights and obligations of the parties under and in view of the contract were correct, the decree should have directed a conveyance by Mrs. McKenzie to the plaintiff; and as everything in this record indicates that the former had paid to Frank for her deed the same amount of money named as the price to be paid by plaintiff, and had become the owner of the property, subject only to the rights of the plaintiff under her alleged contract, the purchase price on deposit in the court should have been ordered paid to her, or, to overcome any doubt on the subject, the court might have directed an inquiry to ascertain which of the two parties, Frank or Mrs. McKenzie, was equitably entitled to the money. The decree as entered not only declared Mrs. McKenzie's deed void, but directed the money paid into court by the plaintiff to be paid to Frank, who, for all that the evidence discloses, had already received the same amount substantially from Mrs. McKenzie when he conveyed to her.

The defendants tendered the issue of want of consideration and lack of mutuality in the contract sought to be specifically enforced, and the errors assigned depend largely upon the contention that the contract is not enforceable by specific performance, for the reason that it lacked both mutuality and consideration. The agreement relied on is expressed in the written contract as follows: "It is further agreed that the party of the second part shall have the right to purchase the above-described premises at any time before the expiration of said six months upon the payment of the sum of \$5,000, and the interest on the same at the rate of 8 per cent. during said time." The older authorities declare the doctrine that, as a prerequisite to specific performance, there must exist both mutuality of obligation and remedy, and, as a general or fundamental rule, that doctrine seems still to be maintained; but in modern equity practice it has become very much narrowed in its application by the recognition of a number of so-called exceptions, though the exceptions are so thoroughly established that it would seem more accurate to consider them as a part of, or a modification of, the doctrine itself. Where a contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions—that is to say where both parties have bound themselves or intended to bind themselves by reciprocal obligations—then no doubt the doctrine as to the requirement of mutuality applies; and in such a case, if for any reason one of the parties is not bound, he cannot compel performance by the other. 2 Warvelle on Vendors (2d Ed.) § 739; Pomeroy on Spec. Perf. of Contracts, § 109.

But the doctrine is not applicable to contracts unilateral in form, though bilateral in

effect, such as bonds and similar obligations; for contracts of that description are constantly enforced. 2 Warvelle, § 739. Nor does it apply to an optional contract for the purchase or sale of land that is founded upon a proper and sufficient consideration. Matthews Slate Co. v. New Empire Slate Co. (C. C.) 122 Fed. 972; Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; 1 Warvelle on Vendors, §§ 125, 126; Pomeroy on Spec. Perf. of Contracts, §§ 167-169, and notes. In Watts v. Kellar, supra, the United States Circuit Court of Appeals said: "When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them." In Matthews Slate Co. v. New Empire Slate Co., supra, it is said: "This court is of the opinion that if two persons enter into a contract in writing under seal, by which the one party, in consideration of one dollar, the payment of which is acknowledged, agrees to sell and convey to the other party within a specified time certain lands and premises, on payment by the other party of a specified consideration, such contract is valid and binding, and ought to be and may be specifically enforced. The seller has the right to fix his price, and covenant and agree that on receiving that price within a certain time he will convey the premises; and if within that time the purchaser of the option tenders the money and demands the conveyance he is entitled to it. To hold otherwise is to destroy the efficacy of such contracts and agreements."

There is abundant authority sustaining the proposition that an agreement by one party to sell and convey land to another for a stated price, if given upon a proper consideration, may be specifically enforced upon an acceptance and tender of the price within the time allowed by the contract; and it is not a valid objection in such case that prior to acceptance and tender no obligation rested upon the option holder to purchase. "And it is now well settled that an optional agreement to convey, or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." Hawralty v. Warren, 18 N. J. Eq. 124; 21 Ency. L. 928; Waterman on Spec. Perf. § 200; 1 Warvelle on Vendors, §§ 125, 126; Pomeroy on Spec. Perf. of Contr. §§ 167-169; Guyer v. Warren, 175 Ill. 528, 51 N. E.

580; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Ross v. Parks*, 92 Ala. 153, 9 South. 357, 25 Am. St. Rep. 20; *Hall v. Center*, 40 Cal. 63. *Waterman*, in the section cited, states that it is doubtful if such an agreement should be called an exception to the general rule as to mutuality, since it is in fact a conditional contract, and, when the condition has been made absolute by a compliance with its terms, the contract becomes mutual and capable of enforcement by either party. See, also, 2 *Warvelle*, § 739. Such an agreement—that is, an optional agreement to convey made upon proper consideration, or forming part of a lease or other contract that is in fact the consideration for it—cannot be revoked by the vendor within the period granted for the exercise of the option. Authorities, *supra*. But a mere proposal without consideration creates no obligation, unless accepted according to its terms; and it may, therefore, be withdrawn at any time before acceptance, though, if such an offer is allowed to remain open until accepted, it will become a binding contract. When the option given upon a consideration is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale; and the same result flows from the acceptance of an offer without consideration, if accepted before the offer is withdrawn or revoked. 1 *Warvelle on Vendors*, §§ 125, 126. An agreement in a lease, granting the lessee the privilege of purchasing the premises within a stated period upon specified terms, is regarded as a continuing offer to sell, which may not be revoked during the period within which the agreement permits the option to be exercised. *Id.* In such case, where no other consideration is stated or shown, the lease itself, with the affirmative covenants of the lessee, is usually considered as a sufficient consideration for the agreement to sell and convey at the lessee's option.

Now, in the case at bar, the optional agreement does not recite a consideration; but it is contained in a written contract signed by the parties, and it is maintained on the part of defendants in error that the contract being a lease of the premises constituted a sufficient consideration for the agreement to convey, and it seems to be relied on as the sole consideration. On the other hand, it is contended that the contract never took effect or became operative as a lease, or for any other purpose, for the reason that the plaintiff neglected to perform a condition precedent to its operation, viz., the agreement to deposit \$500 as security for her faithful performance of the lease and the payment of the taxes. Hence it is insisted that the paper did not amount to a lease, and could not, therefore, be regarded as a proper consideration for the optional agreement, and that the lessor, Frank, revoked the agreement by the sale and conveyance of the premises to his codefendant, Mrs. McKenzie, which fact was

brought to the knowledge of the plaintiff shortly thereafter, and before any acceptance on her part of the privilege of purchase. It becomes important, therefore, to consider the character of the agreement to make the deposit, and whether the failure to do so rendered the lease ineffective. There is no dispute upon the facts as to the deposit. It was neither made nor offered at any time; but, on the contrary, the plaintiff stated, after her eviction, and when her attention was called to her neglect to comply with her agreement to secure her performance of the terms of the lease by making a deposit of \$500, that she repudiated that part of the contract.

Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition. The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement, made and entered into this 4th day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands [description] for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be the taxes for the year, and a certain portion of the crops,

should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease. The statutes require the tax list to go into the hands of the collector by the third Monday of September, and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair. This would all indicate that the agreement for the security was intended as a condition, rather than a mere covenant. Moreover, as a covenant, it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefits. As no time for making the deposit was stated, doubtless a reasonable time would be implied, and, had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. It was clearly proven, and so found by the court, that she was in possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer.

There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions, and the judgment of the court was based upon a finding that they had been substantially complied with. The reply, indeed, alleges that Frank did not demand the deposit; but he was not required to do so. There is no showing, however, as to that averment. The evidence is silent as to whether or not such a demand was made. But, when the plaintiff was charged with failing to furnish the security, she responded by saying that she repudiated that agreement. It is not disclosed, moreover, that Frank did anything toward recognizing the

possession of the plaintiff, after the making of the contract, or that he did any act in relation to the property, except to sell and convey it to Mrs. McKenzie on April 17th; and after that the record is silent concerning him until his refusal of the tender of the purchase price September 20th, except that he appears to have been present at an interview between the plaintiff and Mrs. McKenzie, and their attorneys, after plaintiff had been evicted from the premises. But we think the question of waiver is not the case now before us. The trial court made no finding in that respect, and such an issue is not presented by the pleadings.

The above facts have been adverted to for the purpose of showing that nothing appears, even by the subsequent conduct of Frank, to indicate an intention to treat the agreement for security as anything other than a condition precedent to any right of the plaintiff to the premises under the lease. Similar provisions have, so far as we have been able to discover, been held to amount to conditions precedent. In the English case of *John v. Jenkins*, 1 C. & M. (Exch.) 227, the lease there before the court contained words of present demise: "He, the said Esau Jenkins, lets this farm to David Jones," etc. But the following clause was contained in it: "David Jones is to give two sureties to answer for the rent." The court said that the provision as to sureties was very important, and showed that the instrument was never intended to operate as a lease at all events, but to operate as an agreement only, and that it was not to so operate, except security should be given for the rent by two sureties on the part of plaintiff; and, as no sureties were given, the instrument was for that reason, as well as others unnecessary to mention, held to be without effect, and the plaintiff's possession was held to have been under the terms of a previous tenancy. In that case the plaintiff was in possession as tenant under a former agreement when the one in controversy was entered into. In *McGaunt v. Wilbur*, 1 Cowen, 257, a house was hired on October 31st for six months from the 1st day of November following, for which the hirer agreed to pay \$150, \$50 to be paid in advance, and the residue to be secured by a bill of sale of his furniture in the nature of a mortgage. At the time of the hiring the hirer mentioned that he would not want possession for a fortnight. On the 3d of November the owner of the house, not having received the advance payment or security, rented it to another tenant. A few days later the first party tendered the \$50 and bill of sale, and demanded possession. It was held that as the tenancy under the agreement was to commence November 1st and the advance payment had not been made on that day, nor the security given, the owner had the right to consider the contract at an end, and let his house to any other person. To the same effect are the following cases:

*Andis v. Personett*, 108 Ind. 202, 9 N. E. 101; *Hard v. Brown*, 18 Vt. 87. See, also, *Cassidy v. Robinson*, 8 B. Mon. 279; *Stanton's Adm'r v. Brown*, 6 Dana, 248; *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa, 555.

It is impossible, therefore, to construe the provision in question as anything other than a condition precedent, and hence, until performed, the instrument was only an agreement for a lease; but, not having been performed, the lease did not become effective or binding upon the owner of the premises, and cannot be regarded as constituting a consideration for the optional agreement to convey. There is nothing in the fact of plaintiff's possession to change the situation. She was in possession at and before the signing of the contract, and there is no proof that Frank delivered possession to her. It is not perceived, therefore, upon what ground such possession can be regarded as imparting vitality to the lease. In the absence of any other showing, she would be but a mere tenant by sufferance. Rev. St. 1899, § 2772. The taking and keeping possession by the plaintiff, without more, was clearly not a part performance of the contract on her part. Possession is what she contracted to receive, not to give, and there is no opportunity or foundation in this case upon the record for the application of the principle that, when a party has voluntarily accepted the benefits of part performance, he may be precluded from insisting upon the performance of the residue as a condition precedent to his liability to pay for what he has received. No doubt, had the lessor put the lessee in possession, that act might have indicated an intention not to treat the agreement for security as a condition precedent; and possibly the same intention might have been gathered from affirmative acts of the lessor in recognition of the possession and an existing tenancy under the contract. But there is no evidence of such acts on Frank's part. The evidence does disclose a notice served upon the plaintiff in the early part of July by Mrs. McKenzie, which seems to recognize in a way that plaintiff was holding under the lease, but asserted that she had not complied with its terms, and that the giver of the notice reserved the right to declare the lease forfeited. But Mrs. McKenzie was not a party to the contract, and we do not understand that she could, by recognizing the lease at that time and in that manner, render it effective, so as to make the obligation to convey binding upon Frank, her vendor. There is nothing to show that the latter advised or consented to the notice, or knew of it, and hence it can hardly be deemed persuasive of an intention on his part, or of the parties to the contract, to consider the contract as a present demise, and the provision as to security as a mere covenant.

We are constrained, therefore, to hold that the finding of substantial compliance with the terms of the contract is not sustained by

the evidence. No doubt the contract was valid, so far as effective, and the agreement to convey upon payment of the specified price, although without consideration, obligated Frank to make the conveyance, had there been an acceptance and tender before a revocation on his part. But as his promise was, so far as the record discloses, without consideration, it was his privilege to revoke it at any time previous to acceptance; and the sale and conveyance of the property to Mrs. McKenzie, which does not appear to have been otherwise than in good faith and for a valuable consideration, and which was brought to the knowledge of the plaintiff before any attempted acceptance of the option, amounted to a sufficient revocation. *Dickinson v. Dodds*, 2 Ch. Div. 468; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; *Little v. Thurston*, 58 Me. 86; *Warren v. Richmond*, 53 Ill. 52. There was no apparent attempt on the trial to show, nor is it now suggested, that the optional agreement was based upon any other consideration than the lease. There is a fact disclosed by the evidence that seems to point to the probability of an executed consideration independent of the lease. The plaintiff introduced in evidence a warranty deed of the same date as the contract in question, whereby it appears that the plaintiff conveyed the identical premises to the defendant Frank, in which the consideration is stated to be \$5,000; and it is shown that plaintiff had before that date been in possession of the property. But the deed is not in any way explained, nor is there any proof that it formed a part of the transaction out of which grew the optional agreement. Had the agreement of Frank to subsequently convey the premises to plaintiff at her option been made in consideration of her conveying the property to him, and as a part of the same transaction, we are inclined to think that it would have been competent for plaintiff to have shown that fact, and that it might have rendered the optional agreement binding for the period in which the option was permitted to be exercised, notwithstanding that no right of possession was acquired under the lease because of the failure to furnish the required security. It is true that in her testimony plaintiff speaks of her right to "repurchase" the property. But there was no attempt to show that she obtained or contracted for that right at the time she executed her deed or as a part of that transaction.

Counsel for plaintiff asked her, when she was on the witness stand, to state the conversation between herself and Frank at the time she "signed this deed"; and, upon objection being interposed, counsel stated that the proof was offered particularly in support of the second cause of action, to show that Frank did not intend to comply with his agreement, and to show malice and wrongful acts on the part of both defendants. The



objection was sustained, and the proof offered excluded. The deed and the conversation at the time, therefore, do not seem to have been offered as proof of consideration for the optional agreement; and, as the deed and contract were not connected by the evidence, we are not at liberty to supply the omission by inference, if, indeed, there was any omission. It is not our privilege to assume that they were related. It may be that the agreement sought to be enforced was an afterthought, and entered into after the transaction resulting in the conveyance of the property to Frank had been entirely closed. There is nothing in the findings of the trial court to indicate that any reliance was placed upon the deed.

It follows, from our conclusions as to the contract relied on under the pleadings and evidence, that the district court erroneously found it to be obligatory upon the vendor, Frank, during its term, and to be binding upon him to convey the property upon the tender by plaintiff of the purchase price in September, when the tender was made. As the cause must be remanded for new trial, it will be proper for us to say that we do not coincide with the contention of counsel for plaintiffs in error that the tender was made to the wrong party, assuming that the agreement to convey was then in force. Mrs. McKenzie was not a party to the contract. Frank's conveyance to her would not have released him from his obligations to perform the contract, had it been incapable of revocation on his part. The doctrine of specific performance of contracts for the sale and purchase of land is said to mainly depend upon the principle of the transmission by the contract of an equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee; and a subsequent purchaser from the vendor, with notice of the previous contract, stands in equity in the place of his vendor, and is as much a trustee as he was, and therefore he may be compelled to specifically perform his vendor's contract by conveying the legal title to the first purchaser. *Waterman on Spec. Perf.* § 512. The object of the tender was to exercise the claimed option within the time limited, and to show an acceptance of the option according to its terms; and, under the circumstances of this case, had the option been a subsisting one, we are of the opinion that the tender was properly made to Frank, who had entered into the covenant to convey; and thereupon both Frank and his grantee, Mrs. McKenzie, would have become bound to make the conveyance. *Sizer v. Clark (Wis.)* 93 N. W. 539.

It further follows that the court erroneously awarded the plaintiff damages for the withholding of possession from her from the time of her eviction up to the date of the decree. Not having performed the condition precedent to her right of possession under the lease, she could not lawfully retain it.

Even had there been shown an independent consideration for the agreement to convey, she would not have been entitled to possession, in consequence, merely, of such an option, in the absence of an express stipulation to that effect, until, at least, she had made the tender and demanded a deed. 2 *Warvelle on Vendors* (2d Ed.) §§ 891, 958. It is evident that the damages were awarded upon the second cause of action on the theory that both defendants had wrongfully and maliciously dispossessed the plaintiff and used and occupied the premises. Upon that theory, as already indicated, we think it doubtful if there was a sufficient showing to hold Frank accountable for the acts of his codefendant. But, as the case must go back upon other grounds, it is not necessary to express a decided opinion upon that question; and for obvious reasons it is not necessary to consider whether, had the optional contract been shown to be binding and incapable of revocation by the vendor during its term, Frank would have been liable in damages for plaintiff's loss of possession after the tender, upon the theory that after tender she became in equity the owner, and thereafter entitled to possession or the rents and profits, and that a court of equity, in order to adjust the rights of the parties, in furtherance of justice, might, in an action for specific performance, award damages for deprivation of possession. See 2 *Warvelle on Vendors*, § 958; *Waterman on Spec. Perf.* § 519; *Worrall v. Munn*, 38 N. Y. 137; *Cole v. Tyson*, 43 N. C. 170.

For the reasons stated, the judgment will be reversed, and the cause remanded for new trial.

Reversed.

CORN, C. J., and KNIGHT, J., concur.

### DOWLING v. HIBERNIA SAVINGS & LOAN SOC. et al. (S. F. 3,313.)

(Supreme Court of California. June 2, 1904.)

STREET IMPROVEMENTS — RESOLUTION OF INTENTION — IDENTIFICATION — SUFFICIENCY — POSTING OF NOTICE — AFFIDAVIT — EXCEPTIONS OF PORTIONS OF THE STREET ALREADY IMPROVED.

1. In an action to foreclose the lien of an assessment for a street improvement, the introduction in evidence of the assessment, diagram, warrant, return, and engineer's certificate makes a *prima facie* case for plaintiff.

2. In an action to foreclose the lien of an assessment for street improvement the minutes of the board of supervisors showed, with respect to the adoption of a resolution of intention to improve the street, merely that on a certain date a resolution of a certain number declaring the intention of the board to order the performance of certain street work was adopted on motion of a certain member; but a book called a "resolution book" kept in the office of the clerk of the board was introduced in evidence, and contained, pasted therein, what purported to be a resolution of intention, of the same number as that mentioned in the minutes, introduced by the same member of the board

and adopted on the same date. This resolution was in due form, and directed the clerk to cause the posting of the resolution and its publication in a certain newspaper. The paper pasted in the book had been cut from the newspaper in question after the first publication, and was an exact copy of a paper which was produced by an assistant clerk of the board, which purported to be a resolution of intention of the same number, and was found by the assistant clerk among the files of papers in the office of the clerk. *Held*, that the resolution of intention was sufficiently identified to sustain a *prima facie* case made by plaintiff.

3. The fact that the entry in the resolution book was delayed until after the first publication, and then made by pasting in a printed copy, was not material.

4. The street improvement act (St. 1891, p. 196, c. 147) provides that, on passage of the resolution of intention to make the improvement, the street superintendent shall cause to be conspicuously posted along the line of the contemplated improvement, not more than 100 feet apart, notices of the passage of the resolution. Section 2 authorizes the city council to order the improvement of the whole or any part, either in length or width, of any street, and provides that, where work is proposed, the council may except from its resolution of intention and order any of the work already done on the street. A resolution of intention to make an improvement stated that it was the intention of the board to order curbs and pavement to be laid on a certain street between two other intersecting streets where not already laid, and the affidavit of posting the notice stated that the affiant posted, along the line of the street to be paved between the two other streets, notices not more than 100 feet apart, etc. *Held* to show a sufficient posting under the statute.

5. Under St. 1891, p. 196, c. 147, providing that, where street improvement work is proposed, the council may except from its resolution of intention and order any of the work already done upon the street, etc., a resolution of intention stating that curbs and pavement are to be laid upon a certain street between two intersecting streets, "where not already laid," sufficiently expresses the exception.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by J. J. Dowling against the Hibernia Savings & Loan Society and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Tobin & Tobin, for appellants. Alex. G. and Hobart Eells, for respondent.

ANGELLOTTI, J. This is an action to foreclose the lien of an assessment for street improvement work. Plaintiff had judgment, and certain defendants appeal therefrom.

1. It is contended that no jurisdiction was ever acquired by the board of supervisors to order the work, because no resolution of intention properly or officially authenticated was ever passed or adopted. The plaintiff made a *prima facie* case by introducing in evidence the assessment, diagram, warrant, return, and engineer's certificate. To overcome the case thus made, defendants produced as a witness an assistant clerk of the board of supervisors, who testified that a paper produced by him from the files of the board was the original resolution. What

purported to be a resolution of intention, numbered 2976 (fourth series), sufficient in form and substance, was contained therein, with the names of all the supervisors and the clerk printed thereon. The so-called "resolution" purported to have been introduced by E. Aigeltinger, and to have been adopted on June 12, 1899. On cross-examination of this witness it was developed that he had simply found this paper among the files of papers in the office of the clerk of the board, and knew nothing else about it. It was further shown that all that the minutes of the board disclosed in regard to such resolution was that on June 12, 1899, "The following resolutions were adopted on motion of Supervisor Aigeltinger: \* \* \* No. 2976, declaring the intention of the board to order the performance of certain street work." What, however, is called a "resolution book," kept in the office of the clerk of the board, was introduced in evidence, and this contained, pasted therein, what purported to be "Resolution of Intention, No. 2,976 (Fourth Series)," introduced by E. Aigeltinger, and adopted June 12, 1899, in due form, expressing the intention of the board to order the work done, and directing the clerk to cause the posting of the resolution and the publication thereof in the Evening Post newspaper. The paper so pasted in the resolution book had been cut from the Evening Post after the first publication of the resolution, and it was an exact copy of the paper produced from the files of the board. The *prima facie* case made by plaintiff was not rebutted by this showing. There is no material difference between the facts here and those in the case of *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432. There, as here, the minutes showed only that a resolution of intention of a certain number, introduced by Supervisor Day, had been adopted, and the resolution book containing the resolution was held to sufficiently supply the defect. While the method of keeping the records was criticised, the court said: "A legislative body is not required to keep its minutes in any one book. \* \* \* No special mode of authentication seems to have been provided, and, although a mere reference by number to what is assumed to be a book of resolutions kept by the board is an unsatisfactory mode of identification, we cannot say that the resolution is thereby made invalid. The assessment being put in evidence makes a *prima facie* case. To rebut it, the defendant must prove affirmatively the failure on the part of the board to perform some act essential to its validity. The minutes show the requisite action on the part of the board. Some resolution corresponding in number was passed. It is a question simply of identification, and I think the *prima facie* case has not been rebutted." The minutes of June 12, 1899, showing the adoption of resolution of intention No. 2,976, on motion of Supervisor Aigeltinger, and the resolution book showing reso-

lution of intention No. 2,976 (fourth series), introduced by Supervisor Aigeltinger, and adopted June 12, 1899, such resolution is sufficiently identified to sustain the prima facie case. The fact that the entry in the resolution book was delayed until after the first publication, and that it was then made by pasting in a printed copy instead of writing it in longhand, is not material. A similar objection is made to the order directing the work to be done, and what has been said disposes thereof.

2. It is contended that the only affidavit on file or of record in relation to posting of notices of the street work proposed by the resolution was defective, and insufficient to show a proper posting. The resolution stated that it was the intention of the board to order the following street work, viz.: "That granite curbs be laid on Henry street between Sanchez and Noe streets, where not already laid, and that the roadway thereof be paved with bituminous rock, where not already so paved." This resolution embraced only one block of about 560 feet in length. The work designated in the resolution had already been done on said block, except in front of lot 1 on the north side of Henry street, having a frontage of 150 feet thereon, and lots 2, 3, 4, 5, on the south side of the street (lots 2 and 3 being separated by a lot of 75 feet frontage from lots 4 and 5), having a frontage of 135 feet thereon. The affidavit of posting in evidence stated that the affiant "conspicuously posted along the line of Henry street, between Sanchez street and Noe street, notices not more than 100 feet in distance apart, and six notices in all," etc. The statute relative to such posting provides as follows: "The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than 100 feet in distance apart, but not less than three in all, \* \* \* notices of the passage of such resolution." Street Improvement Act (St. 1891, p. 196, c. 147). It will be observed that the affidavit in terms follows the statutory provision as to posting, except that, instead of stating that the notices were posted along "the line of said contemplated work or improvement," it states that they were posted along the line of Henry street, between Sanchez and Noe streets. This, however, was the line of the contemplated work or improvement described in the resolution of intention, unless the exception in general terms of such work as had already been done made it otherwise.

The statute authorizes the city council to order the improvement of "the whole or any portion, either in length or width of any street" (section 2, St. 1891, p. 196, c. 147), and provides that, where work is proposed, the council may except from its resolution

of intention and order "any of the said work already done upon the street to the official grade," and the lots and portions of lots fronting on said excepted work shall not be included in the frontage assessment for the class of work from which the exception is made. St. 1891, p. 204, c. 147. This exception may be made by language similar to that used here, viz., "where not already laid," and "where not already so paved." McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877; Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Reid v. Clay, 134 Cal. 207, 212, 66 Pac. 262.

Where such exceptions are so made they do not, however, change "the line of such contemplated work or improvement." The council indicates its intention to order a specified portion of a street improved in a certain way. That portion is definitely described in its resolution of intention, as here, "Henry street between Sanchez and Noe streets." It further says, in effect, as authorized by the statute, that, where any of the proposed work has already been done at the expense of the owners fronting on parts of the specified portion of the street, it need not again be done, but the work so already done shall be accepted as a part of the improvement proposed and ordered, and the owners exempted from any frontage assessment for new work of the same character on other parts of the line designated by the resolution of intention. The line of the contemplated work or improvement, within the meaning of the statute, is precisely the same as if no such exception of work already done had been made.

The statute, reasonably construed, requires the notices to be posted along the entire line of the contemplated work or improvement, at intervals of not more than 100 feet. This certainly insures sufficient notice to all property owners of any proposed improvement. The affidavit in evidence, reasonably construed, shows that the notices were posted along the line of Henry street from Sanchez street to Noe street, at intervals of not more than 100 feet, and that the number of notices posted was 6. The line of the contemplated work or improvement being Henry street, between Sanchez and Noe streets, this was a sufficient posting under the statute. The language of the affidavit is as definite in this respect as the language of the statute, being practically a literal copy thereof, and there was certainly nothing therein tending to rebut the prima facie case as to posting made by the assessment, diagram, warrant, return, and engineer's certificate.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

143 Cal. 436

**MATTESON v. EQUITABLE MIN. & MILL. CO.** (Sac. 1,166.)

(Supreme Court of California. June 2, 1904.)

**CONDITIONAL SALES—DEFAULT—RIGHTS OF SELLER.**

1. Under Civ. Code, § 3311, subd. 1, declaring that the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is, if the property has been resold pursuant to section 3049, authorizing such a sale, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale, the seller of personalty under an agreement that the title shall not pass until all the installments of the purchase price are paid is entitled, after a sale of the property at auction, on default in payment, to recover from the purchaser the balance remaining due after crediting the amount received at the auction sale.

In Banc. Appeal from Superior Court, San Joaquin County; Edward G. Jones, Judge.

Action by D. C. Matteson against the Equitable Mining & Milling Company. From a judgment for defendant, plaintiff appeals. Reversed.

A. H. Carpenter, for appellant. Nicol & Orr, for respondent.

BEATTY, C. J. Plaintiff's assignor erected on the mine of defendant a 10-stamp quartz mill, with various appurtenances, under a written contract, by which the defendant agreed to pay for the mill, etc., the sum of \$10,000 in stated installments. The contract included the following stipulation: "It is further agreed by the said party of the second part [the defendant] that the said mill, concentrators, water wheels, pipe line and all other structures built by the parties of the first part under the terms of this contract shall be considered as and shall be personal property, whether attached to the earth or not, and the title and ownership thereof shall be and remain in the said party of the first part with the right to take up and remove the same from the said premises at any time in default of the payment of any installment of the purchase price thereof, or of any payment of money or delivery of stock, or bullion, as provided for in this contract, and leave and license irrevocable is hereby given and granted to said party of the first part to enter in and upon the property of the said party of the second part to remove the same." Plaintiff's assignor fully complied with the contract on his part, but at the end of four years after the completion of the mill a large portion of the contract price was overdue and unpaid. The plaintiff, upon refusal of further payments, caused the mill and appurtenances to be sold at public auction, credited the amount realized as a payment on the contract, and brought this action to recover the balance remaining due. Upon findings, in substance, to this effect, the superior

court rendered and entered its judgment in favor of the defendant for its costs, and plaintiff appeals.

It seems very clear that the judgment is in conflict with the findings. The conclusion of the court that the plaintiff could not recover the unpaid balance of the contract price is supposed to be sustained by the decision of this court in *Parke & Lacy v. White Lumber Co.*, 101 Cal. 37, 35 Pac. 442, and *Holt Manufacturing Co. v. Ewing*, 109 Cal. 358, 42 Pac. 435. Those cases are not in point. In each of them the vendor of personal property was suing to recover the property in specie, or its value, after having recovered a judgment for a part of the price in the first case, and procuring the allowance in probate of the balance of his claim in the second. It was merely decided in those cases that the vendor in a conditional sale, after electing to sue for the purchase money, and after obtaining a judgment, cannot recover the property also. In this case the vendor is suing, not for the property, but only for the balance due upon the contract after crediting the vendee with the value to him of the property sold. The vendor in this case had a right to the possession of the property, which the vendee could not dispute, and this gave him a lien upon it for the balance unpaid of the purchase price, which he could enforce in the same manner as in case of a pledge. Civ. Code, § 3049. He proceeded as in case of a pledge, by selling the property at public auction after notice to the vendee, and crediting him with the price realized at the sale. The measure of his damages for defendant's breach of contract was then the balance remaining due. Id. § 3311, subd. 1. On the findings made by the superior court, the judgment should have been for the plaintiff, but an additional finding is necessary to determine the amount due.

The judgment is reversed and the cause remanded to the superior court, with directions to compute the amount remaining due under the contract after crediting the amount realized at the sale of the property by plaintiff, and to enter judgment for the plaintiff for the amount so computed with costs.

We concur: SHAW, J.; LORIGAN, J.; MCFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

143 Cal. 408

In re TURNER'S ESTATE. (Sac. 1,068.)

**TURNER v. RICHARDSON.**

(Supreme Court of California. June 2, 1904.)

**ADMINISTRATION—RIGHT TO LETTERS—ORDER OF PRECEDENCE.**

1. Code Civ. Proc. § 1365, names brothers fourth in order of those entitled to administer a decedent's estate. Section 1369 provides that no minor may serve; and section 1368, that, if any one entitled to administration be a minor, letters must be granted to his guardian or other person entitled to them, in the court's discretion. Section 1367 authorizes the court

¶ 1. See Sales, vol. 43, Cent. Dig. § 1435.

to grant letters to one or more persons equally entitled. *Held*, that the court has power to grant letters to the guardian of a minor brother to the exclusion of a brother who is of age.

McFarland, J., dissenting.

In Banc. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Application for letters of administration on the estate of Arthur D. Turner, deceased. From an order granting the petition of J. B. Richardson therefor, petitioner L. J. Turner appeals. Affirmed.

R. Clark and O. R. Coghlan, for appellant. Geo. A. Lamont, for respondent.

LORIGAN, J. Arthur D. Turner died intestate on February 9, 1902, a resident of Solano county, leaving property therein. As his sole heirs at law, he left four brothers, residents of said county, three of whom were of age, and the fourth a minor. L. J. Turner, the appellant, one of the adult brothers, applied for letters of administration, as did also J. B. Richardson, the guardian of the minor brother V. F. Turner, and the petitions were heard together. On the hearing it appeared by the testimony of two of the brothers that they desired the appointment of the guardian of the minor brother as administrator, although they filed no written consent or request for his appointment. L. J. Turner testified that he is a brother of the full blood, and desired letters issued to himself. The court, on the evidence, adjudged that Richardson, the guardian, was entitled to letters, and they were ordered issued to him. L. J. Turner appeals from the order.

This appeal involves the construction of section 1368 of the Code of Civil Procedure—a matter not heretofore passed upon by this court. That section provides that, "if any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." Before proceeding to consider this section, it is proper to refer to other sections bearing upon the subject of administration. Section 1365 of the same Code prescribes who must be appointed, and the order in which the persons named are entitled. The brothers are fourth in order. Section 1367 provides that, when there are several persons equally entitled, "the court may grant letters to one or more of them." Section 1369 provides, "No person is competent or entitled to serve as administrator or administratrix who is (1) Under the age of majority. \* \* \*

It is insisted by appellant that the proper construction of section 1368 is that where there is a single person of any class designated by that section as entitled, in their respective order, to letters of administration—children, brothers, sisters, grandchildren—who, if not a minor, would be entitled to such letters, his guardian is so entitled, but, where there are two persons otherwise equally en-

titled as members of a class under said section, the one of whom is a minor, that letters must be granted to the person who is not a minor. The respondent contends—and the lower court took this view of it—that the purpose of section 1368 is to place the guardian of a minor, and the adult members of the class to which the minor belongs, upon the same footing as to the right to letters of administration, and we are of opinion that this construction is the proper one. The language of section 1368 is general in its nature, and unrestricted in its terms. It confers a right in behalf of one member of a class; removes his disability to the extent that it confers upon his guardian a right to which, save for his minority, he would be himself entitled; and, in furtherance of that right, and to uphold it, the language of the section should be liberally, rather than restrictively, construed. There is certainly nothing in the wording of the section which tends to restrict its application in the manner insisted on by appellant. Nor do any other sections of the Code on the same general subject warrant it. There is nothing in the terms of section 1365, declaring who are entitled to administer, which gives an adult of any of the classes there mentioned a preference over minors of the same class. The section simply designates by classes, generally, who are entitled to administer, and prescribes the preferential order in which the classes are so entitled, but it makes no distinction among members of a class on account of minority. The preference which, in the absence of section 1368, is given to adults, springs from section 1369, which necessarily accords such preference, because by this latter section a minor is declared incompetent and not entitled to serve as administrator. This disqualification is general and absolute in all cases and as to all classes, and, but for section 1368, the minor would have no right in any instance to apply for letters. In fact, he has none now. His personal disqualification remains. He cannot serve, but his guardian, as his representative, may. The object of section 1368 undoubtedly is to remove the disqualification of the minor, and place him, through his guardian, in the same category as if the minority did not exist. In the case at bar the particular class of persons to which he belonged was among the brothers of decedent, and, but for his minority, he would have been entitled, as one of that class, to apply for letters of administration. His minority alone disqualified him. That disqualification was certainly intended to be removed by section 1368 to some extent, and the only question is, to what extent has it been accomplished? The language of the section contains no limitation in this respect. It is certainly capable of being fairly and reasonably construed as a removal of the disqualification to the full extent that it is by section 1369 imposed, and to allow him, through his guardian, as his representative, all the

rights to which he would be entitled were he an adult, one of which would be to contest, on an equal plane with all the members of the class, for the right to administer. Nor do the words "letters must be granted to his or her guardian, or any other person entitled to letters of administration in the discretion of the court," indicate a contrary intention, or place the adult in any more favorable position than the minor. The use of these words in the section undoubtedly contemplated that there might be other persons who would be entitled to letters. Such persons are referred to generally, without any discrimination as to whether they may be adults, or minors other than the applicant, or incompetents represented by guardians. And as the term "or any other person entitled" is general in its designation of persons, it must either apply to persons in the same class as the minor, or to persons in inferior classes who, as provided in section 1365, are entitled, in the absence of others having superior rights, to a grant of letters. Now, no good reason can be suggested why, when the Legislature removed the disability from the minor by conferring a right to representation on his guardian, it was intended that the only effect of the application would be to give the court discretion to either appoint him, or some member of an inferior class. This would be according the minor no substantial benefit or advantage, and the section doubtless contemplated the conferring of some substantial right, and this could be best accomplished by placing him in the class to which he would belong if he were an adult, and on an equality with other members of that class—not by placing him on a level with members of an inferior class, or by importing such members into his class and putting them on an equality with him. Under any other construction the section would be held to mean that, while the guardian may apply because his ward is one of a preferential class, who, but for his minority, would be entitled to administration, still, when he does apply, the court may appoint one of an inferior class, who, as against the minor, if an adult, would not be entitled to be heard at all; that, while the minor might be in by superior right, he may be out by inferior displacement. The grant of such a vague and illusory right was never contemplated. Members of an inferior class are never entitled to administer when there is a member of a superior class who is not disqualified, and, by qualifying the minor of such superior class to obtain a grant through his guardian, it is hardly conceivable that the Legislature intended to confer on him no greater privilege than to contest with others of a subordinate class for the discretionary award of a grant of administration. Such a construction would neither be consonant with fairness nor justice to the minor, and we are satisfied that this was not the legislative intent, but that the expression "or any other

person entitled to administer" was intended to, and does, apply to all persons who are entitled to administer as being of the same class as the minor would be, were he an adult. We think this is the proper construction, for several reasons. In the first place, the general subject-matter of the section would indicate it. The section is dealing with the right of a minor to apply through his guardian for letters. It removes his disability, and authorizes the grant to his guardian of letters as a member of a given class. In that class there may be others, equally entitled, seeking letters. Independent of adults, there may be other minors than himself, or they may be all minors whose respective guardians are applying for letters as representatives of their wards. Under these circumstances, it would only be a reasonable construction of the words "other persons entitled" to hold that they apply to persons who are of the same class as the minor, who, either as adults or minors, were seeking letters. In the next place, it is this construction only which accords such minor, through his guardian, the absolute right to letters of administration when he is the sole representative of his class, which cannot be if those outside that class—persons of an inferior grade—are entitled to be considered under the category of "other persons entitled." Lastly, when we consider the entire section, in as far as it confers discretion upon the court to appoint the "guardian or other person entitled," we find it harmonious with, and is in effect the same as, the rule laid down in section 1367, where it is declared that "when there are several persons equally entitled to the administration the court may grant letters to one or more of them." This is the general rule, and applies only in those cases where the persons applying are equally entitled because they are members of the same preferred class, and not only do we think it was not intended to lay down a rule under section 1368 different from the general rule in section 1367, but, on the contrary, from the use of practically the same language in the former section, that it was intended to reiterate and adopt the general rule.

As, then, the expression "or other person entitled" cannot be construed as giving members of a subordinate class an equal or any right to be heard or appointed by the court in its discretion, when the application is made in behalf of a minor of a superior class, it necessarily follows that the language must apply and be confined to members of the same class as the minor, and that, as the law nowhere confers any special right upon an adult to be preferred in a grant of letters of administration, and as the law, by removing the disability of the minor, intended to, and does, place him in the same category of persons entitled, to which the adult belongs, we are of opinion that the guardian of the minor may apply for letters of admin-

istration, notwithstanding there are adults; that the law places them upon the same plane of equality; and that the court, in its discretion, may appoint the guardian of the minor to the exclusion of the adult. This was done in the case at bar, and, as the action of the court was in harmony with the construction we have placed upon section 1368, and was the exercise of its discretion, the order appealed from is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

McFARLAND, J. I dissent, and adhere to the opinion heretofore delivered in department, as follows:

CHIPMAN, C. Application for letters of administration. Arthur D. Turner died intestate on February 9, 1902, a resident of, and leaving property in, Solano county. He left as his sole heirs at law four brothers, residents of said county, three of whom, including appellant, were of age. L. J. Turner, appellant, applied for letters, and J. B. Richardson, the guardian of the minor brother, V. F. Turner, also applied, and their petitions were heard together. It appeared at the hearing, by the testimony of two of the brothers, that they desired the appointment of the guardian of the minor brother, although they had not made or filed any written request for such appointment. L. J. Turner testified that he is a brother of the full blood, and desired letters issued to him. On the evidence, it was adjudged that Richardson was entitled to letters, and it was accordingly so ordered. L. J. Turner appeals from the order.

Section 1365, Code Civ. Proc., prescribes who must be appointed, and the order in which the persons named are entitled. The brothers are fourth in order. Section 1367 provides that, where there are several persons equally entitled, "the court may grant letters to one or more of them." Section 1368 provides: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." Section 1369 provides: "No person is competent or entitled to serve as administrator or administratrix who is: (1) Under the age of majority; \* \* \*" Section 1379 provides: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled filed in the court. \* \* \*" These are all the sections of the Code bearing on the question. In their report of August 1, 1900, made to the Legislature, the code commissioners proposed an amendment to section 1368, and in a note to the proposed amendment said: "This section was probably intended to mean, and will mean, if so amended, that where a

single person would, if not a minor, be entitled to letters in preference to all others, his guardian, if competent and applying, is entitled to letters; but if there are two persons otherwise equally entitled, and one of them is a minor, the letters must be granted to the person not a minor." Appellant insists that this is the correct meaning of the section, when considered with reference to other sections, and therefore the court exceeded its authority in appointing the guardian of the minor brother in preference to a brother who was of age and otherwise competent. Respondent contends that section 1368 places the guardian of the minor brother on the same footing with the adult brother. The statute disqualifies a minor, and says that he is not competent or entitled to serve as administrator. But where "any person entitled to administration [i. e., who is mentioned in one of the classes enumerated in section 1365] is a minor or an incompetent person," his guardian or some other person entitled must be appointed. The person cannot serve, but his representative may, and in such case the court is given discretion to appoint the guardian or "any other person entitled." Section 1368. For example, if there was but one brother, and he was a minor, and therefore disqualified and incompetent, the court might appoint his guardian or any other person entitled by the statute to serve. If, however, there is another brother who is of the age of majority and otherwise qualified, he would be entitled as of right, under section 1365; and we do not think that the Legislature intended to confer an equal right by section 1368 on the guardian of a brother who is by the statute declared to be neither competent nor entitled, or that the Legislature intended by that section to give "any other person entitled" an equal right. It is only by virtue of section 1368 that the guardian of a minor can be appointed, and we do not think it was intended to take away from the adult brother the preference given him by section 1365. It is only where "there are several persons equally entitled to the administration" that "the court may grant letters to one or more of them." Section 1367. Section 1365 places children before brothers of deceased. Suppose the father dies, leaving two sons, one of age and one an infant. Section 1368 would apply to such a case, and respondent's contention would leave it discretionary with the court to appoint the guardian of the minor child or some other person entitled; and this would be true also of the sisters, the grandchildren, and the rest of kin who are mentioned after brothers in section 1365, as entitled. The construction contended for by respondent would place the guardian of a minor on an equal footing with all these different classes of persons. We think the more reasonable meaning of the statute is that where there is but one person of the class entitled, and that person is a minor, the court has the discretion to appoint

his guardian or any other person entitled. But where there are two or more of that class, and one is a minor, the court has no such discretion, but must appoint one of the class who is of the age of majority, if otherwise competent. If all of the class are minors, it may be that respondent's position would hold, but not otherwise.

It is advised that the order be reversed, with directions to grant letters to appellant.

(143 Cal. 430)

**ROSASCO v. COUNTY OF TUOLUMNE.**  
(Sac. 1,115.)

(Supreme Court of California. June 2, 1904.)

**TAXATION—SITUATION OF PROPERTY—CATTLE TEMPORARILY PASTURING—STATUTES—ASSESSORS—ADDING PROPERTY TO TAXPAYER'S STATEMENT.**

1. Pol. Code, § 8891, providing that its revenue laws are to be construed as though the Code had been passed and approved on the last day of the session, does not invalidate an earlier revenue act, unless some repugnancy between the provisions of that act and those of the Political Code relative to the revenues of the state is made to appear.

2. Const. art. 13, § 10, and Pol. Code, § 3628, declares that all property shall be assessed in the county in which it is situated. *Held*, that cattle "temporarily pasturing" in a county were not subject to assessment in that county, but in the county where they were permanently kept.

3. An assessor has power to add property to the verified list furnished in the statement of a taxpayer, though he has not been subpoenaed and examined.

In Banc. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by K. J. Rosasco, as executrix, against the county of Tuolumne. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. B. Curtin, for appellant. F. P. Otis, for respondent.

**HENSHAW, J.** This action was brought to recover from the defendant the sum of \$89 on account of taxes paid by plaintiff, under protest, for certain cattle. The appeal is from the judgment, upon the judgment roll alone. The facts as set forth in the findings are therefore not in dispute. The court found that the estate of Rosasco, of which plaintiff is the executrix, owned about 2,000 acres of land in Tuolumne county and about 589 acres of land in Stanislaus county, and upon the 1st Monday in March, 1901, was the owner of about 306 head of stock cattle. The lands in Tuolumne constitute the home ranch, and for several months prior to the 2d day of March, 1901, all of the cattle had been pastured upon this ranch. On the 2d day of March the plaintiff caused 230 head of cattle to be driven from the home ranch, in Tuolumne county, to the land in Stanislaus county, and 230 head of cattle were at said latter ranch at 12 o'clock noon on the 1st Monday of March,

1901. About the 1st day of April the executrix caused 200 head, and shortly afterwards the remainder of the cattle, to be driven back to the home ranch, in Tuolumne county, after which they were pastured upon the lands of the estate in that county. The residence of the executrix is, and that of her testate in his lifetime was, the county of Tuolumne, and the court expressly finds "that said 230 head of stock cattle were by the executrix of said estate driven from the county of Tuolumne, state of California, into the county of Stanislaus, state of California, on the 1st day of March, 1901, for the purpose of temporarily pasturing the same in said Stanislaus county." The court further finds that the executrix, in making her sworn statement on behalf of the estate for the assessor of Tuolumne county, omitted to enter the 230 head of stock "so driven from the county of Tuolumne aforesaid into the county of Stanislaus aforesaid for the purpose of temporarily pasturing the same in said Stanislaus county." The assessor of the county of Tuolumne thereafter, without subpoena served upon plaintiff, and without order of the board of supervisors of the county, added to the sworn statement so made and given him by the executrix the 230 head of cattle so omitted, and assessed the same against the estate of plaintiff's testator. The appellant contends, under these facts, first, that the cattle were improperly assessed in the county of Tuolumne, because their "situation" upon the noon of the first Monday in March was the county of Stanislaus; and, second, that the assessor had no power to add these cattle to the verified list furnished in the statement of the executrix.

1. The assessment of these animals was proper under the act of March 30, 1872, "Concerning the Assessment of Animals." St. 1871-72, p. 754, c. 511. But to this appellant makes reply that that act has been repealed by the provisions of the Political Code. As the act concerns the revenue of the state, it undoubtedly comes within the purview of section 3891 of the Political Code, which provides that its revenue laws are to be construed as though the Political Code had been passed and approved on the last day of the session; but still the effect of this is not to invalidate or destroy the earlier act, unless a repugnancy between the provisions of that act and those of the Political Code touching the revenues of the state is made to appear. Appellant contends that this is so made to appear by virtue of section 3628 of the Political Code as amended in 1880, and in particular that portion of it declaring that "all other taxable property shall be assessed in the county, city, or city and county, town, township, or district in which it is situated." Substantially the same provision is to be found in the Constitution of 1879 (article 13, § 10). Upon this language it is argued that the actual location of property upon noon of the 1st Monday of March of each year also

¶ 2. See Taxation, vol. 45, Cent. Dig. §§ 562, 564.



lutely fixes its situs for purposes of taxation. With this contention, however, we cannot agree. It is always recognized that in the assessment of goods in transit, of migrating herds, and the rolling stock and vessels of transportation companies, the permanent situs, as distinguished from the place of temporary sojourn, is of controlling force. It is in recognition of this that the rolling stock of railroads operating in more than one county in the state is not made the subject of assessment by the local assessors of the various counties, and it is in further recognition of this that the act of 1872 provides that stock "temporarily grazed" in one county shall nevertheless be assessed in and for the county where the owner resides.

But aside from the provisions of this act, and eliminating it entirely from consideration, still the assessment in this case was justified under section 3628 of the Political Code, and the constitutional provision above cited. The language is that all other taxable property shall be assessed in the county in which it is situated. This, as all of the authorities go to show, has reference to its permanent situation. Thus, if cattle are kept permanently in one county, they are to be assessed in such county, irrespective of the residence of the owner. But if, upon the other hand, cattle are temporarily in a county upon the first Monday of March at noon, they are to be assessed in the county where they are permanently kept. This is in accord with our own decisions and with those of sister states. Thus in *People v. Holladay*, 25 Cal. 301, no contention arose as to the residence of the owner of the cattle—whether it was in Solano county or Alameda county—nor is it made to appear how long the cattle were in Solano county prior to the first Monday in March. For aught that appears to the contrary, they were permanently kept in Solano county, and were therefore properly assessed there. And notwithstanding they had been subsequently removed to Alameda county, when the district attorney of Solano county began suit to collect the taxes, this court very properly held that the Solano county assessment, under the indicated circumstances, was proper. *People v. Niles*, 35 Cal. 282, involved the question of taxes on a sailing vessel. In its discussion this court said by way of illustration: "As, for example, where the nonresident has cattle and sheep which he keeps or herds or pastures in San Mateo county at the time named in the statute, in which case they are taxable in San Mateo county." This language must be construed as having reference to the permanent herding or pasturing, and thus comes within the rule as above enunciated—that, regardless of the residence of the owner, personal property permanently kept or maintained in one county is there to be assessed. In the case last quoted, in recognition of the distinction between the permanent situs of personal property and its transitory or temporary resting

place, this court said: "To authorize the taxing of personal property in any other county than that in which the owner resides, it must appear that the property is being to some extent kept or maintained in such county, and not there casually or in transitu, or temporarily in ordinary course of business or commerce." In *City of Oakland v. Whipple*, 39 Cal. 112—a steamboat case—this court say: "In *People v. Niles* we held that personal property thus transiently within the county could not be there taxed. \* \* \* But in the absence of an express finding on that point, we must presume the implied findings to have been such as were necessary to sustain the judgment, and that the court found the boat was not in transitu, or there for a mere temporary purpose, and was consequently subject to taxation, and rightfully taxed." In the case at bar the finding is explicit that the cattle were in Stanislaus county temporarily. It therefore comes strictly within the rule and reason of the above cases from our own court. In *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068, the plaintiff owned lands in Eureka county, where his cattle were cared for and his business conducted. He allowed them to graze temporarily upon the public domain in White Pine county, and they were assessed in that county. He successfully attacked the assessment; the Supreme Court of Nevada holding that, as his home ranch was in Eureka county for the purpose of herding, caring for, and managing his cattle, "they were not abiding within, nor did they belong in White Pine county in such a sense as to become incorporated with the wealth of that county, or to make them a part of its personal property." In *Ford v. McGregor*, 23 Pac. 508, it is again declared that live stock driven from the home ranch of the owners into another county, to be herded therein temporarily, and then returned to the ranch in the home county, is not assessable for taxes in the former county. In *Whitmore v. McGregor*, 23 Pac. 510, the Supreme Court of Nevada applied the same principle to teamsters engaged in teaming and freighting in Eureka county, who were wont, at the close of the teaming season, to send their horses and mules into Nye county to be fed and cared for until the reopening of the teaming season. It was held that they were not properly assessable in Nye county, but were assessable in the county of Eureka. In *State v. Shaw*, 29 Pac. 321, the Supreme Court of Nevada again held that cattle born, bred, branded, and kept in Nye county have their habitat and are assessable there, although they wander into other counties, and although the owner's home ranch is in Eureka county, where occasionally some of the cattle are taken to be fattened. In *Mayor of Mobile v. Baldwin*, 57 Ala. 71, 29 Am. Rep. 712, the question turned upon the assessment of a steamboat by the municipality, and the court there say: "It is, however, the actual situs of the boat, permanent or temporary,

which it is most material to consider in determining the liability. If the boat had such situs within the city, under the views of the charter we have expressed, it is the subject of municipal taxation. If it had not, and its presence in the city was merely transitory, in the course of its employment, it was not liable to such taxation."

It is concluded upon this proposition, therefore, that grazing stock are assessable, without regard to the residence of the owner, in the county where they are permanently reared and kept; and, as in this case it is distinctly found that they were permanently kept in the county of Tuolumne, and were in the county of Stanislaus temporarily and for the purpose of temporary pasturage, it follows that they were properly assessed in the former county.

2. In support of the asserted illegality of the act of the assessor, appellant relies upon the case of *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735; but that decision has received construction in *People v. National Bank*, 123 Cal. 53, 55 Pac. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32, where it is said: "In respect to this, reliance is placed upon *Weyse v. Crawford*, 85 Cal. 196 [24 Pac. 735], which, it is contended, holds that the assessor cannot add to a list returned by a taxpayer unless he has been so subpoenaed and examined. I do not so understand that opinion. It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization unless the taxpayer has refused to make out his list under oath, or has refused to comply with some other requirement of the law. \* \* \* Unless there has been some dereliction on the part of the taxpayer—unless he has failed to render the assistance to the assessor which the law requires him to render—he cannot be subjected to the penalty of a nonrevisable assessment. \* \* \* This is not a ruling that the assessor cannot assess property not found in the verified lists made by a property owner." So understood, no difficulty is presented by the assessment here under consideration, and the opposite to appellant's contention has been decided in *San Francisco v. La Société, etc.*, 131 Cal. 612, 63 Pac. 1016, and *Security Savings Bank v. San Francisco*, 132 Cal. 599, 64 Pac. 898.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

143 Cal. 478

LUDWIG v. MURPHY et al. (Sac. 1,213.)  
(Supreme Court of California. June 6, 1904.)

MORTGAGES — FORECLOSURE — TIME WITHIN WHICH TO FORECLOSE—EFFECT OF LACHES—VOID JUDGMENT—EFFECT ON SUBSEQUENT ACTION.

1. A holder of a valid mortgage lien has an absolute right to an effectual foreclosure by

action begun at any time within four years from the date of the accrual of his cause of action.

2. A void judgment in a suit to foreclose a mortgage has no effect on the mortgage or lien created, and constitutes no bar to an action to foreclose.

3. A judgment foreclosing a mortgage executed by a married woman on her separate property, on which, subsequent to the giving of the mortgage, and prior to suit to foreclose, a declaration of homestead was filed, rendered in a suit in which the husband was not a party defendant, is void, and constitutes no bar to a subsequent action to foreclose.

Department 1. Appeal from Superior Court, Placer County; Peter J. Shields, Judge.

Action by Caroline Ludwig against E. M. Murphy and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Tuttle and F. P. Tuttle, for appellants. Geo. W. Hamilton and Pullen & Wallace, for respondent.

SHAW, J. Appeal from a judgment for the plaintiff. The appeal is on the judgment roll, and there is no bill of exceptions. The case, briefly stated, is this: The plaintiff is the mortgagee, and the defendant Mrs. E. M. Murphy is the mortgagor, in a mortgage of date March 13, 1897, given to secure a promissory note of even date for the sum of \$1,378, payable April 25, 1899. The mortgage, it was intended by the parties, was to include an adjoining strip of land, which was omitted by mistake in the drawing of the instrument. The other defendant is the husband of the mortgagor. The land mortgaged, including the strip alluded to, was the property of Mrs. Murphy, who was then residing on it, and who, on June 17, 1898, filed thereon a declaration of homestead; her husband at that time having notice of the mortgage. A suit to foreclose was commenced by the plaintiff June 14, 1899, against Mrs. Murphy alone, and resulted, September 19, 1899, in a judgment of foreclosure, and a sale of the mortgaged premises thereunder, July 1, 1901, to the plaintiff. The plaintiff in due course received her deed, and thereupon demanded of Mrs. Murphy the possession of the premises, which was denied; and thereafter application was made to the court by the plaintiff for a writ of assistance, which was resisted by the defendant Murphy (the husband). The object of the present suit—to which both spouses are made parties—is to correct the mistake in the description of the premises mortgaged, and, in effect, to foreclose the mortgage. The above facts are alleged in the complaint, and, with exception of the allegations as to the mistake in the description of the mortgaged premises, are not denied by the answer. As to the alleged mistake, the findings are adverse to the defendant, who makes no point on this branch of the case; which, therefore, need not be further considered. The facts of the case, therefore, so far as stated, are the same as those involved in

*Brckett v. Banegas*, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164, and it is claimed by the respondent that the decision in that case is in point in her favor. On the other hand, it is claimed by the appellant that other facts found by the court distinguish this from the case cited, and that upon the authority of that decision the judgment here must be reversed. The facts relied upon in support of this contention are that the plaintiff's attorney did not make a sufficient search of the records before commencing the suit for foreclosure; and that when the suit was commenced the plaintiff knew of the fact of the filing of the homestead declaration, though it is also found she did not inform her attorney of the fact until June, 1900, which was after the judgment and before the sale, and was not then informed or advised of the legal effect of the filing of the declaration, nor afterwards, until the opposition of Murphy, the husband, which was subsequent to July 7, 1902. The position of the appellant is: First, that there was such laches on the part of the plaintiff's attorney as to preclude her from maintaining this action; and, second, that her failure to make the defendant Murphy a party was not excused by her ignorance of the legal effect of the homestead.

In *Brckett v. Banegas*, supra, there was considerable discussion of the question of the effect of laches upon the right of the plaintiff to maintain the second action to foreclose. In the case at bar the question is obviously immaterial. Perhaps this may have been true also in the case cited. The mortgage note here sued on became due April 25, 1899. The present action to foreclose the same was begun on September 11, 1902, which was much less than four years after the cause of action accrued. The cause of action, considering the case as an action to foreclose the mortgage, was therefore not barred by the statute of limitations. This being true, no question can arise concerning the effect of laches, or as to the sufficiency of any excuses existing therefor. A party holding a valid mortgage lien has an absolute right to an effectual foreclosure by an action begun at any time within four years from the time his cause of action accrues, irrespective of, and in the face of, any degree of laches or delay. The previous attempt to foreclose was, so far as the security was concerned, wholly ineffectual, and in *Brckett v. Banegas*, supra, a similar judgment of foreclosure was held absolutely void as to the security. If it was void as to the security, it could not affect the mortgage, nor the lien created thereby, and it could not constitute a bar, nor in any wise affect an action to foreclose the same. The complaint states facts sufficient to constitute a good cause of action to foreclose the mortgage. The additional facts included therein, disclosing the previous judgment of foreclosure and the excuses for not making the husband a party to that action, do not constitute a bar to the present action, nor any de-

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fense whatever, but, on the contrary, they show that the former judgment was void, and that, therefore, it could not affect the present action.

It is not necessary to consider the effect of section 726, Code Civ. Proc., declaring that there can be but one action to recover a debt secured by mortgage, nor to discuss the question whether or not the former judgment could be considered as a valid judgment on the note, or as cutting off any defense thereto in the present action. No question of that character is presented, and no defense was made in regard to the validity of the note, or the amount due thereon. It is only necessary here to hold that, whatever may be the effect of the former judgment with respect to the note, it was void as a foreclosure, and that it did not operate as a waiver of the mortgage lien, nor of the right to foreclose the same.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

143 Cal. 421

CITY OF SANTA BARBARA v. GOULD et al. (L. A. 1,304.)

(Supreme Court of California. June 1, 1904.)

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—FINDINGS—CONSISTENCY.

1. A water company furnishing water to inhabitants of a village owned land adjacent to a stream, with a right to a certain amount of its water. In a proceeding by a city to condemn the land for a water supply, the court found that the water company was not devoting the water to any public use when the action was commenced, but that the land was of special value to the company for the preservation of the stream; that the company had a right to a certain amount of water from the stream, but that, because of drought, and a tunnel previously dug through the land by plaintiff, the water had ceased to flow to the point where the company diverted it for its use. Held that the finding that the company was not devoting the water or the land to any public use was in conflict with the other findings, inasmuch as the temporary cessation of the flow of water caused by the construction of the tunnel by plaintiff and by the drought did not deprive the company of its right to use the water.

Commissioners' Decision. In Banc. Appeal from Superior Court, Santa Barbara County; Lucien Shaw, Judge.

Action by the city of Santa Barbara against George H. Gould and others. From a judgment for plaintiff, defendants appeal. Reversed.

G. H. Gould and R. B. Canfield, for appellants. Henley C. Booth and Thomas McNulta, for respondent.

COOPER, C. This action was brought to condemn the W. ½ of the N. E. ¼ of section 36, township 5 N., R. 27 W., S. B. M., for the alleged use of plaintiff, "for the purpose of obtaining the percolating waters therein; and to obtain a watershed, and to

preserve the purity of the water in said tunnel." Plaintiff alleged that it had "excavated a tunnel on adjacent land owned by it at great expense, and is now obtaining water therefrom, and is supplying the city of Santa Barbara and its inhabitants with said water, but said supply is not adequate to the wants of said city and people." Findings were filed, and judgment ordered and entered in favor of plaintiff, condemning the land. This appeal is from the judgment, on a bill of exceptions.

It is claimed by appellant the Montecito Valley Water Company, a corporation, that the findings show that it had appropriated the land in contest for a public use prior to the filing of the complaint by plaintiff. It appears from the findings that the said water company is, and has been ever since the year 1886, a corporation duly incorporated for the purpose of distributing and supplying water for the use of the inhabitants of the county of Santa Barbara and the village of Montecito, and to collect rates for the water so furnished; that the waters to be distributed are the waters of Montecito creek and its tributaries; that said objects are a public use, and said water company ever since its organization has been, and still is, in charge thereof, and has supplied, and is now supplying, water for the use of the inhabitants of Montecito. The case was tried in the court below upon the theory—and the judge so stated during the trial—that the public use for which plaintiff proposes to take the land is a more necessary public use than that to which it had already been appropriated by said water company. The issue was thus made to depend upon the fact as to whether or not the land had, prior to the commencement of the action, been appropriated by the said water company to the public use claimed by it. The court found that said water company, "because of said diminution of said stream, was not, when this action was begun, devoting the water of said stream or of the said land to any public use." This finding is in conflict with the other findings, and cannot be held sufficient to justify the judgment. The court finds elsewhere (findings 7 and 8) "that at that time said company desired to purchase said land, and was without sufficient means to do so; that the said company had prior to that time derived its water supply in part from the waters of Cold Springs branch, which in its natural condition was a stream of water flowing from the north to the south through said lands, and the acquisition of said land was of special value to said company as a means for the protection and preservation of said stream; \* \* \* that prior to the commencement of this action, and at the time thereof, said land was held in trust for the use and benefit of the Montecito Valley Water Company, \* \* \* and was so held for the purpose of preserving for said company the normal and natural

flow of the water of said Cold Springs branch; that, at the time this action was begun, said company was the owner of and entitled to the amount of water of said Cold Springs Branch in its natural condition that would flow under a four-inch pressure through a five-inch pipe then maintained by it, to be used to supply with water the inhabitants of the village of Montecito, but before and at the time this action was begun the water of said branch had so diminished that it did not flow down to the point of diversion maintained by said company, and said diminution was caused in part by drought, and in part by the effects of plaintiff's said tunnel, and other tunnels, in draining off and out of the strata in said land sought to be condemned into said tunnels the percolating water aforesaid in said strata, and, because of said diminution of said stream, said company was not, when this action was begun, devoting the water of said stream or the said land to any public use."

It is thus seen that the court in fact concluded that, because of the diminution of the stream, the said water company was not devoting the waters of the stream or the said land to any public use. But the court expressly found that at the time the action was begun the land was of special value to the said water company for the protection and preservation of the stream, and that said water company was the owner and entitled to the amount of the waters of said creek that would flow through a five-inch pipe under a four-inch pressure. Because the plaintiff's tunnel and the dry season had diminished the water of the creek so that it did not flow down to where said water company had its point of diversion, the plaintiff was not entitled to take the property. Plaintiff certainly could not wrongfully divert through its tunnel the waters of the creek, and then claim that by reason of its own act the said water company was not using the waters of the creek for a public use. Nor was said water company responsible for the drought. It ceased to use the water because the water had ceased to flow, but this would not deprive it of the use of the water when it should again flow. Said water company had acquired the land for the purpose of preserving the flow of the stream in its natural state. It had the right to a portion of the waters of the stream. It was engaged in supplying water to the public at the time the action was commenced. Its property could not be taken on the theory that it was not devoted to public use at the time this action was commenced unless it had of its own volition ceased to devote it to public use. If a corporation formed for the purpose of supplying water to a town or city, deriving its supply from a running stream, can be deprived of its property because during some extraordinary dry season the water ceases to flow, it would be dangerous property to own. If the waters

of said creek should never flow again, by reason of the plaintiff's tunnel or drought, the plaintiff does not need the land of the water company. If they should again flow down to the company's point of diversion, it would be entitled to the amount of water owned by it. It is also entitled to the land for the purpose of preserving the normal and natural flow of the stream.

As the case must be reversed by reason of what has been said, it is not necessary to discuss other questions. It is proper, however, to observe that a vital question is raised as to the sufficiency of the complaint. It alleges in reference to the lands sought to be condemned "that plaintiff acquired title to said lands and to other lands for the purpose of excavating a tunnel." If it had acquired title to said lands, and had such title at the time it commenced the action, it is not easy to comprehend why the action is brought. It is to be presumed that, since the attention of plaintiff is called to the matter, it will amend its complaint so as to obviate the objection, in case it should proceed further with the case.

It follows that the judgment should be reversed.

We concur: GRAY, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

(143 Cal. 462)

In re SULLIVAN. (S. F. 3,806.)\*  
(Supreme Court of California. June 4, 1904.)  
GUARDIANS—APPOINTMENT FOR ALLEGED INCOMPETENT—PROCEEDINGS—PARTIES  
—EVIDENCE—APPEAL.

1. A daughter petitioned for her appointment as guardian for her mother, an alleged incompetent. On the hearing the daughter consented to the denial of the petition so far as it asked that she be appointed guardian. The court appointed a third person. *Held*, that the daughter was not a party to the action, under Code Civ. Proc. §§ 1763, 1764, providing for the appointment of guardians for incompetent persons on the petition of relative or friend, nor an adverse party, within section 940, requiring notice of appeal to be served on the adverse party, so that on appeal by the incompetent she was not entitled to notice.

2. In proceedings for the appointment of a guardian for an alleged incompetent neither the incompetent nor his attorney can consent to the entry of an order appointing a guardian, so as to deprive the incompetent of the right to appeal therefrom; Code Civ. Proc. § 1764, authorizing the appointment of a guardian on this ground only where, after examination, it appears from the testimony that the person is in fact incompetent.

3. An alleged incompetent is not deprived of the right to appeal from an order appointing a guardian on the ground of his incompetency because he sought an order under Code Civ. Proc. § 1760, for his restoration to capacity.

4. On proceedings for the appointment of a guardian of an alleged incompetent, the evidence was taken before a judge, who gave no decision thereon. Subsequently the matter was submitted to another judge, who did not hear the witnesses, and before whom no report of the testimony was presented. He orally decided that a guardian be appointed. The order entered making the appointment was signed by a third judge, who had not heard the evidence or argument. All the proceedings were in one court having jurisdiction. *Held*, that the order making the appointment was erroneous, though the incompetent or her attorney consented that a decision might be rendered by a judge who did not hear the evidence.

5. An order providing for the appointment of a guardian of an alleged incompetent will be reversed if purely a consent order.

6. The court, on appeal from an order providing for the appointment of a guardian of an alleged incompetent, which order was not entered by the judge who heard the evidence, and for that reason erroneous, will not determine the question of the necessity for a guardian for the incompetent; that being for the superior court in the first instance.

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, M. C. Sloss, and F. J. Murasky, Judges.

Petition by Hanorah Walsh for the appointment of a guardian for Abby Sullivan, an alleged incompetent. From an order appointing a guardian, Abby Sullivan appeals. Reversed.

J. F. Riley and Crittenden Thornton, for appellant. Sullivan & Sullivan, for respondent.

ANGELLOTTI, J. Hanorah Walsh, a daughter of Abby Sullivan, presented her verified petition to the superior court, alleging that said Abby Sullivan was mentally incompetent to manage her property or to care for herself, and that it was necessary that a guardian of her person and estate be appointed, and praying that she (said petitioner) be appointed such guardian. A citation having been issued and served on the alleged incompetent, the matter came regularly on for hearing upon said petition of Hanorah Walsh, no answer tendering any issue having been filed, and no petition having been filed by any other party. Testimony having been taken in support of the allegations of the petition, the petitioner, in open court, consented that her petition should be denied so far as it asked that letters of guardianship be granted to her, and that Thomas M. Walsh and John J. Sullivan should be appointed as such guardians. The matter having been submitted, the court made its order adjudging said Abby Sullivan incompetent to manage her property and incapable of taking care of herself, denying the request of petitioner that she be appointed guardian, and appointing said Walsh and said Sullivan as such guardians, and directing the issuance of letters to them. From this order said Abby Sullivan has taken an appeal to this court.

\*Rehearing denied July 2, 1904.

There has been submitted with the appeal upon its merits a motion to dismiss the appeal on several grounds, which motion will be first considered. The notice of appeal was served on the guardians appointed by the court, but was not served on the petitioner, Hanorah Walsh, and it is claimed that said petitioner was an "adverse party" within the meaning of those words as used in section 940, Code Civ. Proc., and that, in the absence of service of notice upon her, this court is without jurisdiction to hear the appeal. While, under the provisions of our statute relating to guardians of insane and incompetent persons, any "relative or friend" may, by the filing of a verified petition, confer upon the superior court jurisdiction, after due notice to the alleged incompetent, to hear and determine the question as to the necessity for the appointment of a guardian of the alleged incompetent, and, having determined that such necessity exists, to appoint some proper person as guardian (sections 1763, 1764, Code Civ. Proc.), such relative or friend so presenting the petition cannot, in any proper sense of the word, be considered a "party" to an action or proceeding, except in so far as he may be an applicant for the issuance of letters of guardianship to himself. So far as petitioner was, in this case, an applicant for letters to herself, she had, by her consent that her petition be denied, and that other persons be appointed, withdrawn as a party, and it is therefore unnecessary to consider what rights she may have had, and what position she may have occupied, as an applicant for letters of guardianship. She was no longer such an applicant, but simply a person who, authorized by the law so to do, had presented a verified statement as to the mental incompetency of a person, to the superior court, and thereby empowered the court to appoint any proper person as guardian, if it found such appointment to be necessary for the protection of the person alleged to be incompetent. *Halett v. Patrick*, 49 Cal. 590, 594. As such a person, she has no interest recognized by the law. The fact that she was an heir apparent of the alleged incompetent gave her no legal interest in the property of the incompetent. She occupied the same position that any person not related would have occupied had the petition been presented by such a person. Her position was somewhat similar to that of one who presents the complaint or information upon which proceedings for commitment to an insane asylum are based, or of one who institutes a criminal proceeding against another. Having waived all claims to letters of guardianship for herself, she had no legal right to have a guardian appointed for her mother, and she has no legal right that can be affected by a reversal of the judgment. The guardians to whom letters were granted by the superior court are the only persons

whose legal interests are adverse to the alleged incompetent, and it was sufficient to serve the notice of appeal on them.

It is further urged that the order or judgment appealed from was entered by the lower court by consent of appellant and her attorneys, and that an appeal from a consent judgment will not be entertained. The rule invoked cannot be held applicable to an appeal by an alleged incompetent from an order adjudicating her mentally incompetent and appointing a guardian of her person and property. This proceeding is not at all analogous to an action against one already adjudged incompetent, where such person, appearing by his regular guardian or guardian ad litem, would be bound by the stipulations of such guardian to the same extent as a person laboring under no disability would be bound by his agreement. No one sought any relief against the alleged incompetent in this proceeding. The only question was as to whether or not there was such mental incompetency on the part of Mrs. Sullivan as to make it essential for the protection of herself and her property that a guardian should be appointed. The statute does not contemplate that any such adjudication should be made upon the agreement of the party alleged to be incompetent. If the party is in fact mentally incompetent, his request or consent that he be so adjudged is unavailing for any purpose. He is incapable of making any such request or giving such consent. *McGee v. Hayes*, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57. If he be not, in fact, incompetent, his agreement that he is incompetent does not make him so, and the statute authorizes the appointment of a guardian on this ground only where, after full hearing and examination, it appears from the testimony that the person is in fact incapable of taking care of himself and managing his property. Code Civ. Proc. § 1764. The consent of the alleged incompetent was therefore unavailing for any purpose, except perhaps as evidence upon the question of incompetency, and the attorney of her own selection, representing her in the proceeding, had no more power in this regard than had she. Instead of being barred from appeal by any such consent, we are satisfied that, if the order in question is based upon the consent of the incompetent, and is not the result of a full hearing and examination upon the merits, it should be reversed.

There is nothing in the further contention that the appellant cannot maintain this appeal by reason of the fact that, prior to taking it, she sought an order from the superior court, under the provisions of section 1766, Code Civ. Proc., declaring her restored to capacity.

Coming to the merits of the appeal, we are of the opinion that the order should be reversed on account of the procedure followed

in the lower court. The evidence was all taken and the examination of the alleged incompetent had before one judge, who has never given any decision in the matter. The matter was subsequently argued and submitted for decision to another judge, who never heard any of the witnesses testify, and before whom, so far as the record shows, no report of the testimony was ever produced. He orally decided as the minutes of the court show, that letters of guardianship should issue. The only order or judgment ever entered was signed by still another judge, who had never heard either evidence or argument. It is true that all of these proceedings were had in one court, and that this court had jurisdiction of the matter. The question presented is, however, not one of jurisdiction, but of the erroneous exercise of jurisdiction. A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another judge or another jury. Doubtless a party capable of consenting might waive this right, but a party charged with mental incompetency is incapable, on the trial of the issue as to such incompetency, of making any such waiver, and consenting that a decision may be rendered by a judge who did not hear the evidence, for the same reason that he cannot waive the statutory requirements for the obtaining of jurisdiction of his person, or consent to an adjudication that he is incompetent. *McGee v. Hayes*, supra. The attorney of such a party in such a proceeding has no authority to give any such consent. His authority is limited by the capacity of his client, and he may do no more than she could do in the matter of waiver and consent. The statute undoubtedly contemplates that in a proceeding of this character the decision shall be rendered by a judge who presided at the hearing and examination upon the petition, and who therefore heard the evidence and saw the witnesses. The alleged incompetent was entitled, as a matter of right, to a decision from that judge, and this right she could not waive. No decision has ever been given by that judge, and the order appointing guardians of her person and estate is therefore erroneous, and must be reversed.

It must further be held that, if it is sufficiently shown by the record that the order in question was purely a consent order, it should be reversed for that reason also.

It is suggested that the record amply shows that the interests of the alleged incompetent demand the appointment of a guardian to safeguard her property. That, however, is a question for the superior court to properly decide in the first instance. Doubtless, if such a necessity exists, proper

proceedings in that behalf will be had in the superior court upon the going down of the remittitur.

The motion to dismiss the appeal is denied and the order appealed from is reversed, and the matter remanded for further proceedings.

We concur: MCFARLAND, J.; VAN DYKE, J.

143 Cal. 447

PEOPLE v. METZGER. (Cr. 1,134.)

(Supreme Court of California. June 3, 1904.)

CRIMINAL LAW—TRIAL—CROSS-EXAMINATION—HANDCUFFING WITNESS IN PRESENCE OF THE JURY.

1. On cross-examination of a witness for defendant in a criminal case, he said, referring to another witness, "D. knows he is perjuring himself against an innocent man." "Just like you are doing now?" said the district attorney. "Just like I am doing now," answered the witness. The witness had testified to many facts going to show the innocence of the defendant, and the witness D. was an eyewitness who had identified the defendant as one of the persons who committed the crime. *Held*, that the district attorney was not guilty of misconduct.

2. Immediately after adjournment, during a criminal trial, and before the jury had retired, a deputy sheriff put handcuffs on one of defendant's witnesses. This witness was at the time a prisoner in the jail, charged as a party to the same crime as the defendant. There was no showing that the officer was not acting in good faith. *Held* not to constitute misconduct on the part of the officer prejudicial to defendant.

Department 1. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Frank Metzger was convicted of robbery, and appeals. Affirmed.

John M. York, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

SHAW, J. The defendant appeals from a judgment of conviction of robbery and from an order denying his motion for a new trial.

The two points urged for a reversal are misconduct of the district attorney, and misconduct of a deputy sheriff in charge of one James Burke, a witness for the defendant.

On the cross-examination of the witness Burke, he said, referring to one Dorr, another witness: "Dorr knows he is perjuring himself against an innocent man." Question by district attorney: "Just like you are doing now?" Answer: "Just like I am doing now." It is claimed that this was misconduct on the part of the district attorney. The witness Burke had testified to many facts going to show the innocence of the defendant, and Dorr was an eyewitness to the robbery, who had identified the defendant as one of the persons who committed the crime charged. The cross-examination complained of, as will be observed, elicited from the wit-

ness an admission that the testimony he had given was false. It was therefore proper and pertinent cross-examination, and not misconduct, regardless of what might be said of its courtesy to the witness, or of the right of the witness to refuse to answer the question.

The misconduct of the deputy sheriff consisted in putting handcuffs on the witness Burke immediately after the court had announced the adjournment of the trial until the next day, and before the jury had retired from the jury box. The witness was a prisoner in the county jail, charged as a party to the same crime as the defendant. It was the duty of the deputy to handcuff the witness if he had any fear of an attempt to escape on the way from the courtroom to the jail. In the absence of any showing to the contrary, conceding that such a showing could have been made under any circumstances, it must be presumed that the officer was justified in taking such precautions to prevent an escape. As to the act of putting on the manacles in the presence of the jury, the court cautioned the jury that they must not take the fact into consideration in determining their verdict. We do not see that the defendant had the right to ask more than this, nor that he was unduly prejudiced by the proceeding. When a witness is brought from the jail to testify, it is usually impossible to conceal the fact from the jury. There is no rule of law which requires the officer or the court to conceal the fact. Some prejudice to his credibility is likely to be caused thereby, but it cannot be assigned as sufficient error to require a reversal where the disclosure is made incidentally in the necessary course of the proceedings. Whether or not, if it were purposely called to the attention of the jury by the officer, it would be reversible error, is a question not necessary to decide. There is nothing to show that the officer was not acting in perfect good faith in the endeavor to discharge what he conceived to be his duty. In many cases it is proper, and it is often necessary as a precaution, to manacle a prisoner to secure his safe conduct and guard against an escape while on the way from the jail to the courtroom. An improper motive will therefore not be inferred or presumed from the mere fact that it is done.

We have discussed the questions on the merits, but we might say, in addition, that no exception or objection was made at the time, with respect to either point, in the court below.

The judgment is affirmed.

I concur: VAN DYKE, J.

ANGELLOTTI, J. I concur in the judgment, and in what is said in the opinion in regard to the alleged misconduct of the district attorney. So far as the charge of misconduct of the deputy sheriff is concerned, it is unnecessary to go farther than to hold that

this defendant could not have been prejudiced thereby. The only injurious result that could have been caused by the act of the deputy in placing the handcuffs on defendant's witness Burke in the presence of the jury was the disclosure of the fact that such witness was in the custody of the officers of the law. As such witness had just testified on the trial, in the presence of this jury, that he was one of the defendants charged with the crime for which defendant was on trial, and that he and another had in fact planned and committed that crime, and, further, that he had committed perjury in the making of an affidavit in the cause, it is somewhat difficult to perceive how the disclosure of the fact that this self-confessed robber and perjurer had been arrested could further impair his standing with the jurors.

(148 Cal. 402)

In re LUNDBERG. (Cr. 1,110.)

(Supreme Court of California. June 1, 1904.)

GUARDIAN AND WARD—APPOINTMENT—NOTICE TO PARENT—COLLATERAL ATTACK—HABEAS CORPUS PROCEEDINGS—CUSTODY OF CHILD—CONSTITUTIONAL LAW—RIGHT OF PARENT—DEPRIVATION OF PROPERTY.

1. Under Civ. Code, §§ 204, 247, 248, and Code Civ. Proc. § 1753, by which the guardian of the person of a minor, appointed by the superior court, is entitled to the custody of the minor, and the authority of the parent ended, the right of the guardian to the custody cannot be attacked collaterally in a habeas corpus proceeding.

2. Civ. Code, § 203, providing that the abuse of parental authority is the subject of judicial cognizance in a civil action by the child or certain relatives or the county supervisors, in which the child may be freed from the dominion of a parent, is not a limitation on the power of the superior court to appoint a guardian of the person of a minor; and in guardianship proceedings, under other sections of the Code, the custody of a child having parents living may be given to the guardian.

3. Under Code Civ. Proc. § 1747, authorizing the superior court to appoint guardians of the persons of minors when necessary, and providing that the court shall cause such notice as it shall deem reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper, the court, on giving notice to the person having the immediate care of a minor, had jurisdiction to appoint a guardian of the person of such minor, without giving notice to the minor's parent.

4. Code Civ. Proc. § 1747, authorizing appointment of guardians of the persons of minors without notice necessarily being given to the parents, is not invalid as depriving the parent of a valuable right without due process of law, as the state has a right to provide for the disposition and custody of children.

5. Code Civ. Proc. § 1747, is not unreasonable, in view of the fact that the court appointing the guardian may annul the appointment on application, and is authorized by Civ. Code, § 253, subd. 8, to remove the guardian whenever the ward should no longer be under guardianship.

6. In habeas corpus proceedings to inquire into the detention of a child by defendant, justifying under an appointment as guardian of the person of the child, a contention that his appointment was invalid because it did not, in



terms, recite that it appeared to the court that the mother had abandoned the child, as alleged in the petition, but found that the mother was an unfit person to have the custody of said child, could not be considered, as it was a collateral attack on the order appointing the guardian.

Beatty, C. J., dissenting.

In Banc. Petition for a writ of habeas corpus by Mae Shaw to inquire into the detention of Violet Lundberg. Writ discharged.

W. P. Hubbard, for petitioner. T. J. Crowley, for respondent. Garret W. McEnerney, amicus curiæ.

ANGELLOTTI, J. Upon the petition of Mae Shaw, the mother and only surviving parent of Violet Lundberg, a female minor child of the age of 6 years, alleging that said minor was unlawfully restrained of her liberty by M. J. White, a writ of habeas corpus was issued by this court. The petition for the writ and the return of said White both show that he holds the custody of said minor child under an order of the superior court of the city and county of San Francisco appointing him the guardian of her person, and letters of guardianship issued to him by said court under such order, upon his qualifying in accordance with the requirements of the same. No question as to the authority of a court on habeas corpus to take a child from the person legally entitled to the custody thereof, where the best interests of the child so demand, is involved in this case, for neither the petition nor the return contains any allegation presenting any such question. The petitioner claims that the order appointing White as the guardian of her child is void, and that, as the surviving parent thereof, she is therefore legally entitled to its custody.

A guardian of the person of a minor, duly appointed by a superior court, is legally entitled to the custody of the minor. Civ. Code, §§ 247, 248; Code Civ. Proc. § 1753. And the authority of a parent ceases upon the appointment of such a guardian. Section 204, Civ. Code.

This right of the guardian to the custody of the minor can be attacked collaterally only upon the ground of want of jurisdiction in the superior court to make the order of appointment; and when, upon proceedings in habeas corpus, the respondent justifies his custody of the minor by such an order, an impeachment thereof is a collateral attack. *Ex parte Miller*, 109 Cal. 643, 646, 42 Pac. 428; *In re Chin Mee Ho*, 140 Cal. 263, 73 Pac. 1002, 15 Am. & Eng. Ency. of Law (2d Ed.) p. 37.

The petition for the appointment of White as guardian of said minor was presented to the superior court by the California Society for the Prevention of Cruelty to Children and said M. J. White, its secretary. It was alleged therein that said minor was a resident of said city and county of San Francisco, and was of the age of about 6 years. It

was further alleged that said minor had no guardian appointed by will or deed or by the order of any court; that it was necessary and convenient that a guardian of her person be appointed; that her father was dead; that her mother, last known as Mrs. Mary Anderson, had deserted and abandoned the minor over two years before the filing of the petition, and that the residence of said mother was unknown to petitioners; that since said desertion and abandonment said minor had been and still was in the care of Mrs. Kate Thompson, of said city and county; and that said Mrs. Kate Thompson was unable to provide for and properly educate said minor. Upon the filing of the petition, the superior court appointed a time for hearing the same, and directed that notice thereof be given to Mrs. Thompson, the person having the care of said minor, by citation served on her at least five days before the hearing. Such notice was given, and at the appointed time the court heard the petition, and an order was thereupon made, which, after reciting that proof of the giving of such notice had been made to the satisfaction of the court, and further reciting that "It duly appearing to the court that the said minor is a resident of said city and county, and needs the care and attention of some fit and proper person, and that the mother of said minor is an unfit and improper person to have the care, custody, and control of said minor," decreed "that said M. J. White be, and he is hereby, appointed guardian of the person of said minor, and that letters of guardianship of the person of said minor be issued to him upon his giving bond to said minor in the sum of five (5) dollars." White having qualified, letters of guardianship were issued.

It is suggested that under our statute the superior court had no jurisdiction, in guardianship proceedings, to deprive a parent of the custody of his child by appointing another as guardian of the person thereof on the ground of the abandonment of the child by the parent, or such violation or neglect of parental duty as jeopardizes its safety and welfare. This suggestion is based upon the provisions of section 208, Civ. Code, providing that the abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the child resides, and that when the abuse is established the child may be freed from the dominion of the parent, and the duty of support and education enforced; the claim being that a parent can be deprived of the right to the custody of his child on the ground of his abandonment of the child, or other violation or neglect of parental duty jeopardizing its safety or welfare, only by an action brought under the provisions of said section. This claim finds support in the opinion of this court in *Re Hunt*, 103 Cal. 355, 37 Pac. 206, and in the dissenting opinion of the Chief Justice

in *Ex parte Miller*, 109 Cal. 643, 649, 42 Pac. 428. The law of the state, however, in this regard, must be considered as settled by the opinion of the court in *Ex parte Miller*, supra, signed by four of the Justices, and the concurring opinion of Mr. Justice Temple. It was thereby held that the superior court had jurisdiction, in guardianship proceedings, to determine the question as to whether the parents of a minor were for any reason "unfit and improper persons to have the custody of said minor," and, upon the ground that they were so unfit and improper, to appoint another the guardian of the person of the minor. It was declared that section 203 of the Civil Code was not a limitation upon the power conferred upon the superior court by other provisions of the Codes to appoint a guardian of the person of any minor, who is a resident of the county, and has no guardian legally appointed by will or deed, whenever it appears to the court necessary that such an appointment should be made; and it was pointed out that said section 203 had no relation to guardianship proceedings, and that its object was to confer a right of action in favor of a child against the parent for abuse of parental authority, for the purpose of emancipating the child from the control of its parent, and at the same time enforcing in its favor and against the parent the parent's obligation of support and education. We see no reason for receding from the views expressed in the majority opinion in *Ex parte Miller*, supra. It has long been the settled practice to determine in guardianship proceedings questions as to the fitness and competency of parents to have the custody of their children. What was said in the opinion in *Re Hunt*, supra, concerning section 203, Civ. Code, cannot be considered as authority, in view of the later decision in the *Miller Case*.

It is contended that the order appointing White as guardian is void for the reason that no notice whatever of the proceedings was given to the mother, petitioner here, and it will be assumed that the record of the proceedings in the superior court shows upon its face that no notice was given to her. So far as the provisions of the statute relative to the appointment of guardians is concerned, it must be conceded, we are satisfied, that notice to a parent of the minor is not in all cases essential to the jurisdiction of the court to appoint a guardian; and this for the simple reason that the statute does not require that such notice must in all cases be given to a parent. Undoubtedly a parent should be notified, where possible, of proceedings, the effect of which may be to terminate his parental authority; and undoubtedly, where such notice is not required to be given, a parent would be entitled, upon seasonable application, to be heard upon the question as to whether the appointment of another as the guardian of his child, without his knowledge, should not be set aside, that he might be

heard upon the question of the necessity of appointing such other as guardian. See *In re Van Loan* (Cal.; Sac. 1040) 76 Pac. 87. The Legislature, however, recognized the fact that in many cases, where the interests of the minor make it essential that some one should at once be given authority to act as the legal custodian, it would be practically impossible to notify the parents, owing to ignorance of the facts as to parentage, or of the whereabouts of its parents. Section 1747, Code Civ. Proc., after providing that the superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors, who have no guardian legally appointed by will or deed, who are inhabitants or residents of the county, and that such appointment may be made on the petition of a relative or other person on behalf of the minor, if 14 years of age, provides as follows, viz.: "Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper." Under this provision of the statute, no notice to relatives of the minor residing without the county is essential to the jurisdiction of the court; and it is further settled that, as to relatives residing within the county, it is for the superior court, in its discretion, to determine what relatives shall be notified, and how they shall be notified. In *Asher v. Yorba*, 125 Cal. 513, 515, 58 Pac. 137, it was said by this court that, "upon a careful reading of the statute, it will be found that it is a matter of discretion upon the part of the court to give any notice whatever to the relatives residing in the county. The statute says the notice is to be given to those relatives of the minor residing in the county, 'as the court may deem proper.'" The well-settled law in this regard was stated by the Chief Justice in *Re Chin Mee Ho*, 140 Cal. 263, 266, 73 Pac. 1002, speaking of this provision of section 1747, Code Civ. Proc., as follows, viz.: "From this it will be seen that the only persons to be notified are those having the care of the minor, and such relatives residing in the county as the court may deem proper. The relatives to be notified, and the length of notice, are entirely at the discretion of the judge to whom the petition is presented." The statute does, in terms, require that notice shall be given to the person having the care of the minor, and such notice, for such time as the court may determine to be reasonable, is necessary to give the court jurisdiction to make the appointment. *Estate of Elkerenkotter*, 126 Cal. 54, 58 Pac. 370. The statute further substantially provides that, where the minor is of the age of 14 years or more, the court may appoint a guardian for him only after he has nominated his own guardian, or has neglected for 10 days, after being duly cited by the court to nominate a suitable person. Sections

1748, 1749, Code Civ. Proc. We find no other statutory provision as to notice that goes to the question of the jurisdiction of the court to make an appointment, other than the provision of section 1747, Code Civ. Proc., already noticed, requiring that notice be given "to such relatives of the minor residing in the county as the court may deem proper." So far as the provisions of the statute are concerned, it is therefore a sufficient answer to this collateral attack upon the order of appointment on the ground of want of notice to the mother that the superior court did not require any such notice to be given. The filing of a petition showing the necessity for the appointment of a guardian of the person of this minor, a resident of the city and county of San Francisco, and the giving of the notice prescribed by the court to the person having the care of the minor—no notice to any other person having been required by the court—gave to the court full and complete jurisdiction to make an appointment, good as against any collateral attack.

In this connection, it is proper to state that the petitioner does not allege that she was residing in the city and county of San Francisco at the time the guardianship proceedings were instituted.

It is urged that such a proceeding, had without notice to a parent, even though in terms authorized by the statute, deprives the parent of a valuable right without due process of law; the intimation being that, so far as the statute authorizes such a proceeding without such notice, it is invalid. We cannot assent to this view. While the right of a parent, under ordinary circumstances, to the care and custody of his minor child, is universally recognized, this state being no exception (see *In re Campbell*, 130 Cal. 380, 62 Pac. 613; *In re Salter* [Cal.] 76 Pac. 51, and the provisions of the Codes therein cited), it is likewise universally recognized that the rights of the parent must yield where the interests of the child so demand, and that the safety and welfare of the child constitute the paramount consideration in such matters. The right of the state to provide for the disposition of the custody of children whose safety and welfare are menaced by the conduct or incompetency of their natural guardians has been too long established to be seriously questioned. It is, of course, clear that, where it is practicable, some notice of such proceeding should be given to the parent, but it is also clear that in many cases the situation may be such that it is not possible to give personal notice to the parent. The child may be a homeless waif, whose parentage is unknown in the community in which it is, or the parents may have abandoned the child, and their whereabouts may be unknown. Doubtless other instances might be cited. The safety and welfare of such a child might absolutely require the appointment of some legal custodian, and yet, if actual notice to the parent were a prerequisite in such cases, no appoint-

ment could be legally made. The safety and welfare of the child being the first consideration, the rights of the parent are of such a nature that they must yield to such reasonable regulations as to notice as the Legislature may prescribe. We have found no case in which this right of the Legislature has been denied. Our statutory provisions in this regard cannot justly be said to be unreasonable. Notice to the person having the care of the minor is made essential thereby. In the great majority of cases the minor is in the care of its parents, and in such cases notice to them is therefore essential. Where the child is in the care of some other person, notice to that person will ordinarily come at once to the knowledge of the parents, in the absence of fraud, if the parents have not practically abandoned the child and ceased to make any inquiry in regard thereto. The court to which an application for an order appointing a guardian is made will always make inquiry as to the relatives, and require notice given to them, where the giving of such notice is practicable. If it subsequently develops that a parent has by such proceedings been fraudulently deprived of the custody of his minor child, the order of appointment may be annulled or vacated by appropriate proceedings; and the court having jurisdiction of the guardianship proceedings will always, upon seasonable application by a parent who did not in fact have notice, liberally exercise the discretionary power confided to it, to give the parent full opportunity to be heard upon the question as to the necessity for the appointment of another as guardian. And finally the guardian so appointed may be removed whenever it is no longer proper that the ward should be under guardianship. Civ. Code, § 253, subd. 8.

The cases cited by counsel for petitioner do not support his contention. In *Seaverns v. Gerke et al.*, 3 Sawy. 353, Fed. Cas. No. 12,595, the appointment was made without any notice, while the statute gave the authority to appoint only "after notice is given to all persons interested." In *People v. Wilcox*, 22 Barb. 178, it was held that an appointment of a guardian of a minor without notice to the mother was good, under the statute, and could not be assailed collaterally, but that the court, on habeas corpus, consulting the best interests of the child, might take it from its legal custodian. In *Redmen v. Chance*, 32 Md. 42, the statute expressly required notice to the parents. Such notice was in fact ordered, and never given, and the proceeding was one to revoke the order of appointment. In *Re Reynolds* (Sup.) 8 N. Y. Supp. 172, the court refused, on habeas corpus, to take the custody of the child from the father's mother, and give it to the child's mother, without notice to the father. In *Peacock v. Peacock*, 61 Me. 211, it was held that the appointment of the guardian, made without notice—the statute not requiring notice—was valid, but the Maine statute did

not give the custody of the minor to the guardian so appointed. The Matter of Feeley, 4 Redf. Sur. 308, involved a motion to set aside an order of appointment, and it was held that, while it was within the discretion of the surrogate to determine as to what relatives should be notified, the discretion was not an arbitrary one. It was not held therein that the order of appointment was void. *Underhill v. Dennis*, 9 Paige, 202, *White v. Pomeroy*, 7 Barb. 640, and *Welden v. Keen*, 37 N. J. Eq. 251, were all appeals, and the question was as to whether the order of appointment should be reversed or set aside. In *State v. Paine*, 23 Tenn. 523, there was no question as to the guardianship. The dispute was between the father and mother, on habeas corpus. In *Kurtz v. St. Paul, etc., R. Co.*, 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657, it was said that the matter of notice was purely a matter of statutory regulation. In *Corwin's Appeal*, 126 Pa. 326, 19 Atl. 38, there was no claim that the court making the appointment without notice was without jurisdiction, and the question was as to whether the guardianship court had erred in granting a petition of the mother for revocation of the letters of guardianship, issued without notice to her. In *Spears v. Snell*, 74 N. C. 210, it was held that, where an appointment had been made without notice to the mother, the guardianship court had the power, and ought, in the exercise of a legal discretion, upon an application on behalf of the mother, "made within reasonable time, to have called in the letters of guardianship and heard the matter de novo, when all sides could have a showing." In the case of *Waldron v. Woodman*, 58 N. H. 15, cited in some of the authorities called to our attention, it was held that, where the statute did not require notice to the father, a demurrer to his appeal, on the ground of want of such notice, from an order appointing another as guardian, would be sustained; and in the Case of *Gibson*, 154 Mass. 378, 28 N. E. 296, it was held that, if the statute did not require notice, no notice was essential. We have found no case in which it was held that an appointment of a guardian of the person of a minor, made in accordance with all statutory requirements, was void for want of actual notice to a parent, and open to collateral attack.

It is further urged that the order of appointment is invalid, for the reason that it does not in terms recite that it appeared to the court that the mother had abandoned the child, as alleged in the petition, but found that the mother of said minor is an unfit and improper person to have the care, custody, and control of said minor, as to which there was no allegation in the petition, other than the allegation as to abandonment. This contention raises, at most, a question as to the sufficiency of the findings to support the judgment, and it is needless to say that such a question cannot be considered on a collat-

eral attack. We know of no provision of law rendering an order of this kind void for failure to contain findings of fact, or to recite the existence of facts upon which its jurisdiction depends. On the contrary, it is expressly provided by section 1704, Code Civ. Proc., that orders in probate proceedings need only contain the matters ordered adjudged, except as otherwise provided.

We find nothing else requiring mention. The petition was sufficient to confer jurisdiction over the subject-matter; the proceedings thereon were, on the face of the record, strictly in accord with all the requirements of the statute; and the order is valid as against collateral attack.

It appears from the return that there is now pending in the superior court having jurisdiction of the guardianship proceeding a proceeding on behalf of the petitioner for a revocation of the letters of guardianship issued to respondent, which proceeding was instituted within six months after the order of appointment was made. Doubtless by that proceeding the petitioner will obtain a full hearing upon the question as to her competency and fitness to have the custody of her child, and all her rights in relation to her child and the custody thereof will be protected so far as is consistent with its safety and welfare.

The writ is discharged.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; VAN DYKE, J.; HENSHAW, J.

BEATTY, C. J. I dissent upon the grounds stated in my dissenting opinion in *Ex parte Miller*, 109 Cal. 649, 42 Pac. 428.

143 Cal. 450

In re BROWN'S ESTATE. (S. F. 3,446.)  
(Supreme Court of California. June 3, 1904.)

WILLS—CONSTRUCTION—INVESTMENT—ANNUITY—LEGACY FOR MAINTENANCE—LEGACY OF INCOME—APPEAL—FINDINGS OF FACT—REVIEW.

1. A bequest of a specific sum to one, in trust, for investment, with directions to pay out of the income arising from the investment a fixed sum monthly to a designated beneficiary, does not constitute an annuity in favor of the beneficiary, Civ. Code, § 1357, defining an annuity as a bequest of certain specified sums periodically.

2. A testatrix made a bequest of a specified sum to trustees with directions to invest the same, and out of the income thereof to pay a fixed sum monthly, during life, to a designated beneficiary. It was found that the beneficiary had been, for many years prior to the death of the testatrix, a confirmed cripple, and had been in the monthly receipt of sums of money from the testatrix. Held not a legacy for maintenance within Civ. Code, § 1369, providing that legacies for maintenance bear interest from testator's death.

3. In the absence of a bill of exceptions showing the evidence, the Supreme Court will take the findings of fact as true, and presume that they are supported by the evidence.

4. A bequest of a specified sum to one, in trust, for investment, with directions to pay out of the income arising from the investment a fixed sum monthly to a designated beneficiary, is not a bequest within Civ. Code, § 1868, providing that in case of a bequest of the income of a certain fund the income accrues from the testator's death, as the trustee could not begin payment until he received the fund and invested it so as to produce an income.

McFarland and Lorigan, JJ., dissenting in part.

In Banc. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Petition by Katherine Nowland for the partial distribution of the estate of Susanna Brown, deceased. From an order awarding insufficient relief, petitioner appeals. Affirmed.

A. Everett Ball (Jordan, Treat & Brann, of counsel), for appellant. Louis Titus and T. C. Kierulff, for respondent.

SHAW, J. Upon the hearing of this case in department, an opinion was prepared by Mr. Commissioner HAYNES, of which the following portion is now adopted as part of the opinion of the court:

"Katherine Nowland appeals from an order made on her petition for partial distribution of said estate.

"Susanna Brown died testate in the city and county of San Francisco on the 27th day of September, 1899. The petition alleged that the will of said deceased was duly admitted to probate, and that T. C. Kierulff and Albert C. Hooper were duly appointed the executors thereof, and letters testamentary were duly issued to them, which said letters are still in full force. That an inventory and appraisal of said estate was filed, showing that said estate was appraised at \$45,098.43. That all of the debts of said deceased and of the estate have been paid, and nearly, if not all, of the specific legacies have also been paid, and that more than one year has elapsed since said letters were issued to said executors. That by the terms of said will there was given and bequeathed to T. C. Kierulff and Albert C. Hooper the sum of \$5,000, in trust, to pay petitioner the monthly sum of \$20 during her natural life. The portion of said will relating thereto is as follows:

"I give and bequeath to T. C. Kierulff and Albert C. Hooper, and the survivor of them, as joint tenants, the sum of \$5,000, in trust, nevertheless, for the following uses and purposes, and not otherwise.

"(a) To invest the said money in some safe investment, in their discretion, with power, at all times, to reinvest the same as they may deem best.

"(b) Out of the income arising from the investment of said fund, as aforesaid, to pay Kate Nowland, a half sister of my deceased husband, Richard Brown, at present resid-

ing at Los Gatos, California, monthly the sum of \$20 for and during the term of her natural life, and at her death the said fund, with its accumulations, over and above the income payable to said Katherine Nowland, as aforesaid, shall go to my residuary legatees hereinafter named.'

"It is further alleged that at the time of the death of said testatrix, and for many years prior thereto, petitioner, who is now and has been for many years a confirmed cripple, was and had been dependent upon said testatrix for support and maintenance ever since the death of the brother of petitioner, the husband of decedent, who, prior to that time, had wholly supported petitioner.

"It is further alleged that the executors had not paid any portion of said monthly sum, and refused to do so, claiming that nothing is due petitioner until a distribution shall be had, and that there is due this petitioner on account of said monthly sum bequeathed to her, as aforesaid, the sum of \$20 per month from said 27th day of September, 1899, the date of the death of said decedent.

"Petitioner prayed for an order directing said executors to distribute to themselves, as trustees under the said will, the sum of \$5,000, and also the sum of \$20 per month from the date of the death of the testatrix, directing the payment to petitioner of the said sum of \$20 per month from said date to the date of distribution, and thereafter to pay her the sum of \$20 per month during the term of her natural life. The answer consisted of general denials.

"The court in its findings recited the provisions of the will above quoted, and that the will contained, in addition thereto, the following clause in a separate paragraph: 'It is my will that my executors shall not, nor shall either of them be charged with interest upon any bequests herein made.' The court further found: 'That for many years prior to the death of testatrix said petitioner was, and still is, a confirmed cripple, and had been in the monthly receipt of sums varying from \$20 to \$10 from said testatrix, and for many years prior to 1899 said sum had been \$20, and up to April of that year, but in July, August, and September the monthly allowance had been \$10.' That said \$20 per month bequeathed to said petitioner, Katherine Nowland, by said will, is not an annuity nor a legacy for maintenance. That said petitioner is entitled to the said sum of \$20 monthly, out of the income of said sum of \$5,000, only from the date of this decree of distribution; that said petitioner is not entitled to any interest upon said amounts; and that 'the said petitioner is not entitled to said monthly payments from the death of said testatrix, but only from the date of distribution herein.'

"As conclusion of law, the court found: 'That said petitioner is entitled to have the sum of \$5,000 distributed to said trustees un-

der the will, and that she be paid monthly out of the income of \$5,000 the sum of \$20, commencing November 20, 1902, and is not entitled to be paid anything prior to that date,' and thereupon entered judgment accordingly.

"This appeal is by the petitioner from the judgment or order, except that part of it which distributes to the said trustees said sum of \$5,000 for the purposes expressed in the will. The record does not contain any statement or bill of exceptions.

"Appellant presents the following questions: '(1) Is the bequest to appellant an annuity? (2) Is appellant entitled to the \$20 per month from the date of the death of the testatrix? (3) Is she entitled to \$20 per month in any event, or only the income that may arise from the sum of \$5,000 when invested?'"

The first and third of these inquiries may be answered together. It is not an annuity, for the reason that the amount to be paid monthly is not certain. The amount to be invested by the trustees is fixed, but the income which may be realized therefrom is not. The income realized may be less than \$20 per month, but she is entitled to the whole of the income if it does not exceed that sum per month. "An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy." Civ. Code, § 1357, subd. 3; *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73; *In re Dewey*, 153 N. Y. 63, 46 N. E. 1039.

The remaining question is whether or not the appellant is entitled to \$20 per month from the death of the testatrix, or only from the time of the entry of the decree appealed from. It is contended on the part of the appellant that the legacy for her benefit is a legacy for maintenance, which, under section 1369, Civ. Code, bears interest from the death of the testatrix. This does not appear from the face of the will, but the contention is that the specific facts found by the court necessarily make it so. Reliance is placed upon the decision in the case of *In re Mackay's Estate*, 107 Cal. 308, 40 Pac. 558, in which it was held that although the will did not expressly declare that the legacy was for the maintenance of the legatee, yet, if the evidence showed that the legatee had been supported by the testator for many years prior to his death, it would be construed to be a legacy for maintenance. The essential element present in that case, however, is lacking in this. The petition alleged, as before stated, that for many years prior to the death of the testatrix, the petitioner was dependent upon the deceased for her support and maintenance. The court, however, fails to find this fact, but does find that the petitioner was for many years prior to the death of the testatrix a confirmed cripple, and had been in the monthly receipt of sums from the testatrix, varying

from \$20 to \$10 per month. In addition to these specific facts, the court found expressly that the legacy bequeathed to the petitioner is not a legacy for maintenance. This was the ultimate fact upon which the decision of the case depended, so far as the right to interest from the death of the deceased was concerned. The specific facts found do not necessarily show that it was a legacy for maintenance. The deceased may have had many reasons for making the monthly payments, other than the reason that it was necessary for her support. There is no bill of exceptions showing the evidence, and we must upon this appeal take the findings of fact as absolutely true, and presume that the evidence necessary to sustain them was presented to the court below.

The appellant cites, in support of her claim to payment from date of death, section 1366 of the Civil Code, as follows: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death." If this section was applicable, of course the appellant would be entitled to the monthly payments from the time of the death of the testatrix. But the bequest in this case was not of the interest or income of a certain sum to be paid by the executors of the estate. The testatrix bequeathed the sum of \$5,000 to certain trustees, and the monthly income was to be paid by the trustees, and not by the executors. Necessarily, the trustees could not begin payment until they received the fund and invested it so as to produce an income. The intention of the testatrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees who were to make the payments. The distinction is thus stated: "Where he absolutely gives the beneficiary a given income, and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such cases is to be estimated from the death of the testator. \* \* \* But where the bequest is only of the income to be obtained from a certain specified fund, \* \* \* it is held that the beneficiary can receive only the actual income when received from such fund." Page on Wills, § 601. A gift of an income from a certain fund is not an annuity, and interest does not begin thereon until one year from the death of the deceased. *Booth v. Ammerman*, 4 Bradf. Sur. 129; *Bartlett v. Slater*, supra. The petitioner expressly disclaims any right to the payment of interest upon the monthly payments from the death of the deceased. As to the claim that she is entitled to interest on the \$5,000 bequeathed to the trustees, we think that is covered by the provision in the will that the executors should not be charged with interest upon any bequest therein made. We think the decree of the court was in accordance with the proper construction of the will.

The order is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

We dissent, and think that the conclusion reached in department reversing the order appealed from is right: MCFARLAND, J.; LORIGAN, J.

142 Cal. 458

PEOPLE v. ROMERO. (Cr. 1,098.)

(Supreme Court of California. June 4, 1904.)

ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS—REMARKS OF COUNSEL—APPEAL AND ERROR.

1. In a prosecution for assault with intent to commit murder, evidence that immediately before the assault the defendant, who had approached to within 10 or 15 feet of the prosecuting witness and his companion, was using profane language to the prosecuting witness, who, unarmed, advanced toward defendant, telling him to come on and he would show him what the trouble was, is sufficient to sustain an instruction that the right to take life or use a deadly weapon in self-defense is unquestionable, "yet one on whom another is making a mere assault with the fist, not with intent to kill or do great bodily harm, and who is not deceived as to its character, is not justified in taking life or in using a deadly weapon in self-defense."

2. In a prosecution for assault with intent to commit murder, the prosecuting witness testified that during the night on which the alleged assault occurred he and defendant were at a dance, and that during the evening he asked a woman who was sitting beside defendant to dance with him, whereupon defendant objected, and told him she was not going to dance with him. Defendant denied any such occurrence, and that he spoke to the witness, or that the witness spoke to him. The district attorney in his closing argument characterized as incredible the story that the prosecuting witness assaulted the defendant with a knife, as testified to by defendant, and said that the fact of the business was that there was a little feeling caused by the occurrence at the hall, and these men met on the public road, and one word brought on another, until defendant pulled his revolver and fired at the prosecuting witness, and that that was how it happened. *Held* insufficient to show misconduct on the part of the district attorney; the remarks being legitimate argument under the evidence.

3. In a prosecution for assault with intent to commit murder, the prosecuting witness testified to a difficulty at a dance on the night of the alleged assault, but defendant denied that any difficulty occurred, or that he spoke to witness, or that the witness spoke to him at the hall. On cross-examination defendant was asked if he had been married since the difficulty. An objection to the question was sustained. In his argument defendant's counsel said that no motive for the alleged crime had been shown, and that the affair in the dance hall was of no importance. The district attorney, in replying to the argument, said: "Now, I say this little affair about the woman in the dance hall is the only thing we have in the case that tends to show there was a feeling between these parties. We think it does show it, and we think the fact that the defense is so sensitive about it shows it. Else why wasn't the defendant willing to testify that he had been married since? Why withhold such testimony, if these things are not material?" Defendant simply reserved his exception to the argument, and assigned the action of the district attorney as misconduct. *Held* that, as the court sustained the objection and excluded the proposed evidence as to de-

fendant's marriage, it was improper for the district attorney to comment on the motive of defendant in excluding it; but, as the defendant's cause could not have been injuriously affected by the remarks, they were not cause for reversal.

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Joaquin Romero was convicted of assault with a deadly weapon, and appeals. *Affirmed*.

W. P. Butcher, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was informed against for the crime of assault with intent to commit murder, and was convicted of an assault with a deadly weapon. He appeals from the judgment pronounced upon said conviction, and from an order denying his motion for a new trial.

1. The court instructed the jury that although the right to take life or use a deadly weapon in self-defense is unquestionable, "yet one on whom another is making a mere assault with the fist, not with intent to kill or do great bodily harm, and who is not deceived as to its character, is not justified in taking life or in using a deadly weapon in self-defense." The court elsewhere fully instructed the jury as to what would constitute a killing or shooting in self-defense. The only objection made by appellant to the instruction quoted above is that there was no evidence upon which to base it; it being claimed that the evidence of the prosecution was to the effect that the shots were fired by defendant without previous assault of any kind upon the part of the prosecuting witness, and that the evidence of the defense was that the shots were fired to repel an attack then being made by the prosecuting witness and his companion, the prosecuting witness being armed with a knife and his companion with a club. If it be conceded that this claim is well founded, we are unable to see how the instruction could have prejudiced the defendant's cause. While the court should not instruct the jury on mere abstract questions of law not applicable to the circumstances of the case on trial, such action on the part of the trial court will not warrant a reversal, where it is apparent that no injury could have resulted to the defendant therefrom. There was, however, evidence given by one of the witnesses for the prosecution, tending to show that, immediately before the firing of the shots, the defendant who had approached to within 10 or 15 feet of the prosecuting witness and his companion, was using profane language to the prosecuting witness, Ruiz, and that Ruiz, unarmed, advanced toward defendant, telling him to come on and he would "show him what the trouble was." This evidence, we think, afforded a sufficient basis for the instruction.

2. The district attorney in his closing argument characterized as incredible the story that Ruiz assaulted the defendant with a knife, and said as follows: "The fact of the business is that Joaquin Romero had become jealous, and there was a little feeling caused by the occurrence at the hall, and these men met on the public road, and one word brought on another. Joaquin said this, and Delorez said that, and the thing continued until they got red hot, and Joaquin pulled out his revolver and fired at him. That is how that thing happened"—and this is assigned as misconduct on the part of the district attorney. This was legitimate argument, fully justified by the evidence in the case. Counsel has the right on the argument to fully state his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom, and in what is quoted above the district attorney did no more than this.

3. Ruiz testified to the effect that, during the night on which the shooting occurred, he and defendant were at a dance, and that, during the evening, he asked a woman, who was sitting beside the defendant, to dance with him, whereupon defendant objected to her dancing with him, and told him that he was not going to dance with her. He further testified that the woman did not dance with him. It was while Ruiz was on his way home, later in the night, that the shooting took place. This occurrence in the dance hall was relied on somewhat by the prosecution as furnishing a motive for the subsequent quarrel and assault. Upon cross-examination, defendant was asked: "Have you been married since the difficulty?" The objection made by defendant's counsel to this question was sustained. In his argument to the jury, defendant's counsel said that no motive for the crime had been shown, and that the affair in the dance hall about the woman was trivial and of no importance. In replying to this, the district attorney said: "Now, I say this little affair about the woman in the dance hall is the only thing we have in the case that tends to show there was a feeling between these parties. We think it does show it, and we think the fact that the defense is so sensitive about it shows it. Else, why wasn't the defendant willing to testify that he had been married since? Why withhold such testimony if these things are not material?"

Defendant did not ask the trial court for any action relating to these remarks, but simply reserved his exception to the argument, and assigns the action of the district attorney as misconduct. The court having sustained the objection to the proposed evidence, and the same having been thereby excluded, it was improper for the district attorney to comment upon the motive of the defense in excluding it, but the matter was certainly not of sufficient importance to warrant a reversal. The defendant's claim in

regard to the alleged occurrence in the dance hall, as shown by his testimony, was that there was no such occurrence; that Ruiz did not ask the woman sitting beside the defendant to dance with him; and that he never spoke to Ruiz at the hall, and Ruiz did not speak to him. The fact, if it be a fact, that the defendant subsequently married the woman, could throw no light upon the issue thus made by the testimony of Ruiz and the defendant as to whether Ruiz had asked the woman to dance with him, or influence the jury in arriving at a conclusion thereon. It would show, at most, a feeling on the part of the defendant in regard to the woman that might have prompted him to object to her dancing with Ruiz, if Ruiz had asked her to dance with him, and that might have caused him to resent any such invitation on the part of Ruiz. If the jury believed the testimony of Ruiz as to what took place at the hall, it must have been fully satisfied by such testimony of the existence of such a feeling on the part of defendant; and if, on the other hand, they believed the statement of defendant, that Ruiz did not ask the woman to dance, the question as to the feeling of the defendant toward the woman was absolutely immaterial. In either event we cannot see how the remarks of the district attorney, so far as they may have been improper, could have injuriously affected the defendant's cause.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

143 Cal. 469

# TRAFTON v. QUINN. (S. F. 3,773.)\*

(Supreme Court of California. June 4, 1904.)

ELECTIONS—CONTEST — BALLOTS — VALIDITY—  
STATUTE PASSED AFTER ELECTION—WHAT LAW  
GOVERNS — CITY CHARTER — TIME OF TAKING  
EFFECT.

1. Where an election was held before the law as to distinguishing marks on ballots had been changed by the amendment to Pol. Code, § 1211 (St. 1903, p. 150), and a contest was had after the amendment, the provision of the Code prior to the amendment was the governing law on the question whether the ballots bore distinguishing marks.

2. On an election contest, the question whether the ballots were shown to have been so guarded as to preclude suspicion that they were not in their original condition was one largely within the discretion of the trial court.

3. Pol. Code, §§ 1264, 1265, provide that election returns shall be delivered to the county clerk, who shall be their custodian. Section 1075 makes the common council of a city the election commissioners for city elections. Section 1077 makes the clerk of the city clerk of the board of election commissioners, and section 1078 provides that the county clerk of each county, and the clerk or secretary of the common council of a city, shall, within their respective counties or cities, exercise all the powers conferred, and shall discharge all the duties imposed by law on such officers in respect to the conduct, management, and supervision of

\*Rehearing denied June 30, 1904.



elections held within the respective counties or cities. *Held*, that ballots on a city election are to be returned to the city clerk and kept in his custody.

4. Where, on an election contest over the office of mayor of a city, contestee admitted the election and prayed judgment confirming his title to the office, a contention on his part that there was no law for holding the election was outside the issues.

5. A general clause in a city charter provided that it should take effect May 18, 1903, and contained a specific provision that the first election under it should be held on the second Monday of May, 1903, and that the trustees of the then existing city should provide for the election. *Held*, that the election was properly held on the second Monday, which fell on the 11th, the provision as to the 18th not referring to the election, but to the machinery of the new government.

In Banc. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Election contest by William A. Trafton against Richard P. Quinn over the office of mayor of the city of Watsonville. From a judgment in favor of contestee, contestant appeals. Reversed.

Wyckoff & Gardner, for appellant. Chas. M. Cassin and James A. Hall, for respondent.

MCFARLAND, J. This is an election contest, under section 1111 et seq. of the Code of Civil Procedure, over the office of mayor of the city of Watsonville. According to the count of the canvassing board, contestant had 407 votes and contestee 411. The latter was declared elected, and a certificate of election was issued to him by the city clerk. Afterwards Trafton instituted this proceeding, and the superior court, after a hearing and a recounting of the votes, found that Trafton had received 407 legal votes and Quinn 411 legal votes—4 majority for the latter—and rendered judgment decreeing that Quinn had been elected and was entitled to the office. From this judgment the contestant, Trafton, appeals.

On the count in the court below there were only 13 ballots objected to. These ballots are before us, and we have examined them and considered the objections made thereto by the respective parties, and the rulings of the court thereon. The objections were that the ballots contained distinguishing marks which made them invalid. We are satisfied that the court erred in counting for respondent the ballots marked "Contestant's Exhibits 9, 10, 11, 12, 13, 14, 6, 15, 16, and 17." They were all invalidated by distinguishing marks. The ballot marked "Contestant's Exhibit 7" was properly counted for respondent, over appellant's objection. The court, upon respondent's objection, properly refused to count for appellant ballot marked "Contestant's Exhibit 8." The deduction of the foregoing 10 votes erroneously counted for respondent leaves a majority of 6 for appellant, and he should have been declared elected.

Respondent makes very little contention

that the 10 ballots above mentioned did not contain distinguishing marks under the law as it stood when the election involved herein was held, in May, 1903; but before the trial of this case, in July, 1903, the law as to distinguishing marks had been changed by an amendment to section 1211 of the Political Code (St. 1903, p. 150), and respondent contends that the law on the subject as it was at the time of the trial should govern. This contention cannot be maintained. The question is whether the ballots were, at the time they were voted, legal ballots which should have been counted. The provisions of the Code in question are parts of the substantive law upon the subject of elections, and changing these provisions is not merely changing a rule of evidence, or a remedy. The question is whether the ballots were legal ballots on election day.

Respondent contends that the ballots should not have been received in evidence because it was not sufficiently shown that they had been so guarded as to preclude the suspicion that they were not in their original condition. But this question is one which is largely within the judgment and discretion of the trial court, and in the case at bar there was no such want of evidence to support the ruling of the court on the subject as would warrant us in disturbing it.

Respondent further contends that the ballots should not have been received because they were returned by the election boards to the city clerk and kept in his custody, while, as is contended, they should have been returned to the county clerk and kept in his custody. We do not think that this point is tenable. It is true that it is provided in sections 1264, 1265, Pol. Code—where the general subject of elections is being dealt with—that election returns shall be delivered or sent by mail to the county clerk, who, among other prescribed duties touching elections, shall be the custodian of them. But by section 1075 the common council, or other governing body, of a city, constitute the election commissioners for city elections, and by section 1077 the clerk of the city is ex officio clerk of the board of election commissioners; and by section 1078 it is provided that "the county clerk of each county, and the clerk or secretary of the common council of a city, shall, within their respective counties, or cities, exercise all the powers conferred, and shall discharge and perform all the duties imposed by this Code, or by any law of this state, upon such officers in respect to the conduct, management, and supervision of elections, and matters pertaining to elections, held within the respective counties, or cities, as the same are now or may be hereafter prescribed by law." These provisions clearly enough put the city clerk, with respect to city elections, in the same place occupied by the county clerk with respect to county elections, and give to the former, in city elections, the

rights and duties which the latter has in county elections.

Respondent contends that appellant must fail in this proceeding because there was no law in force for the holding of the election here in question. This contention is based on the proposition that the charter of Watsonville went into effect on May 18, 1903, and the election was held on May 11th of that year. But, in the first place, no such issue is made by the pleadings. Respondent admits and avers that there was such an election, alleges that at such election he received the highest number of legal votes cast, and prays judgment confirming his election to the said office of mayor; and, moreover, it is doubtful if any such question can be raised on a proceeding under section 1111, Code Civ. Proc. In the second place, while there is a general clause in the charter of the city that it shall "take effect at the hour of 12 m. on Monday, May 18th, 1903," it contains a specific provision that the first election under it shall be held on "the second Monday of May, 1903," and that the board of trustees of the then existing city of Watsonville should provide for such election. It is clear that the general provision above mentioned merely means that the machinery of the new government shall not start until the 18th, and is not inconsistent with the other clause providing such machinery, without which the new charter could not have gone into effect on the 18th. See charter, on page 647 et seq., St. 1903. There are no other points calling for special notice.

The judgment is reversed, and the superior court is directed to render judgment decreeing that appellant was elected to the said office of mayor and entitled to hold the same.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

143 Cal. 412

Ex parte GERINO. (Cr. 1,107).  
(Supreme Court of California. June 1, 1904.)  
STATE BOARD OF MEDICAL EXAMINERS—APPOINTMENT—EXAMINATION TO PRACTICE MEDICINE—CONSTITUTIONAL LAW.

1. Under Const. art. 20, § 4, providing that all officers "whose offices \* \* \* may hereafter be created by law, shall be \* \* \* appointed as the Legislature may direct," the duty of appointment of such officers may be delegated by the Legislature to some person or body.

2. The power granted by Act Feb. 27, 1901 (St. 1901, p. 56, c. 51), to certain medical societies, to appoint the members of the State Board of Medical Examiners, not being for the individual benefit or advantage of the societies, is not a right or privilege, within Const. art. 1, § 21, providing that no class of citizens shall be granted privileges or immunities which on the same terms shall not be granted to all citizens, or article 4, § 25, subd. 19, forbidding a special or local law granting any special or exclusive right, privilege, or immunity.

\*Rehearing denied June 30, 1904.

3. The provisions of Act Feb. 27, 1901 (St. 1901, p. 56, c. 51), establishing a State Board of Medical Examiners, and prescribing its duties and powers, are not affected by any invalidity in the method provided therein for the appointment of its members, as in such case there is a legal office established, without any specific provision for appointment of a person to fill it, the vacancy in which thus existing is, under Const. art. 5, § 8, to be filled by the Governor.

4. In case of a legal office, which can be filled by a de facto officer, validity of an appointment thereto, and the right of the appointee to hold it, cannot be questioned in habeas corpus proceedings.

5. Act Feb. 27, 1901 (St. 1901, p. 56, c. 51) § 5, providing that an applicant for a certificate to practice medicine must produce a diploma issued by a medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year, does not require such school to have the identical course of study and other requirements prescribed by the association, but merely that the standard of scholarship required of its students shall be equal to the standard required by said association, so that, if said association is composed of colleges teaching only the allopathic system of medicine, there is no arbitrary or unjust discrimination against other schools.

6. Act Feb. 27, 1901 (St. 1901, p. 56, c. 51) § 5, prescribing the standard of scholarship to be maintained by medical schools, whose diplomas the State Board of Medical Examiners should be authorized to accept, as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession, makes the standard sufficiently fixed, definite, and certain.

7. The main purpose of Act Feb. 27, 1901 (St. 1901, p. 56, c. 51), being clearly to admit no one to practice medicine who has not passed such an examination as is prescribed by it, the law is not otherwise void, because, if such be the case, the provision of section 5 giving the Board of Medical Examiners power to admit without examination persons who have passed an equally strict examination of another state board is unconstitutional.

In Banc. Application by one Gerino for writ of habeas corpus directed against the chief of police of the city and county of San Francisco. Petition denied.

Garoutte & Goodwin, for petitioner. Ottum Suden, R. B. Carpenter, and Beverly L. Hodghead, amici curiæ. William M. McGuire and William C. Taft (Charles S. Wheeler, of counsel), for respondent.

SHAW, J. The petitioner is in custody on the charge of practicing medicine without a certificate from the State Board of Medical Examiners established by the act of February 27, 1901, for the regulation of the practice of medicine and surgery. St. 1901, p. 56, c. 51. By his petition in habeas corpus he asks to be released on the ground that the statute is unconstitutional. The act establishes a State Board of Medical Examiners, which is empowered to issue to persons who pass or have passed a satisfactory examination a certificate which shall authorize such persons to practice medicine and surgery in this state. It makes it a misdemeanor for any person not having such cer-

tificate to engage in the practice of medicine or surgery. It is conceded that the Legislature has the power to enact laws establishing the conditions upon which persons shall be allowed to practice the profession of medicine within this state. The inquiry before us is whether or not this power has been constitutionally exercised. Several provisions of the act are assailed, and each is claimed to be so essential to the general purpose and object of the law that, if it is unconstitutional, the whole law, including the part defining the offense in question, must be declared invalid.

1. The act provides, with respect to the membership of the board of examiners, that "five members thereof shall be elected by the Medical Society of the State of California, two members thereof by the California State Homeopathic Medical Society, and two members thereof by the Eclectic Medical Society of the State of California." This, it is claimed, violates section 21, art. 1, of the state Constitution, declaring that no class of citizens shall "be granted privileges or immunities which upon the same terms shall not be granted to all citizens"; also section 11, art. 1, that "all laws of a general nature shall have a uniform operation," and subdivision 19, § 25, art. 4, forbidding a special or local law "granting to any corporation, association or individual, any special or exclusive right, privilege, or immunity." The Legislature has power to establish offices in addition to those created by the Constitution itself. Section 4, art. 20, provides that "• • • all officers • • • whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." This gives the Legislature power to declare the manner in which officers other than those provided by the Constitution, shall be chosen. Such officers may be appointed by the Legislature itself, or the duty of appointment may be delegated and imposed upon some other person or body. *People v. Provines*, 34 Cal. 541; *In re Bulger*, 45 Cal. 559. There is no limitation to any particular person or class of persons upon whom alone the Legislature may impose this obligation. In our opinion, the power to appoint officers in such cases is not one of the rights or privileges contemplated by the provisions of the Constitution upon which the petitioner relies. It is more in the nature of a duty than of a right or privilege. The rights and privileges referred to in those guaranties and limitations must be something for the individual benefit or advantage of the person or association upon which they are conferred, and not the power to perform a public duty for the benefit of other persons or of the public. In exercising the power in this particular case the societies mentioned in the law are acting for the benefit of the state and the people at large. The power of the state to constitute such a board, and to impose restric-

tions upon the right to practice medicine, to be enforced by the board, could not be upheld at all if it were put upon the ground that in so doing the state is acting for the benefit of any one or all of the medical societies or schools of medicine existing in the state. The power rests entirely on the theory that such regulations are for the general welfare, and specifically to protect people from the arts of quacks and pretenders and from the mistakes of incapable practitioners. The board of examiners, when constituted, is not the agent of the medical societies which appoint its members, and its functions are not conferred or designed for the benefit of those societies, or either of them. The board constitutes a state agency for the regulation of the practice of medicine and surgery, and it must discharge that duty under oath and impartially for the benefit of the people, and not for the promotion of the interests of any school of medicine or medical society. In *Ex parte Frazer*, 54 Cal. 94, substantially the same question was raised in the argument, although it is not discussed at large in the opinion, and the court, speaking of a like power of appointment, says: "The assumption of the power by these individuals or societies would be the assumption of a public duty, and the performance of the duty simply would not be profitable or beneficial to them as societies." *Ferner v. State*, 151 Ind. 249, 51 N. E. 360; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. The societies named, by receiving this power of appointment, are constituted agencies of the state to perform a part of the duty pertaining to the sovereign power of the state, and they are not, in that respect, the recipients of private rights or privileges. *People v. Provines*, supra.

The decisions in *Britton v. Board*, 129 Cal. 341, 61 Pac. 1115, 51 L. R. A. 115, and *Murphy v. Curry*, 137 Cal. 485, 70 Pac. 461, 59 L. R. A. 97, are not applicable. They hold that when the Legislature undertakes to prescribe rules and conditions under and by which alone citizens, either individually or collectively, may freely exercise political rights such as the right of suffrage, or the right to become a candidate for office at a general election, it must make rules and establish conditions which shall give to every citizen, as against any other citizen, equal facilities for the exercise of such rights, and that, if any privileges are given to any party or association of citizens to have the names of its particular candidates spread upon the official ballot, the same privileges must be given to all parties and associations similarly situated, and having like objects and purposes. The law here in question does not deal with political rights held by citizens generally, nor with any existing right of these medical societies. The societies were presumably not organized for the purpose of appointing members of examining boards, and neither of them possesses any such right or power independent of the law conferring

it; nor is this power given them in furtherance of the exercise of any right or power which they possessed before. It is, as before stated, a simple public duty which they are empowered to discharge as a political agency of the state. The Legislature may distribute such powers according to its will, under section 4, art. 20, untrammelled by the restrictions in other portions of the Constitution respecting the granting of rights and privileges equally to all of the same class. It may be true that in making these appointments each medical society will choose persons who believe in the school of medicine of which its members are composed. This, however, does not render the law unconstitutional. The board, when appointed, must act equally for the benefit of all applicants, and impartially with respect to each, regardless of the school of medicine to which they belong. Their official oath so requires, and there is nothing in the act which authorizes or permits them to do otherwise.

We have thus considered and decided the validity of the method of appointing the members of the examining board for the reason that both parties have fully discussed the subject, and certain persons, claiming to represent the state in a quo warranto proceeding to test the right of the board to hold that office by virtue of such appointment, have appeared *amici curiæ* and argued the proposition from their standpoint. We think, however, that this objection does not involve the constitutionality of the act as a whole. The law establishes an examining board, and prescribes its duties and powers, and the power of the Legislature to establish such board is not disputed. This being the case, it is clear that, even if the method provided in the law for the appointment of the members is invalid, the other provisions of the law would stand unaffected. See cases hereinafter cited. There would then be a legal office established, without any specific provision for the appointment of any person to fill it, and the vacancy thus existing could be filled by appointment of the Governor. Const. art. 5, § 8; *Quigg v. Evans*, 121 Cal. 551, 53 Pac. 1093; *People v. Edwards*, 93 Cal. 156, 28 Pac. 831. But, as it would be a legal office, it could be filled by a *de facto* officer, and in that case the validity of his appointment and his right to hold the office could not be questioned in this proceeding in *habeas corpus*.

2. The other objections relate to the construction and effect of section 5 of the act. It begins by requiring that every person practicing medicine or surgery in the state must have the certificate of the examining board as therein provided. It then enacts that, as one of the steps toward procuring a certificate, the applicant must produce "a diploma issued by some legally chartered medical school the requirements of which medical school shall have been, at the time of granting such diploma, in no particular

less than those prescribed by the Association of American Medical Colleges for that year." The provision fixing the standard of this association as a test of the character of the medical school issuing the diploma is, it is contended, invalid, first, because, it is said, the association is composed of colleges teaching only the regular or allopathic system of medicine, and therefore it would place it in the power of that school of medicine to fix a standard that would put the other schools at a disadvantage, and this makes the provision an unjust and arbitrary discrimination against all of the other schools of medicine; and, secondly, because it delegates to the association the power to fix this standard—a power which, it is claimed, can be exercised only by the Legislature itself—and, moreover, it is in effect the adoption of a standard that may vary from year to year, whereas the provisions of law, it is said, must be fixed, definite, and certain. A diploma is required because its possession indicates that the applicant has, to some extent, prosecuted the studies necessary to qualify him to follow the medical profession. It may be that there are medical colleges which require little preparation on the part of their students as a condition to the issuing of a diploma. The provisions of the law imply that there are such. If the diplomas of such colleges were made sufficient to admit an applicant for a certificate to an examination, the number of that class of colleges would doubtless increase. It was therefore necessary, in the judgment of the Legislature, to prescribe a standard of scholarship to be maintained by the colleges whose diplomas the board should be authorized to accept. The law on this point is not to be construed so as to require these colleges to have the identical course of study and other requirements prescribed by the association. The test is that the requirements of such college shall be "in no particular less than" those prescribed. That is to say, the standard of scholarship required of its students shall be equal to the standard required by the association. It need not be the same course of study, nor the study of the same text-books, nor the attendance for the same length of time, but it must be such as require of the student a degree of proficiency in the studies necessary to prepare him for practice equal to that which would ordinarily be produced by the requirements prescribed by the association. Whether or not the Association of American Medical Colleges is composed of those only which teach the allopathic branch of that profession, we cannot say; but, admitting it to be so, we cannot say that there is in this provision of the law, thus understood, an arbitrary or unjust discrimination against other schools. Surely they would not claim the right to have their adherents admitted to practice the profession upon a less degree of proficiency in the preparatory studies than is required of those in the regular school. It

being proper for the Legislature to demand some standard of efficiency, as we have seen, we think it is equally within its powers to declare that it shall be the same as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession. Evidently the standard of proficiency in scholarship as a preparation, and the particular studies necessary to secure a fair preparation, must change as the discoveries in natural science open new fields of investigation, and suggest or reveal new curative agencies. The Legislature cannot successfully prescribe in advance a standard to meet these new and changing conditions. The method adopted appears to be sufficiently definite to enable all colleges to reach the required standard, when in good faith they desire to do so. The law is as fixed, definite, and certain in this respect as the nature of the subject and the object to be attained will permit; and we do not think it should be held void because it adopts the standard fixed from time to time by those who, it will be presumed, are the most eminent in the profession which it attempts to regulate, and who should be the most interested in maintaining the highest degree of professional proficiency, skill, and training.

3. The next objection is that under the guise of authority to exercise discretion the examining board is given power to make arbitrary and unjust discriminations between persons holding certificates from medical examining boards of other states, by subjecting one to an examination and admitting another without examination. This objection is directed to the last paragraph of section 5 of the act, which provides, in substance, that in the case of a person holding a certificate from another state examining board, which has required the production of a diploma or license of equal grade to those required by the act, and has also required the holder to pass an examination as strict as that required by our own board at the time, such person may, in the discretion of the board, be admitted to practice without further examination. It will be seen that every person within this class must have a diploma or license such as the act prescribes, and therefore must be eligible to examination here, if the board requires it. If the provision giving the board discretion to admit without examination is held unconstitutional, the effect would be that all applicants must submit to examination as provided in the act. The act shows clearly that the main purpose is to admit no one to practice who has not passed such an examination, and the only effect of the last paragraph is to permit in some cases the substitution of the examination of another state board for that of our own. A law which is unconstitutional in part only is not to be held wholly void, unless the invalid portion is so important to the general plan and operation of the law in its entirety as to reasonably

lead to the conclusion that the law would not have been adopted if the Legislature had perceived the invalidity of the part so held to be unconstitutional. If the law is separable, so that the general object can be attained without aid from the part that is void, the other parts of the law will be upheld. *Ex parte Frazer*, supra; *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *People v. McFadden*, 81 Cal. 496, 22 Pac. 851, 15 Am. St. Rep. 66. "If an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid." *McGowan v. McDonald*, 111 Cal. 65, 43 Pac. 418, 52 Am. St. Rep. 149. Such invalid provisions "will not vitiate the whole act unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions." *People v. Hill*, 7 Cal. 103; *People v. Burbank*, 12 Cal. 393; *Mills v. Sargent*, 36 Cal. 382. It is not necessary to consider whether or not the provision allowing a discretionary power to admit without a new examination in some cases is constitutional. Conceding, but not deciding, that such provision is void, it comes clearly within the rule above stated, and does not affect the other provisions of the act under which the petitioner is held in custody.

There are no other points that require notice.

The petition is denied, and the petitioner remanded to the custody of the chief of police of the city and county of San Francisco.

We concur: VAN DYKE, J.; ANGELL, J.; MCFARLAND, J.; HENSHAW, J.; LORIGAN, J.

143 Cal. 875

PEOPLE v. BUCKLEY. (Cr. 1,084.)\*

(Supreme Court of California. May 31, 1904.)

MURDER — EVIDENCE — ADMISSIBILITY — TESTIMONY AT PRELIMINARY EXAMINATION — ABSENT WITNESS — DEPOSITION — TRANSCRIPT OF TESTIMONY AT PRELIMINARY EXAMINATION — CERTIFICATE — SUFFICIENCY — OFFICIAL STENOGRAPHER — PROOF — CROSS-EXAMINATION OF DEFENDANT — INSTRUCTIONS — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DISCRETION OF TRIAL COURT.

1. Evidence on a prosecution for murder in the first degree examined, and held to so identify accused as the one who committed the murder as to sustain a verdict of guilty.

2. Where, in a criminal case, the evidence on the question of the guilt of the accused was conflicting, the Supreme Court will not interfere with the verdict of the jury, approved by the trial court.

3. Where a police officer testified as to witness defendant, on trial for crime, had stated to him, been his connection with the crime, it was not prejudicial error to refuse to strike out the officer's testimony that he had told defendant that his story was absurd.

4. The uncontradicted evidence that a witness, who testified at the preliminary examination,

\*Rehearing denied June 30, 1904.

tion of accused on the charge of murder, was at the time of the trial, and for two months preceding it had been, in a foreign country, is sufficient to show that he could not be found in the state, within Pen. Code, § 686, providing for the introduction in evidence of the deposition of a witness on preliminary examination, on it being shown that the witness cannot be found within the state.

5. Pen. Code, § 869, subd. 5, requiring the reporter, within 10 days after the close of the preliminary examination, if defendant is held for trial, to transcribe his shorthand notes, and certify and file the same with the county clerk, is directory merely, and the filing of the same within a reasonable time is sufficient to warrant its use as the deposition of a witness at the examination not found within the state at the time of the trial.

6. Where it was shown that a person was an official stenographer of the police court, that he was specially appointed and sworn by the committing magistrate to take down the testimony on the preliminary examination of defendant, that he took down the testimony, that he filed a transcript thereof with the clerk, and that he made the signature at the end of the transcript, it was sufficiently shown that the person who signed the certificate at the close of such testimony was an official stenographer.

7. On a trial for crime, the people introduced in evidence as a deposition the testimony of a witness at the preliminary examination as certified and filed by the reporter. The certificate of the reporter was not set forth in the bill of exceptions, but it appeared that the people offered the entire transcript for the purpose of giving character to the entire document and the certificate at the end thereof, and that defendant objected to its admission, on the ground that it had not been shown that the person signing the certificate was an official stenographer, and that the court ordered the admission of the entire transcript for the limited purpose. *Held*, that the court, on appeal, must presume that the transcript offered was certified by the reporter as being a correct statement of the evidence, and therefore under the statute *prima facie* a correct statement of the testimony constituting the depositions of the witnesses whose testimony was shown therein.

8. A reporter personally dictating from his shorthand notes of the testimony on a preliminary examination to an assistant, who, under his direction and in his presence, makes the longhand transcript, transcribes his shorthand notes within Pen. Code, § 869, requiring the reporter to transcribe into longhand his shorthand notes.

9. The failure of the reporter to make a comparison with his notes of the longhand transcript done at his dictation by an assistant does not show that the statement of the testimony contained in the transcript is incorrect.

10. Where a reporter personally dictated from his shorthand notes of the testimony at a preliminary examination to an assistant, who made the longhand transcript, the evidence of the reporter that he accurately dictated to his typewriter, and the evidence of his typewriter that he literally put into longhand the dictation, was competent to show that the transcript was a correct statement of the testimony.

11. A defendant on trial for crime, who desires to show that the transcript of the testimony at the preliminary examination is incorrect, may avail himself of the reporter's shorthand notes filed with the county clerk, as required by statute.

12. Where defendant, on trial for crime, testified on his direct examination as to his age, residence, family, attendance at school, and that he had never been on trial before, nor convicted of crime, except for disturbing the peace eight or nine years ago, it was not error to permit the people to cross-examine him as to the num-

ber of times he had been arrested, and on what charges; Pen. Code, § 1323, providing that a defendant may be cross-examined as to all matters about which he was examined in chief.

13. The testimony of defendant, on trial for crime, on his direct examination, as to age, residence, family, attendance at school, and that he had never been on trial before, nor convicted of crime, except for disturbing the peace, is sufficiently relevant to warrant the people to cross-examine him about the matters testified to.

14. The refusal to give requested instructions embodied in instructions given is not error.

15. The refusal to give requested instructions containing abstract propositions of law which have no bearing on the crime charged is not error.

16. Where, on a trial for murder in the first degree, the prosecution claims that accused shot and killed decedent, instructions containing statements that it is no offense for one to go and see a fist fight or a crime committed are properly refused.

17. A requested instruction that verbal admissions ought to be received with great caution, that such evidence is subject to much imperfection, the party himself not having clearly expressed his own meaning or the witness having misunderstood him, is properly refused, because going beyond Code Civ. Proc. § 2061, subd. 4, providing that the jury is to be instructed that evidence of oral admissions of a party ought to be received with caution, and violative of Const. art. 6, § 19, prohibiting judges from charging juries with respect to matters of fact.

18. A new trial on the ground of newly discovered evidence should not be granted, in the absence of a showing that the new evidence is sufficient to render a different result probable.

19. The action of the trial court in denying a new trial on the ground of newly discovered evidence, because of the insufficiency of the showing that the new evidence is sufficient to render a different result probable, will not be disturbed, except in case of manifest abuse of the court's discretion.

In Banc. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William Buckley was convicted of murder in the first degree, and he appeals. Affirmed.

Robert Ferral and Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and Lewis F. Byington, Dist. Atty. (P. F. Dunne, of counsel), for the People.

ANGELLOTTI, J. The defendant, William Buckley, was convicted of the crime of murder of the first degree, for the killing of one George W. Rice, and adjudged to suffer death. He appeals from such judgment, and from an order denying his motion for a new trial.

1. Much of the brief of counsel for defendant is devoted to a discussion of their proposition that the verdict is contrary to the evidence. The record shows no possible basis for holding that the evidence was insufficient to sustain the verdict. The evidence showed, without conflict, the following facts: The homicide was committed in the city and county of San Francisco on October 11, 1901, at about 6 o'clock p. m. The deceased was returning from his work.

He took a Howard Street car somewhere in the vicinity of First street, and rode on the inside thereof to the corner of Howard and Twentieth streets, where he alighted from the rear end. The defendant and some companions were passengers on the same car, having taken it at the corner of Howard and Second streets; the defendant standing on the left-hand side of the open section in front. When the deceased alighted, he was followed by a man who struck him on the head with a club and beat him to the ground. Another man, who came from near the front of the car, then approached and with a pistol fired three or four shots into the prostrate body of the deceased, inflicting the wounds which caused his death. The defendant left his place on the car and was on the ground near the deceased before any shot was fired. He fled from the scene of the shooting down Twentieth street to Shotwell, and east on Shotwell street, at least one other man running nearly with him, and was overtaken and arrested on Seventeenth street, about half way between Folsom and Harrison streets, and nearly half a mile from the corner of Howard and Twentieth streets. He was then pale and perspiring greatly. He was wearing at the time an old gray suit and a soft light hat. Three witnesses, Walter J. Platt and his daughter, Erline Platt, aged 14 years, both of whom were seated on the lefthand side of the front open section of the car, and Arthur Cleve, a boy of 16 years, who was standing on the lefthand side of such section, leaning against the body of the car, positively identified the defendant as the man who fired the shots. All the witnesses agree that the man who fired the shots ran down Twentieth street toward Shotwell, and there is testimony that the man who did the clubbing ran in the same direction. The deceased, in his dying declaration, stated that the man who shot him wore a white hat. There was other testimony to the effect that the man who fired the shots wore a light suit and a light hat, while the man who did the clubbing wore a dark suit and dark hat; that two men, so attired, ran nearly together down Twentieth to Shotwell, to Nineteenth, and to Folsom, where they separated, the man in light clothes going east on Folsom to Seventeenth, and down Seventeenth for half a block, where he was arrested, and was found to be the defendant. There was also testimony to the effect that, when overtaken, defendant was asked by the officers where he was going, and said that he was endeavoring to catch a Harrison Street car, and, when asked if he did not know that the car did not run on Harrison street west of Fourteenth street, made no reply; that he was further asked if he had been at the scene of the shooting, and he replied that he had not, and knew nothing about it, but had been out to see a friend on Folsom street.

Having been taken to the police station, he was very shortly after taken to the hospital for identification by the deceased, and, on his way there, admitted having been at the shooting, but denied all participation therein.

Enough has been stated to show the want of foundation for the contention that the evidence is not sufficient to support the verdict. It is true that the defendant testified, substantially in accordance with the story that he told shortly after his arrest, that he started out with two or three acquaintances for the purpose of going out to the Mission to witness some kind of a fight, a fist fight, he understood; that they were joined at Howard and Second streets by a couple of strangers whom he had never before seen; that when they boarded the car defendant found himself standing on the left-hand side of the front open section, with one of the strangers, who wore a black hat, standing on the same side and holding on by the stanchion at the extreme front; that when they reached Howard and Twentieth streets his attention was attracted by the clubbing, and he alighted and stood "surprised and astonished"; that the stranger who had been standing on the car with him then commenced to fire the shots at deceased; that he, after the second shot, frightened because he had been in this man's company, ran away, the man who had done the clubbing having already run in the same direction, and that when he turned into Shotwell street he discovered that the man who had done the shooting was running close behind him, a foot or two behind; that they ran some distance that way, to Folsom street, "or maybe Shotwell street"; and that he never saw this stranger again after they separated. It is also true that several witnesses to the homicide gave testimony to the effect that Buckley did not do the shooting, and that the man who did wore dark clothes and a dark hat, and that, on his behalf, other circumstances were shown, all forming the basis for an argument to the jury that the defendant was not guilty. But such an argument can have no potency in this court. At the most there was simply a conflict of evidence on the question as to whether the defendant was guilty, and under well established rules this court is powerless to interfere with the verdict of the jury thereon, and the determination in regard thereto of the trial judge, on the motion for a new trial.

2. According to the testimony of Sergeant of Police Duke, the defendant on the morning following the homicide informed Duke that he wanted to have a talk with him, and thereupon in the presence of others, voluntarily made a statement of what he claimed the facts to be. In this he said, among other things, that he and his codefendants, Donnelly and Moran, started out the afternoon

before to see a "scrap" in the Mission; that before they boarded the street car at Second and Howard streets they were joined by two strangers, who went with them; that on the way out one of the strangers informed defendant that the fellow they were going to do up was a nonunion man; and that this stranger actually did the shooting. Duke testified that, when defendant had made this statement, he said to him substantially, "Your story is absurd in regard to the two strangers," and that defendant did not reply. Defendant moved to strike out this statement of the witness as to the absurdity of the story as irrelevant, immaterial, and impertinent, and the motion was denied.

It is unnecessary to determine whether or not this ruling was erroneous, for it is clear that defendant could not have been prejudiced thereby. The case was not one of attempting to show accusing and incriminating statements by another, in the presence of one accused of crime, who has failed to speak at all, but was simply an expression of his opinion, by one to whom the accused person had voluntarily made a statement, as to the reasonableness of one portion of such statement. If such expression of opinion by Duke was made under such circumstances and conditions that the failure of the accused to reply thereto would in any degree impair the force of his previous voluntary statement, it was undoubtedly admissible in evidence. If it cannot be said that the statement of Duke was such as would naturally call for a reply, it was, at most, a mere expression of his opinion as to the reasonableness of the statement made by the defendant, which, in view of the fact that the statement so characterized as absurd was before the jury, could not have injured the defendant. The jury could determine from the statement itself whether or not it was "absurd," and it cannot be assumed that in reaching that determination they would be influenced by Duke's opinion in regard thereto.

3. The people were allowed to read in evidence, from the transcript of the testimony and proceedings taken and had on the preliminary examination of the defendant, the evidence given by Erlene Platt on said examination, upon the ground that said witness could not with due diligence be found within the state, and that her deposition might therefore be read. It is earnestly claimed that for several reasons the court erred in allowing this testimony to be read in evidence. There is nothing in the objection that it had not been shown that the witness was not within the jurisdiction of the court, or that it had not been shown that due diligence had been used to have her present at the trial. The Penal Code (section 686) provides that the deposition of a witness on the preliminary examination may be read

on the trial, "upon its being satisfactorily shown to the court that he is dead, or insane, or cannot with due diligence be found within the state." The uncontradicted evidence of the father of said witness was, in the absence of any other evidence on the subject, sufficient to justify the trial court in finding that the witness was at the time of the trial, and for two months preceding the trial, in the city of Mexico, Republic of Mexico, and therefore could not with due diligence be found within the state of California.

Another ground of objection was that the transcript of testimony showed upon its face that it was not filed with the county clerk of the county within the time required by law, the statute providing that, "the reporter shall, within ten days after the close of such examination, if the defendant be held to answer to the charge, transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk," etc. Pen. Code, § 869, subd. 5. It appears that such transcript was not filed within 10 days after the close of the preliminary examination, which was apparently held during the latter part of October, 1901; but it was filed before the trial, which commenced in January, 1902, the certificate of the reporter at the end of the transcript being dated December 16, 1901. It is settled that the specification as to time contained in the section last quoted from is directory merely, and that, if the filing be within a reasonable time, it is sufficient. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214. See, also, *People v. Eselabe*, 127 Cal. 243, 59 Pac. 577. As was said in the *Grundell* Case, we are not prepared to say the time in this case was unreasonable.

It was further objected that it was not shown "that the person who signed the certificate at the close of this testimony, to wit, one D. W. Long, is an official stenographer, and the court cannot take judicial notice of" his signature. In response to this objection it was shown that the said Long was an official stenographer of the police court, that he was specially appointed and sworn by the committing magistrate to take down the testimony and proceedings on the preliminary examination of defendant, that he did take down such testimony and proceedings, and, a transcription thereof having been thereafter made, that he filed the same with the clerk of the court, and that he made the signature at the end of the transcript. The other objections were that no foundation had been laid for the introduction of the deposition; that it was not shown that the testimony was transcribed by the official stenographer, D. W. Long, into longhand; that the transcript in longhand was not made by Long, and therefore could not be certified by him; and "that it is hearsay—that is, the transcript being dictated to someone else and taken down."



The foundation for the introduction of the testimony of the witness taken on the preliminary examination was fully laid by the showing that the witness could not with due diligence be found within the state. Pen. Code, § 686. Under the provisions of section 809 of the Penal Code, the transcript in longhand of the shorthand notes of the testimony and proceedings, made and certified by the shorthand reporter appointed by the magistrate to take down the same, and who did take down the same, filed with the county clerk, is placed upon the footing of a deposition. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214. The same section provides that such transcript, "when written out in longhand writing and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings." It may be assumed, as contended by the learned counsel for appellant, that this authentication of the deposition by the certificate of the reporter is the sole and exclusive method provided by the statute of proving it; that where there is no certificate, or only one that is materially defective, there is no such deposition as is contemplated by the statute; and that in the absence of such a deposition the testimony of the absent witness cannot be given to the jury. *People v. Morine*, 54 Cal. 575; *People v. Gardner*, 98 Cal. 127, 130, 32 Pac. 880; *People v. Ward*, 105 Cal. 652, 655, 39 Pac. 33. It does not, however, follow that in this case there was error in admitting the deposition; for it must be assumed, upon the record before us, that the transcript produced was duly certified by the reporter as being a correct statement of the testimony and proceedings. The certificate is not set forth in the bill of exceptions. It however appears that the people offered the "entire transcript for a limited purpose—that is to say, for the purpose simply of giving character to the entire document, and \* \* \* the certificate at the end thereof"; that defendant objected to its admission on the ground that it had not been shown "that the person who signed the certificate at the close of this testimony" is an official stenographer; and that the court ordered the entire transcript admitted for the limited purpose stated by the people. The record thus affirmatively shows that there was some kind of a certificate at the end of the transcript, which, with all other portions of the transcript, except the testimony of the absent witness, has been omitted from the bill of exceptions. It was at no time specially stated as a ground of objection that there was no certificate, nor was there any objection suggested by the defendant to the effect that the certificate was in any way defective. Even where the record entirely fails to affirmatively show that the reporter properly certified the transcript of his shorthand notes, but does not show that there was no such certificate, it will be presumed in this court, in support of

the ruling of the court below, in the absence of specific objection on the ground of want of a proper certificate, that the transcript was properly certified by the reporter. *People v. Reilly*, 106 Cal. 648, 40 Pac. 13; *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Grundell*, 75 Cal. 301, 304, 17 Pac. 214. In *People v. Reilly*, supra, the general objection was, as here, that no foundation had been laid for the introduction of the deposition, and it was, in effect, held that the objection was not sufficiently specific to raise the question as to the certificate. The cases cited by defendant upon this point are not applicable to the question under discussion. Assuming, then, as we must, that the transcript offered was certified by the reporter as being a correct statement of the testimony and proceedings, it was, under the statute, prima facie a correct statement of such testimony and proceedings, constituting the depositions of the various witnesses whose testimony was shown therein.

The basis of the remaining objections was the showing made by the testimony of the reporter, in answer to the attack on the deposition made by the defense, to the effect that he did not personally do the typewriting in the transcription of the notes, except as to a small portion thereof. So far as he did not himself do the typewriting, he dictated his notes to a Miss Grey, who acted as his typewriter, and he then put together the completed work and made the necessary certificate, without, however, having made any comparison for the purpose of verification of the result of the work of the typewriter with his original shorthand notes. He testified that, so far as he dictated the notes, he dictated fully, faithfully, and literally; and Miss Grey, under objection, testified that she faithfully, fully, and literally transcribed upon the typewriter the dictation as it came to her from Mr. Long. While the statute requires the reporter to "transcribe into longhand writing his shorthand notes," this does not mean that the reporter must, with his own hand, do the actual writing or typewriting. Such a construction would be unreasonable, and the practice thereby compelled would be not only most burdensome, and, in many cases, impracticable, but also no more conducive to accuracy than the practice of dictating to another. The statute undoubtedly contemplates that the work of reproducing in longhand the shorthand notes shall be done under the personal direction and supervision of the reporter who wrote the notes. There can, however, be no doubt, where such a reporter personally dictates from his notes to an assistant, who, under his dictation and in his presence, makes the longhand transcript, that the reporter is himself transcribing his shorthand notes, within the meaning and requirements of the statute. He participates in every part of the work, and the fact that he has the assistance of others therein does not make it any the less

his transcription. If, therefore, the effect of the certificate annexed to the transcript would be destroyed by a showing that the reporter did not transcribe his notes, the evidence in this case fails to show that he did not so transcribe them.

It is strenuously urged, however, that the facts stated in the certificate were shown to be false by the evidence that the reporter, before making the same, did not personally compare the transcription with his notes, and that the prima facie effect of such certificate was thus destroyed. We are unable to appreciate the force of this argument. The certificate of the reporter provided for by the law (and, as we have seen, such a certificate must be assumed to have been attached to the transcript here) is one stating that the transcript is "a correct statement of such testimony and proceedings in the case." This is the essential fact to be stated in the certificate, and the failure of the reporter to make a comparison with his notes of the longhand work, done at his dictation, does not show that the statement of the testimony and proceedings contained in the transcript is incorrect. The statute, of course, contemplates that the reporter shall satisfy himself that it is a correct statement before he makes his certificate to that effect; but it does not concern itself with the method by which he shall so satisfy himself. It simply provides that, when he has certified it as being a correct statement of the testimony and proceedings, it is prima facie a correct statement, and the effect of the certificate can be overcome only by evidence tending to show that it is an incorrect statement, or, at least, by evidence affording fair grounds for the conclusion that it is incorrect. We are speaking, of course, of a transcript certified by the reporter who in fact officiated as the reporter at the preliminary examination, and not of the possible case suggested by appellant of a certificate made by one who was not present at the preliminary examination; for, if the certificate be not made by the person designated by the law, it is necessarily worthless. The Legislature has seen fit to give this effect to the certificate of the regularly appointed and officiating reporter.

There was no intimation that the statement of the testimony and proceedings contained in such transcript was incorrect in any particular. The transcript was accompanied by a certificate which, under the express provisions of the law, was a sufficient authentication, and prima facie established its correctness. The only possible question, then, in this connection, was as to whether the certificate was true, and not as to whether it had been made after sufficient investigation by the reporter; and, unless the transcript was incorrect in some particular, the certificate was true. If any suspicion that it might be in any way incorrect was raised by the exposure that there had been no comparison, the evidence of the reporter that he accurately

ly dictated to his typewriter, and the evidence of his assistant that she fully and literally put into longhand his dictation, was competent, for the purpose of showing that the work of transcription was accurately done, and that the transcript was what the certificate represented it to be, a correct statement of the testimony and proceedings. For these purposes, such testimony was in no sense hearsay testimony, and the case of *People v. John*, 137 Cal. 220, 69 Pac. 1063, which was the simple case of attempting to prove what A. said by the testimony of B., who derived his information solely from C., has no possible application. The statute requires that the original shorthand notes of the reporter shall be filed with the county clerk, and presumably they were so filed in this case, and, if the defendant had desired to show that the transcript was incorrect, he could have availed himself of these notes for that purpose. If it had been shown that the transcript was not a correct statement of the testimony and proceedings, it might not have been available for use on the trial; but the evidence here presents no such case. The cases cited by counsel for appellant are in no degree in conflict with our conclusions on this question. They are simply to the effect that every substantial requirement of the law relating to the introduction of the deposition of a witness must be observed, that such a deposition can be introduced only in the cases provided for by section 686 of the Penal Code, that where such a deposition is not authenticated as required by the law it cannot be received in evidence, and that evidence as to what the witness actually testified to cannot be received in lieu of the statutory deposition. We are satisfied that the court did not err in overruling the objections to the reading in evidence of the deposition of the witness.

4. The defendant was examined as a witness on his own behalf. On his direct examination, having testified as to his age, his residence in San Francisco during the whole of his life, viz., 26 years, his family, and his attendance at day school, and afterwards at night school, while engaged in work during the day, the following occurred, viz.: "Q. Have you ever been before a jury in your life before this? A. No, sir. Q. Ever convicted of any crime at all? A. No, sir. Q. Now, will you kindly tell us, without my friends object— A. (Interrupting.) Excuse me, Judge Ferral, if you call disturbing the peace a crime, I was fined five dollars one time. Q. You were fined once five dollars for disturbing the peace. Is that right? A. Yes, sir. Q. How long ago is that? A. It is about eight or nine years ago, I guess. It is quite a long time ago. Q. And that is all your trouble? A. That is the extent of my conviction of any crime." On cross-examination the following occurred, viz.: "Q. You were asked here about your troubles, and you spoke about having been arrested for disturbing the peace some number of years ago. Is

that the only trouble you had with the police prior to this shooting? A. I have been arrested, but convicted I never have been. Q. How many times have you been arrested? (Objected to as irrelevant and incompetent and hearsay, and not cross-examination, and assigned as misconduct. The Court: Objection overruled. Mr. Ferral: An exception.) A. I guess two or three times. Q. Two or three times. Well, what was the trouble the first time? (Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination, and assigned as misconduct. The Court: The objection is overruled. Mr. Murphy: An exception.) A. The first time? Mr. Dunne: Yes. A. I think it was driving in a buggy one night. There was some young fellow hired a buggy that I know, and I got into the buggy, and he had it out all day, and I got in that night, and rode an hour with him, and the man that owned the buggy had him arrested, and they arrested me with him. Q. What was the trouble the second time? (Objected to as irrelevant, immaterial, and incompetent, and not proper cross-examination, and assigned as misconduct. The Court: The objection is overruled. An exception was taken.) A. I don't remember exactly what I did get arrested for. It was nothing serious, I know. Only a misdemeanor, whatever it was. Q. Well, don't you remember what the trouble was? (Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination, and not the best evidence. The objection was overruled and an exception taken.) A. I think I was arrested—I don't know—it was battery I believe. I don't remember the time exactly. I could not tell you about the time, or anywhere near the exact time. It must have been six or seven months before George Rice was shot." These rulings of the court on the cross-examination of the defendant are assigned as error.

It is too well settled to require the citation of authorities that, upon the trial of one accused of a crime, evidence of other specific wrongful acts, not pertinent to the issue on trial, is not admissible, and also that a witness cannot be impeached by evidence of particular wrongful acts, except that it may be shown that he has been convicted of a felony. Most of the many cases cited by learned counsel for defendant go to one or both of these rules, neither of which was violated by the cross-examination in question. While, under our law, a defendant cannot be compelled to testify, if he does become a witness and testify in his own behalf, he may be cross-examined "as to all matters about which he was examined in chief." Section 1323, Pen. Code. The proper limits of the cross-examination are determined by the scope of the direct examination, and so long as the cross-examination is limited to the subject-matter of the direct examination it is allowable. The cross-examination in question did not go beyond the

matters covered by the direct examination. The plain object of the direct examination was to show that the defendant was a peaceable, industrious young man, who had never before even been accused of crime, and the effect of the testimony given thereon was that he never before had been accused of crime, or had been in any trouble with the authorities, except in the single case when he was fined five dollars for disturbing the peace. It would be altogether too narrow a construction of the direct examination to hold otherwise. This being the proper construction, the people had the right on cross-examination to draw out anything which would tend to contradict the evidence adduced on the direct examination, or weaken or modify its effect. See *People v. Gallagher*, 100 Cal. 466, 475, 35 Pac. 80. We cannot say that the cross-examination was not fully justified by the direct examination. The only California case to which we have been cited that presents the precise question here involved is that of *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396, where the defendant was asked on cross-examination if he had ever been arrested before. This court said: "The cross-examination of the defendant was certainly very broad; but, as he testified in chief about his birth, parentage, education, and business, we cannot say that he did not open the door wide enough to justify what followed in the cross-examination." Appellant's counsel suggests that, as the question in the *Fong Ching* Case was answered in the negative, no harm could have resulted. This court, however, did not put its decision upon the ground of want of injury, but disposed of it in the words above set forth. The direct examination in the case at bar was much broader in its scope than that in the *Fong Ching* Case.

It is urged in appellant's reply brief that the evidence given by defendant on his examination in chief was absolutely irrelevant, incompetent, and immaterial, and that the people had, therefore, no right to cross-examine him thereon; the claim being that the presumption of the good character of the defendant as to the traits involved in the charge can be supported only by evidence of his general reputation. It cannot be said that the evidence on direct examination was either irrelevant or immaterial to the issue. While it would be a harsh rule that would forbid the usual practice of allowing one on trial for a crime to testify, if he so desires, that he has led a decent, industrious life and has never before been even accused of crime, for such evidence certainly tends to show good character, still, if it be conceded that that is not the proper way under the rules of evidence to show good character, and such testimony is nevertheless allowed, it is proper subject-matter for cross-examination. If a defendant does not choose in his direct examination to enter upon matters relating to his previous history, the prosecution cannot

commence any inquiry in regard thereto, except as to the single case of a previous conviction of a felony; but, if he voluntarily opens the door to his past and testifies regarding the same for the purpose of showing his good character, he cannot complain of any cross-examination that is limited to the scope of his direct examination thereon.

5. The following instructions were requested by the defendant: "(11a) It is no offense against the law to go and see a fist fight, or what is commonly called a 'scrap,' so long as nothing more than this is done. (11b) It is not against the law to go and see even a crime committed, so long as there is no participation in its commission; that is, nothing is done or said to aid or abet in the perpetration. (11c) Whatever may be said of the propriety of a citizen looking on and not interfering with the commission of a crime committed in his immediate view and presence, yet the law does not make him answerable for so doing. (11d) In this case, if you have a reasonable doubt as to Buckley's saying or doing anything towards causing the death of Mr. Rice, it is your duty to give him the benefit of the doubt." The court refused to give any of these, and such refusal is assigned as error.

Although there would have been no harm done in giving it, the subject-matter of the fourth of these requested instructions (11d) was fully and fairly covered by other instructions given by the court. As to the other three, we see no error in the action of the court. It may be that, as mere abstract propositions of law, they are correct; but as mere abstract propositions of law they apparently bear no direct relation to the particular charge contained in the information. The charge here was that the defendant had willfully, unlawfully, and with malice aforethought killed a human being, and questions as to whether the law makes it an offense for one "to go and see a fist fight," or "to go and see even a crime committed," or "to look on and not interfere with the commission of a crime committed in his immediate view and presence," were immaterial. The defendant was not charged with any such offense, but was charged with having willfully and with malice aforethought killed Rice. The theory of the prosecution was that he actually fired the shots that caused the death of Rice, and there was apparently no claim or pretense that he was guilty of the offense charged by reason of being merely present at the scene of the crime, or unless he had actually fired the shots. The jury were fully and correctly instructed as to what was essential to render the defendant guilty of the offense charged, viz., the murder of Rice; and probably, if a proper instruction directly bearing upon the question as to what was necessary to make defendant a party to the homicide, within the meaning of the law, had been requested by him, it would have been given, notwithstanding

the fact that the subject-matter was fairly covered by other instructions.

6. The following instruction requested by defendant was refused, viz.: "(7) With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." In this the court did not err. The question as to the propriety of giving any requested instruction on the subject of oral admissions is not here involved. The instruction requested went far beyond the language of subdivision 4 of section 2061, Code Civ. Proc., which simply provides that the jury is to be instructed upon all proper occasions "that the testimony of an accomplice ought to be received with distrust, and the evidence of the oral admissions of a party with caution," and was practically the same instruction held to be erroneous in *Kauffman v. Maier*, 94 Cal. 269, 283, 29 Pac. 484, 18 L. R. A. 124, as being in violation of the constitutional provision that "judges shall not charge juries with respect to matters of fact." Const. art. 6, § 19. There can be no doubt as to the correctness of that decision. See, also, *People v. Rodley*, 131 Cal. 240, 258, 63 Pac. 351. The cases cited by defendant, viz., *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. Strybe*, 36 Pac. 3, and *People v. Silva*, 121 Cal. 668, 54 Pac. 146, were all cases where the proposed instruction was limited to the language of the statute.

7. One of the grounds of the motion for a new trial was that new evidence had been discovered material to the defendant and materially in favor of his innocence, which he could not with reasonable diligence have discovered and produced at the trial. It may be conceded that the affidavits show that the newly discovered evidence could not with reasonable diligence have been discovered and produced at the trial. A new trial should not, however, be granted upon the ground of newly discovered evidence, unless the showing as to such newly discovered evidence is sufficiently strong to render a different result probable. The question as to whether such a showing is made is one that is addressed to the sound legal discretion of the trial court, and the action of that tribunal in regard thereto will not be disturbed, except in cases of manifest abuse. See *People v. De Masters*, 109 Cal. 607, 42 Pac. 236; *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254. We have carefully examined the affidavits presented on the motion for new trial, and we cannot say that it is clear that the proposed

evidence would render a different result probable. We therefore cannot interfere with the action of the trial court.

The judgment and order are affirmed.

We concur: VAN DYKE, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.

LORIGAN, J. I concur fully in the foregoing opinion of Justice ANGELLOTTI, except that I am not disposed to hold that the giving of an instruction as to verbal admissions is violative of the constitutional provision that "judges shall not charge juries with respect to matters of fact." On that point I accord with the declaration in *People v. Wardrip*, 141 Cal. 232, 74 Pac. 744 (in the opinion by the court on rehearing I did not participate), that such an instruction "states a mere commonplace within the general knowledge of juries, and we do not think that either the giving or the refusing of such an instruction would warrant reversal." I think that this sufficiently disposes of such an instruction, and I am not inclined to go further.

BEATTY, C. J. I concur in the judgment and in the opinion of Justice ANGELLOTTI. With respect to the point adverted to in the concurring opinion of Justice LORIGAN I take this—the first proper—occasion to retract my concurrence in what was said in response to the petition for a rehearing in the case of *People v. Wardrip*, 141 Cal. 233, 74 Pac. 744. I am satisfied, upon further reflection, that the statute providing that the jury are on all proper occasions to be instructed that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admission of a party with caution (Code Civ. Proc. § 2061), is not unconstitutional. The power of the Legislature to determine what is or is not competent evidence in civil or criminal cases is unquestionable. A law which absolutely disqualified an accomplice, or excluded all evidence of the oral admissions of a party, would be free from any constitutional objection; and if this is so—if such evidence could be made absolutely incompetent—it seems clearly to follow that its admission may be made subject to any reasonable condition which the Legislature may see fit to prescribe. To require the court to instruct the jury on all proper occasions to view the testimony of an accomplice with distrust, or the evidence of oral admissions of a party with caution, is not to charge the jury as to matters of fact, but merely to state the condition upon which the jury is permitted to hear that class of evidence. I also think that the allowance of these instructions is obligatory in every proper case, and that it is prejudicial error to refuse them, when requested by a party against whom such evidence has been given. In this case, however, the instructions requested contained a number of matters in addition to the require-

ments of the statute, and in the nature of an argument upon the evidence, and were for that reason objectionable.

143 Cal. 394

PEOPLE v. DONNOLLY. (Cr. 1,077).\*

(Supreme Court of California. June 1, 1904.)

MURDER—CONSPIRACY — ADMISSIBILITY—SUFFICIENCY—WITNESSES—CROSS-EXAMINATION—INSTRUCTIONS.

1. Evidence in a prosecution for murder examined, and held to so show that defendant conspired with the person who killed decedent as to sustain a verdict of guilty.

2. Though as general rule no testimony of the acts of alleged conspirators can be shown until the conspiracy has been first established, it is not error to admit evidence of the acts of the alleged conspirators before the conspiracy is established.

3. A verdict in a criminal case supported by sufficient evidence is conclusive in the Supreme Court.

4. The language of the court, in passing on the admissibility of evidence showing the flight of two of defendant's alleged co-conspirators in the commission of the crime charged, that "two persons who were claimed to have" run down a certain street, etc., was not a charge on the weight of the evidence.

5. On a trial for the murder of a machinist who continued to work during a strike, it was shown by a witness for defendant that the strike of defendant's organization continued up to a few days before the killing, and that there had been no connection between the machinists' union and the union to which defendant belonged. Held proper to show, on the cross-examination of the witness, that there had been a general strike in which defendant's union was involved, and that while these strikes were on decedent continued to work, contrary to the policy with which defendant's union had become identified.

6. The refusal to give instructions on mere abstract propositions having no relation to the facts of the case is not error.

7. The refusal to give instructions covered by the court's charge is not error.

Beatty, C. J., dissenting.

In Banc. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Charles Donnolly was convicted of murder, and he appeals. Affirmed.

H. W. Hutton (M. J. Kuhl and J. J. Barrett, of counsel), for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Dep. Atty. Gen., for the People.

VAN DYKE, J. The appellant, William Buckley, Thomas Moran, and Edward Duncan were informed against jointly by the district attorney for the crime of murder. In accordance with appellant's demand, he was tried separately, and was convicted of murder in the second degree. He moved for a new trial, which was denied, and was sentenced to 17 years' imprisonment in the state prison. He appeals from the judgment and the order denying a motion for a new trial.

The first point made by the appellant, and the one apparently upon which he most re-

\*Rehearing denied June 7, 1904.

lies, is that the evidence is insufficient to support the verdict and judgment. The evidence was indirect or circumstantial. The facts concerning the homicide are as follows: On October 11, 1901, George W. Rice, a machinist employed at the Golden State & Miners' Iron Works, in San Francisco, was shot and killed just as he had alighted from a street car at the corner of Howard and Twentieth streets, and was about to proceed to his home near by, after his day's work. The evidence showed beyond a doubt that the death of Rice was not the result of a sudden encounter, or heated quarrel, but was one of preconcert and prearrangement among several parties. At half-past 5 o'clock on the afternoon of the day of the shooting Rice quit work for the day, and took the west-bound Howard Street car at the corner of First and Howard streets, and rode on this car, as already stated, as far as Twentieth street, where he alighted. He had no sooner stepped from the car, at the corner of Howard and Twentieth streets, when another person who got off at the same time ran forward and felled him to the ground with a club, and another person from the car followed and shot the prostrate man three or four times. The man who shot and the man who clubbed, and, according to the testimony of some of the witnesses, a third man, immediately ran down Twentieth street, turning the corner of Shotwell towards Nineteenth street; Buckley and Moran being identified as two of the parties who thus ran away. When the defendant was arrested the next morning, he admitted to the officers that he had been with Buckley, Moran, and Duncan in Maloney's saloon, at the corner of Brannan and Zoe streets, on the afternoon of the killing, and that they all left the saloon together between 4 and 5 o'clock, and that he went as far as Third and Brannan, but denied that he had gone out with them on the Howard Street car. He was then told that Buckley had said that he had gone out with them, but he denied that he had. When taken to the city prison he was confronted with Buckley, whereupon Buckley repeated what he had told the officers, that Donnolly had gone out to Twentieth and Howard streets with them, and thereupon defendant admitted in terms that he had told the officers a lie, and that he did go out on the Howard Street car with Buckley and Moran, but that when they got out to Howard and Twentieth streets he heard some shots fired, but claimed he did not know who fired the shots. It further appears that defendant was a member of the Pacific Coast Marine Firemen's Union for some time during the year 1901, including the month of September and up to the 24 day of October, and that during the whole of this time the members of that union were out on a strike. There was at the time a general strike of the City Front Federation. On October 11th there was a strike among

the machinists of San Francisco, including the employees of the Golden State & Miners' Iron Works, and such strike had been active from the preceding May. It appears that Rice did not go out on this strike, but that during the pendency of the strike and up to the time of his death he kept on working as a machinist at the Golden State & Miners' Iron Works. It is strongly contended on behalf of the appellant, from all that appears in the evidence, he may have been an innocent passenger on the Howard Street car at the time, and have been simply a witness to the killing of Rice, without having taken any part therein, the same as other passengers on the car. But it appears from his own admission that he was in company with the proved conspirators Buckley and Moran, and a third man by the name of Duncan, at a given saloon on the afternoon of the murder, and remained in their company at the saloon until 5 o'clock or thereabouts; that he left the saloon in their company, and that he rode out on the Howard Street car with Buckley and Moran to the scene of the shooting; and that they all left the car at the time of the shooting. He certainly was a member of the party or company of men who boarded Rice's car, and rode on that car to Twentieth and Howard streets, where Rice was assassinated. Buckley and Moran, as the evidence proved, went to Howard and Twentieth streets for the purpose of murdering Rice, and Donnolly was in their company and went with them, and he belonged to a union that had been on strike, whereas Rice, on the contrary, refused to go out on strike and continued at work. If the defendant in this case had been simply a passenger on the car, innocent of any intended crime, he certainly would have had no reason for denying that he had gone out as he did; but, when confronted by Buckley and Moran, the proved conspirators, he was driven to the necessity of admitting the truth of the statement of Buckley that he had accompanied them out there. From these circumstances the jury had a right to infer that it was the sense of his own guilt that compelled him to deny that he went out with the other parties, and that he was one of the party that committed the crime.

The ponderous transcript of the testimony and proceedings in this case contains innumerable objections on the part of defendant's counsel to testimony in reference to certain facts from which a conspiracy might be inferred, on the ground that the ultimate fact of conspiracy should first be established. In appellant's brief his counsel says: "During the admission of the testimony for the prosecution, defendant in the case of each witness made a motion to strike out the whole thereof, on the ground that no connection had been shown between the testimony of the witness and the defendant, and in each case an adverse ruling was made by the court and exception taken." There are

over 600 objections to rulings and exceptions thereto involved in the numerous motions to strike out, scattered through the transcript, which is composed of over 600 pages, and it would accomplish no good purpose to notice them in detail. They are all on the line as above stated—that no testimony at all could be introduced until the conspiracy had been first established. The general rule is undoubtedly as claimed by appellant, and, when practicable, should be followed; but, as has been held by this court, the order of evidence in this respect is not mandatory, and, under the circumstances, the course adopted by the court below in this case has been often approved. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Van Horn*, 119 Cal. 330, 51 Pac. 538; *People v. Compton*, 123 Cal. 408, 56 Pac. 44. The ultimate fact here, of course, was the conspiracy on the part of the defendant, with the other parties named, in the commission of the crime; but it is not necessary, in order to establish that fact, to prove that the parties met and actually agreed to jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted, it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct, consisting of inferences and presumptions, and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue. Code Civ. Proc. §§ 1826, 1831, 1832, 1870, subd. 15, and sections 1937-1960. From all the facts and circumstances disclosed in this case on the trial of the defendant, it cannot be said that there was not evidence from which the jury could draw the inference, or find the ultimate fact of a conspiracy on the part of the defendant; and, as said in *People v. Fitzgerald*, 138 Cal. 40, 70 Pac. 1015: "Where there is evidence to sustain the verdict a question of law cannot arise, but only in a case where there is in effect an entire lack of evidence." Therefore, the verdict of the jury in this case is conclusive, as the jurisdiction of this court in criminal cases is limited to questions of law alone.

The language of the court in passing on the admissibility of the testimony showing the flight of Buckley and another of the conspirators is not subject to the objection that it charged on the weight of evidence. What the court said was: "Two persons who were 'claimed' to have run down Twentieth Street."

The court did not err in admitting testi-

mony regarding the club, or in admitting the club itself in evidence. It was sufficient to identify it to warrant its admission as evidence.

It was not error to admit the dying declarations of the deceased, and the testimony of the witness Duke concerning the same. The foundation for the admission of his dying declarations was sufficiently laid.

The testimony of Erline Platt, given before the committing magistrate, was properly admitted, the foundation therefor having first been laid. The objections to the transcription of the stenographer's notes are entirely too hypercritical for practical purposes. The stenographer, instead of actually typewriting a portion of the shorthand notes, dictated the same to a typewriter, which seems to be a customary, if not the usual, practice, and which expedites the transcription as well for the benefit of one side as the other. Besides, it seems he compared the work of the typewriter with his notes, and personally satisfied himself that the transcription was correct, except in the matter of some trifling mistakes. But a full discussion of this objection will be found in the case of *People v. Buckley* (just filed) 77 Pac. 169, to which reference is made.

The court did not err in sustaining the objections to the questions asked on cross-examination of the witness Cleve. There is nothing in the direct examination justifying the cross-examination attempted to be made.

Appellant excepts to the cross-examination of the witness Bell upon the question of the strike. It was shown by that witness that the strike of Donnolly's organization was in effect up to the 2d of October, a few days before the killing of Rice, and that the machinists' strike was still on when the homicide occurred. On the direct examination appellant brought out in the testimony of Bell that Donnolly in 1900 went North in a ship called the Valencia, that he was a member of the firemen's union, and that when he came back from the North he was reinstated in the union, in which he had been in bad standing in the early part of the year. Further, on direct examination on behalf of the defendant, it was brought out that there had been no connection or business transaction between the Golden State & Miners' Iron Works, where Rice had been employed, and the union to which Donnolly belonged. Upon cross-examination it became important to show that there had been a general strike on the city front, in which Donnolly's union was involved, and also a machinists' strike, and that while these strikes were on the Golden State & Miners' Iron Works was employing men like Rice, who would not join in the strike, and that Rice himself was a nonstriking machinist, and occupying a position and pursuing a policy hostile to the general attitude, and out of line with the general position and

policy with which Donnolly's union had become identified; in other words, that there was an antagonism and opposition prevailing between them.

Some 50 instructions were offered on the part of the defendant. Most of them were refused, and a few modified as given by the court. Many of the instructions were upon mere abstract propositions having no relation to the facts of the case as shown by the evidence, and others were entirely misleading or unnecessary, being covered by the charge given by the court. We have examined them quite carefully and, without considering them here in detail, it is sufficient to say that we can see no error on the part of the court in so refusing or modifying the instructions asked. In the charge of the court the case was fully and fairly presented to the jury, in fact, so fairly presented and so favorably to the defendant that no objection seems to be raised thereto in appellant's brief on the appeal.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment, and generally in what is said in the opinion of Mr. Justice VAN DYKE. It being clearly shown that the death of Rice was not the result of a sudden encounter, but was one of preconcert and prearrangement, I am of the opinion that the evidence was sufficient to sustain the conclusion of the jury that this defendant was concerned in the commission of the crime, to the extent, at least, of aiding and abetting in such commission.

BEATTY, C. J. I dissent. Among the instructions requested by the defendant and refused by the court there were two that correctly stated the law applicable to the case made by the evidence, and for which nothing equivalent was presented as a substitute in the charge of the court. They were the following: "Where persons are unlawfully together, and have a concurrent understanding in the actual perpetration of some crime, if one of the defendants, of his sole volition and not in pursuance of the main purpose, and in no way connected with what was actually contemplated, commits another crime, the other is in no way liable." "One who has advised or encouraged in a misdemeanor is not responsible for a murder committed by his co-conspirator not in furtherance, but independent, of the common design." (Instructions Nos. 25 and 32.)

The verdict of the jury acquits the defendant of participation in the deliberate plot to murder Rice, and must have been founded upon the unsatisfactory state of the evidence tending to connect him with the purposes of Buckley and Moran. There

was evidence tending to show that his object in accompanying them to the scene of the murder was merely to witness or perhaps to promote a "scrap"; in other words, to commit a misdemeanor. In this state of the case it was highly material to the defense that the instructions above quoted should have been given.

It was also an error, in my opinion, to allow the people, after the defendant had closed his case, to introduce evidence as to his connection with the strikers. This evidence was intended to show a motive for the homicide, and for that purpose was a part of the opening case. Having omitted to make that a part of the case in the opening, the people could not bring it in by way of rebuttal. It rebutted nothing offered by the defendant, for the utmost effect of the evidence offered by him was to leave the case where the people had left it; that is to say, without any evidence of any particular motive on the part of the defendant for seeking the life of the deceased.

143 Cal. 368

In re SMITH. (Cr. 1,048.)

(Supreme Court of California. May 31, 1904.)

POLICE POWER—REASONABLENESS OF EXERCISE  
—REVIEW BY COURTS—EXTENSIVE  
EVIDENCE—GAS WORKS.

1. Upon the filing of the return in habeas corpus, the petition is treated as a traverse to it, and, if any of the matters in the petition so treated are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them, so that, in the absence of such issue joined, the facts stated in the petition will be taken as true.

2. Under Const. art. 11, § 19, giving gas companies the privilege of using city streets for their pipes, etc., a county has no power to prohibit the manufacture of gas, though it may regulate its manufacture.

3. Under Const. art. 11, § 11, providing that any county, town, or township may make and enforce local police and sanitary regulations, it is a judicial question whether any particular regulation of the right of a citizen to pursue any trade or business is a valid exercise of the police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes on rights guaranteed by the Constitution.

4. In determining whether a police regulation of a city or county is valid, the court will consider evidence outside the regulation itself.

5. In determining the validity of an alleged police regulation of a city or county, the court will not consider the motives prompting its enactment.

6. A county ordinance made it a misdemeanor to erect or maintain gas works within a certain district. This district was sparsely settled, and contained only 15 dwelling houses in all, none of which were nearer than 300 yards to a gas plant which was located within such district at the time the ordinance was passed. *Held*, that the ordinance was unreasonable and void.

In Banc. Petition for habeas corpus by F. A. Smith to secure petitioner's release from custody. Petitioner discharged.



Lynn Helm and Lee, Scott, Bailey & Chase, for petitioner. J. D. Fredericks, Dist. Atty., W. P. James, Chief Deputy Dist. Atty., and Davis, Rush & Willits, for respondent.

HENSHAW, J. The petitioner is in custody for the alleged violation of a criminal ordinance of the county of Los Angeles, making it a misdemeanor to erect or maintain gas works, gas holders, gas tanks, etc., within a boundary fixed in the ordinance. Before the passage of the ordinance, petitioner and others had erected the gas works within the district and were supplying gas to consumers, inhabitants of the cities of Pasadena and Los Angeles. After his works were so in operation the ordinance in question was adopted. Its effect, if valid, is to suppress his business. In his petition he set up, with other matters, that the district within which it is declared to be illegal to erect or maintain gas works is a sparsely settled rural community lying between the cities of Los Angeles and South Pasadena on the south and the city of Pasadena and the city of Los Angeles upon the north, through the center of which runs a wash which is known as the Arroyo Seco. This wash is a sandy, rocky waste, between 200 and 300 yards in width, and constitutes 95 per cent. of the district described in the ordinance. In the immediate vicinity of the gas works there are no dwelling houses, none nearer than a distance of about 300 yards, and the whole district contains only 15 places of habitation. It is further alleged that the works are safely and securely constructed, so as to be free from danger from leakage or explosion of gas; that the gas made is such as is ordinarily distributed to consumers in the various cities of the state; that it is impossible, owing to the secure method of construction, for any odors to escape; and that the works as constructed and operated do not and cannot injuriously affect the health, safety, welfare, or comfort of the citizens of the county of Los Angeles, or of any of them. Other matters are set forth, touching the motive of the board of supervisors in passing the ordinance; it being herein asserted that it was passed to perpetuate the monopoly of another gas company. The ordinance itself is fully set forth in the petition.

It being within the powers of the board of supervisors in proper cases to regulate, or even to prohibit, the manufacture of gas within prescribed limits, this ordinance upon its face would appear to be innocuous and valid. It became necessary, therefore, for the pleader in his petition to set forth the matters dehors the ordinance, by virtue of which he contends that the ordinance is unreasonable, oppressive and void. Upon the issuance of the writ the constable made the return contemplated by law, showing that he held the petitioner under a criminal complaint and warrant of arrest upon the charge

of violating the ordinance. He further made return that he had no information or knowledge of the other facts set up in the petition for the purpose of showing its unreasonableness, and the case was submitted on the theory that those alleged facts are true. Under our practice, upon the filing of the return, the petition is treated as a traverse to it. Then, if any of the matters in the petition, so treated as a traverse to the return, are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them. In the absence of such issue joined, the facts set forth in the petition will be taken as true. So, in this case, the facts averred will be considered as admitted.

It will not be disputed that the business here sought to be prohibited is not only legitimate and useful, but even necessary, to our present civilization. Moreover, under the very terms of our Constitution, it is a recognized lawful occupation. Const. art. 11, § 19. The county of Los Angeles, therefore, has no power to prohibit the manufacture of gas, though it may, in the legitimate exercise of its powers, regulate its manufacture and the places thereof. Upon the other hand, the right of cities and counties within this state to pass ordinances, in the exercise of the police power, comes direct from constitutional grant. Const. art. 11, § 11. It is by virtue of this constitutional grant that the respondent argues that courts in construing the validity of the ordinance will take into consideration only the face of the ordinance and such facts as are within the judicial cognizance of the court, and herein reliance is had on the language of the Supreme Court in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, which declares: "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state; but, if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge." But, running current with this principle, and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution. *Ex parte Whitwell*, 98 Cal.

73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. Indeed, the Supreme Court of the United States, in cases later than that of *Munn v. Illinois*, has set at rest any doubt that might exist as to the meaning of the language employed in the earlier case. In *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. Ed. 385, it is said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." And again in *Holden v. Hardy*, 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. Ed. 780, the court say: "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

As has been said, there must always be left a large discretion in the legislative body, with the exercise of which the courts will not, and have no desire to, interfere. Nor will they in any event interfere, except where the case be plain that needless oppression is worked and constitutional rights invaded. But courts are not limited in their inquiry to those cases alone, where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions. In city ordinances, as distinguished from county ordinances, the interest and requirements for protection of a thickly settled and growing community will often be widely different from those of sparsely settled and thinly inhabited rural districts. An ordinance limiting, regulating, or even prohibiting, in a certain district within the corporate limits of a city, may be perfectly reasonable, where like limitations, restrictions, and prohibitions as to some district within the county, arbitrarily carved out, would be oppressive and unreasonable in the extreme. Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police powers; but, as the same conditions do not exist in the country, county ordinances, passed in the exercise of the same power, may well be scanned with more critical eye. And, as it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face

thereof, evidence in such cases will be admitted to show the existing conditions. But this evidence will not go to motive. If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. This is but in accordance with the well-settled rule, and for that reason the allegations touching the motive of the board of supervisors in passing the ordinance here under consideration have been and are entirely disregarded. But in support of the proposition above declared, that the conditions and circumstances upon which the ordinance bears are proper subjects of evidence, may be cited *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1004, 30 L. Ed. 220; *Tugman v. Chicago*, 78 Ill. 405; *Oxanna v. Allen* (Ala.) 8 South. 79; *People v. Armstrong*, 73 Mich. 238, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; *Ex parte Patterson* (Tex. Civ. App.) 58 S. W. 1011, 51 L. R. A. 654; *Cleveland Railway Co. v. Connersville* (Ind. Sup.) 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418; *Pieri v. Mayor, etc., of Shieldsboro*, 42 Miss. 493; *Town of Kosciusko v. Slomberg*, 68 Miss. 469, 9 South. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281; *Corrigan v. Gage*, 68 Mo. 541.

When, finally, we come to apply these principles to the ordinance in question, the need of discussion is at an end. It is manifest that the ordinance is unreasonable and oppressive, works an invasion of the petitioner's constitutional rights, and is therefore void. The ordinance being void, the criminal proceedings against petitioner founded upon the ordinance are likewise void.

It is therefore ordered that the petitioner be discharged from custody.

We concur: MCFARLAND, J.; LORIGAN, J.; BEATTY, C. J.

SHAW, J. I concur in the opinion of Justice HENSHAW, and in the conclusion reached by him. The court will take judicial notice of the fact that the county of Los Angeles is a large territory, consisting of several thousand square miles, large portions of which are very sparsely settled, and within which are a number of cities and villages, ranging in population from over 100,000 to a few hundred, and many districts of thickly settled farming communities. It appears from the face of the ordinance that the board of supervisors selected from all this territory, having these varying conditions, a small district, comprising but 200 or 300 acres, lying between the cities of Pasadena and South Pasadena on the one side and the city of Los Angeles on the other, and, ignoring the welfare and comfort of all the other territory of the county outside of incorporated cities, made it unlawful to erect or maintain gas works within

this particular district. Another fact, so obvious that I think the court can either take judicial notice of it or assume it to be true, is that there are very many other districts within the county of equal or greater extent, within which the erection or maintenance of gas works would be equally detrimental to the inhabitants thereof. It is admitted that at the time this ordinance was passed the petitioner and others acting with him had already at great expense erected gas works in this district, wherein they were manufacturing gas for sale and distribution to the public, and that the district is sparsely settled, having no places of residence within 300 yards of the gas works, and only 15 in all. Under these circumstances I think the court is justified in holding that the ordinance in question was manifestly intended to prohibit and suppress the particular business of the petitioner; that it was not a reasonable or bona fide exercise of the police power for the welfare and comfort of the inhabitants of the district or of the county, but an attempt, under color of the police power, to create an unjust, arbitrary and unreasonable discrimination against the enterprise in which the petitioner was engaged; and that for that reason it is unconstitutional and void.

I concur: ANGELLOTTI, J.

(14 Okl. 148)

**B. S. FLERSHEIM MERCANTILE CO. v. GILLESPIE.**

(Supreme Court of Oklahoma. June 8, 1904.)

**APPEAL—ASSIGNMENTS OF ERROR—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

1. Assignments of error presented in a motion for a new trial, and relied upon for a reversal in the Supreme Court, which do not appear in the record as shown by the case-made, will not be considered by this court. Statements of counsel in their brief as to the existence of such errors will not be taken as evidence of the fact, unless the same is shown by the case-made as signed by the judge and certified to by the clerk.

2. Before a motion for a new trial on the ground of newly discovered evidence will be sustained, it must appear that such evidence could not have been discovered before the trial by the use of reasonable diligence.

3. The affidavits on such motion must contain the facts which show such diligence, and the mere assertion that all reasonable diligence was used is insufficient.

(Syllabus by the Court.)

Error from District Court, Blaine County; before Justice James K. Beauchamp.

Action by the B. S. Flersheim Mercantile Company against Ed Gillespie. Judgment for defendant, and plaintiff brings error. Affirmed.

This case was originally brought in the justice court before Victor Payne, a justice of the peace, at Watonga, Blaine county,

Okl., to recover for a balance due on account from Ed Gillespie, the defendant, to the B. S. Flersheim Mercantile Company, plaintiff. The case was tried in justice court with a jury, which trial resulted in a verdict in favor of the defendant. An appeal was taken to the district court of Blaine county, and on the 26th day of March, 1903, was tried before a jury. Plaintiff introduced its evidence. Defendant demurred to the evidence, which demurrer was sustained by the court. The jury were instructed to bring in a verdict for the defendant, to which action plaintiff objected. Objection overruled, and exceptions saved. Judgment rendered against the plaintiff for costs, from which judgment plaintiff in error appeals to this court, motion for a new trial having been filed and overruled.

Lookabaugh Bros., for plaintiff in error.  
Hotchkiss & Emery, for defendant in error.

IRWIN, J. (after stating the facts). Plaintiff in error complains of the action of the court in overruling the motion for a new trial, and the first assignment of error is that the court erred in not granting a new trial for the particular reason that the court abused its discretion by compelling plaintiff to go to trial without the personal attendance of witnesses who had been subpoenaed, but who were not in attendance. The record in this case shows the following on page 6 of the case-made: "That afterwards, and upon the 26th day of March, 1903, said cause came regularly on for hearing in the district court of Blaine county, Oklahoma Territory, a jury having been again demanded by the defendant, a true, full, correct, and complete transcript of the record in said proceeding as reported by the official stenographer of said court, together with depositions introduced by the plaintiff upon said trial, is in words and figures as follows, to wit." Then follow the title of the court, and the name of the parties, and the term of court. Then the record proceeding is as follows: "Counsel for plaintiff here make their opening statement of their case to the court and the jury, which is as follows." Then follows the opening statement of counsel for plaintiff. The record then shows the following: "Counsel for the defendant here make opening statement of defendant's case to the jury." Then follows statement of defendant's counsel. Then the record discloses that the evidence of plaintiff was taken, after which a demurrer to the evidence was interposed, and sustained by the court. Now, it is apparent from this record that no application was made for a continuance on the ground of the absence of witnesses, and no objection was made, so far as the record discloses, to proceeding to trial at that time. It is true that counsel in their brief make the statement that they objected at that time, and that they asked for further time to procure the testimony of

¶ 2. See Appeal and Error, vol. 37, Cent. Dig. § 210.

one witness, Mike Graham, who was legally and regularly subpoenaed; but the record in this case, as shown by the case-made, fails to show any such condition or statement of facts, and this court, in passing upon the case as presented and the errors as assigned, must be governed by the record as disclosed by the case-made, and will not take notice of errors assigned which have no record to sustain them, and are only supported by the statement of counsel in their brief.

The next assignment of error is that the court erred in refusing to grant to plaintiff a new trial on the ground of newly discovered evidence. It is a well-recognized rule of this court that a new trial on the ground of newly discovered evidence will not be sustained unless it affirmatively appears from the affidavit in support of such motion that diligence has been used to discover such testimony, and that the same could not have been discovered at a time prior to the trial by the use of reasonable diligence. In the affidavit in support of the motion for a new trial in this case the general statement is made that the plaintiff and its attorneys have used every possible effort to ascertain the names of those witnesses, and the facts whereof they would testify; but it does not appear by the affidavit what these efforts were, or in what manner or how they investigated or made inquiry to ascertain the facts. It is true they state they made inquiry and wrote letters concerning this evidence, but this is virtually swearing to a conclusion. The affidavit does not name the witness by whom this newly discovered evidence would be furnished, and we think that on an examination of the entire affidavit it does not show that reasonable diligence was used to procure the attendance of the witnesses necessary to prove the facts alleged in said affidavit, if such witnesses exist; and we think further that such evidence, if produced, would be merely cumulative, and would not be controlling in determining the issues in this case.

The only remaining assignment of error to be considered in this case, was the action of the district court in sustaining the demurrer to the evidence. Upon this proposition we think the true rule is "that, when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, and may direct a verdict for the defendant." *L. & N. R. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032. Now, we have examined this record carefully, and we cannot see, upon any theory that could possibly be adopted after a reasonable consideration of the evidence, how a verdict in favor of the plaintiff could have been sustained; hence we think the action of the district court in sustaining the demurrer was correct.

Finding no error in the record, the judgment of the district court is affirmed, at the costs of the plaintiff in error. All the Justices concurring, except BEAUCHAMP, J., having tried the case below, not sitting, and BURFORD, C. J., absent.

#### FERGUSON et al. v. STEPHENSON-BROWN LUMBER CO.

(Supreme Court of Oklahoma. June 8, 1904.)

#### MECHANIC'S LIEN—KNOWLEDGE OF OWNER—LIEN STATEMENT.

1. Where an action is brought under section 4819 of chapter 63 of Wilson's Statutes of 1903 to enforce a materialman's lien for material furnished under a subcontract with the contractor, it is not necessary to allege or prove that the owner of the building had knowledge that the person claiming the lien had furnished the material to the contractor.

2. In order to establish a mechanic's lien, the statement filed for that purpose must substantially comply with the statute; and where the lien claimant filed in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed, and the items thereof, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property so as to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, verified by affidavit, it will be sufficient.

(Syllabus by the Court.)

Error from District Court, Greer County; before Justice Beauchamp.

Action by the Stephenson-Brown Lumber Company against H. M. Ferguson and others. Judgment for plaintiff. Defendants bring error. Affirmed.

On the 19th day of June, 1901, the defendant in error (plaintiff in the court below) filed its statement for a materialman's lien against the plaintiffs in error, and against lots numbered 5 and 6 in block No. 8 in the town of Mangum, Greer county, Okla., the property of Ferguson, McCollister, Clay & Shadden, claiming the plaintiffs in error Ingram & Maloy, the contractors, were indebted to the defendant in error in the sum of \$1,851.05 on account of material furnished to be used in the erection of the building on the lots. On the 29th day of August, 1901, defendant in error filed its petition in the district court of Greer county, in said territory, asking for a judgment against plaintiffs in error Ingram & Maloy, and for a foreclosure of its lien. On September 23, 1901, plaintiffs in error filed their demurrer to said petition, which was by the court overruled, to which the plaintiffs in error saved exceptions. Plaintiffs in error then filed an answer and cross-petition. Defendant in error demurred to the cross-petition, which was by the court sustained, to which the plaintiffs in error saved exceptions. On the 19th day of August, 1903, the case was tried by the court without a jury, and judgment was rendered in favor of the defendant in error for the sum of \$2,131.75,

and foreclosure of lien, and costs of the action. Motion for a new trial was filed and overruled on the 19th day of August, 1903, and exceptions saved. Case is brought here for review.

C. H. Eagin, T. P. Clay, and C. M. Thacker, for plaintiffs in error. O. O. Blake, E. E. Blake, and John Livingston, for defendant in error.

IRWIN, J. (after stating the facts). In this case some objections are made by attorneys for defendant in error to the sufficiency of the record as presented in the case-made, but we think it advisable not to go into the merits of these objections, which are of a technical nature, but rather to consider the case on its merits.

The first assignment of error presented to the court for reversal is that the trial court committed error in overruling the demurrer to the petition on the grounds that said petition fails to show that there was any knowledge or privity between the Stephenson-Brown Lumber Company and H. M. Ferguson and the other owners of the building in the furnishing of the material to Ingram & Maloy, the contractors. That this contention is not sound, it will, we think, be only necessary to refer to the language of the mechanics' lien act (section 4817, c. 66, Wilson's St. 1903), which provides: "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, furnish materials," etc., " \* \* \* shall have a lien," etc. Section 4819 of the same chapter provides: "Any person who shall furnish any such material \* \* \* under a sub-contract with the contractor \* \* \* shall have a lien." It was under this latter section the material was furnished in this case, by which section no privity or knowledge on the part of the owner of the building is made necessary.

The second assignment of error is that the lien statement filed by defendant in error, and upon which the petition was based, failed to state sufficient facts to establish any liability of the plaintiffs in error, and failed to show that said lien statement was filed within 60 days after the furnishing of said material. Section 4819 of chapter 66, Wilson's St. 1903, above quoted, provides that the parties seeking a lien under this section "must file with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished \* \* \* under such sub-contract, a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which the lien is claimed, and by serving a notice in writing of the filing of such lien upon the owner of the land."

In the case of *Blanchard v. Schwartz*, 7 Okl. 23, 54 Pac. 303, this court says: "Mechanic's Lien—Statement of Sufficiency. In order to establish a mechanic's lien, the statement filed for that purpose must substantially comply with the statute; and where the lien claimant files in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed, the items thereof, the name of the owner, the name of the contractor, the name of the claimant, and the description of the property, so as to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, verified by affidavit, it will be sufficient."

Now, in this case we find on page 11 the following statement:

"Stephenson Brown Lbr. Co. a corporation organized under the laws of Oklahoma Territory, and doing business in the county of Greer and Territory of Oklahoma, file this materialman's claim for payment of the sum of Eighteen Hundred Fifty-One and  $\frac{5}{100}$  (\$1,851.05) Dollars against all that certain two-story building situate on lots 5 & 6, in block 8, in the city of Mangum, in the County of Greer, in the Territory of Oklahoma, and the tract or piece of land and curtilage appurtenant to the said building.

"The said sum of Eighteen Hundred Fifty-One and  $\frac{5}{100}$  (\$1,851.05) Dollars being a debt contracted for material, viz. lumber, lime, cement, roofing paper, furnished by the said Stephenson-Brown Lumber Company for the erection of said building and appurtenances of which T. P. Clay, H. M. Ferguson, E. E. McCollister, and W. C. Shadden are the owners or reputed owners, and G. T. Ingram and H. M. Maloy are the contractors at whose instance and request the material was furnished as aforesaid, and the Stephenson-Brown Lumber Co. claim a lien on said building and tract or piece of land and curtilage appurtenant to said building from the time of its commencement for the sum aforesaid; and said claimants hereto annex a statement of said claim, setting forth the amount and items thereof as nearly as practicable, which statement is marked exhibit A."

This statement was sworn to by S. A. Stephenson, as president of the Stephenson-Brown Lumber Company, and was marked: "Filed June 19, 1901. B. D. Shear, Clerk, O. P. Elliott, Deputy." On pages 7, 8, 9, and 10 of the case-made is an itemized statement showing the articles of said material furnished. On page 6 of the case-made is the following notice:

"Territory of Oklahoma, County of Greer. I, R. C. Parsons, bookkeeper for the Stephenson-Brown Lumber Company, being duly sworn, depose and say that I delivered to each H. M. Ferguson and E. E. McCollister on July 5, 1901, and to T. P. Clay and W. C. Shadden each a notice on July 10, 1901, of which the following is a true copy, to wit:

"Notice. To T. P. Clay, H. M. Ferguson, E. E. McCollister, and W. C. Shadden: You are hereby notified that on the 19th day of June, 1901, the undersigned filed in the office of the clerk of the district court of Greer County, Oklahoma Territory, a statement of its claim of lien for materials furnished by it to G. T. Ingram and H. M. Maloy, Contractors, to be used in the erection and completion of a two-story building on lots 5 and 6, in block eight in the city or town of Mangum, in the said county, which materials were so furnished on and between the 5th day of Mch. and the 17th day of June, 1901, and for the sum of \$1,851.05 with interest at 7% per annum from the 19th day of June, 1901, and that said undersigned claims said lien. Stephenson Brown Lumber Co. By S. A. Stephenson, Pres. R. C. Parsons."

"Subscribed and sworn to before me this 11th day of July, 1901. James Brown, Notary Public, Greer County, Oklahoma. [Seal.]

"My Commission expires March 29, 1905."

This statement so filed, and the notice so given, shows that the last item of material furnished was on June 17, 1901; and the date of the filing of the statement, as shown by the certificate of the clerk, and the time of serving the notice, as shown by the affidavit of the bookkeeper, Parsons, were both within the 60 days required by statute. This, we think, fills the requirements of the law.

The next contention of plaintiffs in error is that the court committed error in sustaining the demurrer to the cross-petition of the plaintiffs in error. In this cross-petition, plaintiffs in error sought to make the sureties on the bond of the contractors, Ingram & Maloy, parties to this action, in order to secure a judgment against them on the bond. In support of their right so to do, they cite section 4234, c. 66, of Wilson's Statutes of 1903, which reads as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." In determining whether the bondsmen were proper parties, we must consider the two classes included in this section. First. Were they persons having or claiming an interest adverse to the plaintiff? This, we think, must be answered in the negative. Second. Were they necessary parties to a complete determination or settlement of the questions involved in this case? Now, what were the questions involved under the pleadings in this case? (1) Had material been furnished to the contractors by the plaintiff? (2) How much? (3) Was plaintiff entitled to a materialman's lien? Now, the parties they desire to bring into this record and make parties to this litigation were parties who had become sureties on the bond of the contractors for the faithful performance of their contract with

the owners of the building, and it seems to us that they were not either necessary or proper parties to bring into the record, and their presence as parties to the litigation was in no manner necessary to adjust any of the questions or issues raised by these pleadings. If rights or duties existing on the part of the bondsmen and between the owners of the building and the parties to the bond were to be litigated, it certainly was not in this case, or between the parties to this suit. Hence we think there was no error in the court sustaining the demurrer to this cross-petition.

The only remaining contention of plaintiffs in error is that the court below rendered a judgment in favor of plaintiff on entirely insufficient evidence, and that the evidence did not warrant the court in finding that the material furnished by the defendant in error was sold to Ingram & Maloy to be used in the building belonging to plaintiffs in error. Under the long-established and oft-repeated rule of this court that this court will not disturb a finding of fact by the district court where there is evidence which reasonably tends to support such finding, we have only to examine into the record far enough to determine that such evidence exists, to dispose of this contention. That there was evidence which reasonably tends to support the court's finding, we have only to refer to the testimony of R. C. Parsons, at page 22 of the case-made, wherein he states that the materials described in the lien statement were sold expressly to be used in this particular building; that, as materials were taken from the lumber yard, checks were made, showing that the materials went to that building; that, when the material was taken from the yard, he knew it was going to that building, and saw a part of it used there; that the last of the material was furnished on the 15th day of June, 1901; that they were furnishing material to Ingram & Maloy for but the one building; that all of the material in the account was furnished to Ingram & Maloy, the contractors for that building. And on page 32 of the case-made the same witness testifies that materials were delivered from the car and yard to the building by the plaintiff, and the most thereof was hauled by plaintiff's teams. We also call attention to the testimony of H. C. Stephenson, president of the lumber company (page 32 of the case-made), wherein he testifies that he made the contract with Ingram & Maloy to furnish the materials, giving them reduced rates on account of the size of the building, and the importance of the deal, and their ability to ship a part of the material in car-load lots; and on page 34 the same witness testifies that the Stephenson-Brown Lumber Company furnished materials to the contractors for this building only; and on page 37 the same witness testified in answer to the question: "Do you know that the materials

in this account that you have charged here went into that building?" "It was delivered there for the purpose of going into this building." We think that an examination of the entire record will show not only that there was evidence which reasonably tends to support the finding of the district court in this particular, but that a large preponderance of the evidence is in favor of such finding.

We think this disposes of all the assignments of error raised or argued in the brief of plaintiffs in error, and, finding no error in the record, the judgment of the district court is affirmed at the costs of plaintiffs in error. All the Justices concurring, except BEAUCHAMP, J., who, having tried the case in the court below, took no part in this decision, and BURFORD, C. J., absent.

### SMITH v. TERRITORY.

(Supreme Court of Oklahoma. June 9, 1904.)

#### CRIMINAL LAW—INDICTMENT—RULINGS ON EVIDENCE—CONVICTION OF LOWER OFFENSE.

1. Where an indictment is sufficient in all other respects, a mere clerical error or mistake in the spelling or use of a word does not render the indictment invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

2. Errors of the trial court in its rulings upon the admission of testimony, which in no way could prejudice or tend to prejudice or affect the substantial rights of the party complaining, is not sufficient grounds for the reversal of a judgment.

3. The jury in a criminal case may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, and whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty, and when there is a reasonable doubt in which of two more degrees he is guilty he can be convicted of the lowest of such degrees only.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Pink Smith was indicted for murder, and convicted of manslaughter in the second degree, and brings error. Affirmed.

T. S. Jones, Jno. Devereux, and Lawrence & Huston, for plaintiff in error. J. C. Roberts, Atty. Gen., and C. H. Woods, Asst. Atty. Gen., for the Territory.

BEAUCHAMP, J. Plaintiff in error, Pink Smith, was indicted in the district court of Logan county, charged with the murder of William L. Mitchell. At the February, 1903, term of that court, a trial was had, and the jury returned a verdict finding the defendant guilty of manslaughter in the second degree. Motions for a new trial and in arrest of judgment were by the court overruled, and exceptions saved, and the defend-

ant sentenced to a term of three years in the territorial penitentiary. He appeals to this court. At the trial the plaintiff in error admitted the homicide, but pleaded that the shooting was done in self-defense.

It is urged as a ground for the reversal of the judgment that the indictment in this case does not sufficiently conform to the requirements of the statute, and does not state facts sufficient to constitute a public offense. The indictment reads that the homicide was perpetrated "with the premeditated design to affect" the death of the deceased, William L. Mitchell, while the statute reads "with the premeditated design to effect" the death of the person killed, or of any other human being. No motion was made by the defendant to quash the indictment or demurrer interposed, but, upon the territory offering its first witness, the defendant objected to the introduction of any testimony, for the reason that the indictment does not state facts sufficient to constitute a public offense, and that the several counts in said indictment are improperly joined. The only objection argued is that the indictment is insufficient for the reason that the design shall be to effect the death of the person killed. This was clearly a mistake of the pleader, a clerical error; and where a defect in an indictment is merely technical, and the indictment being sufficient in all other respects, we are unable to see how the substantial rights of the defendant are affected by such mistake. Therefore we cannot reverse the judgment for that reason. *Wilson's St. 1903, § 5366*: "No indictment is insufficient nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Section 5801: "Neither a departure from the form or mode prescribed in this chapter in respect to any pleadings or procedure, nor an error or mistake therein, renders it invalid unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right." *People v. Hitchcock (Cal.) 38 Pac. 198*.

Upon the trial one W. H. Mills was offered as a witness by the defendant, who testified that the reputation of the deceased for being a dangerous and violent man was bad. Upon cross-examination by the county attorney the witness was asked whom he had ever heard say Mitchell's reputation was bad. He stated that he had heard Mr. Caldwell say that the deceased had abused him; that the defendant had told him that the deceased abused him before the shooting; that the defendant's father had said the same; and that a neighbor girl had claimed that the deceased had called her a liar, or as good as called her a liar, and abused her some about the cattle. Upon further examination he was asked: "Q. You said there was a

\* 1. See *Indictment and Information*, vol. 27, Cent. Dig. § 214.

Jones girl said that Mr. Mitchell's reputation was bad? A. She did not say it direct to me. She didn't say it was bad. She said he talked mean to her, and as good as called her a liar, or something to that effect." After the defendant had offered his evidence, the territory called in rebuttal Myrtle Jones as a witness, who denied that she had made the statements as stated by the witness Mills, which testimony was allowed by the court over the objections of the defendant, to which the defendant excepted. Defendant's counsel then asked witness a number of questions in cross-examination, to which there were objections interposed, and sustained by the court, and exceptions saved by the defendant. Defendant urges as grounds for the reversal of the judgment against him that the court erred in admitting the testimony of the witness Myrtle Jones to contradict the testimony of Mills, and urges that the testimony given by the witness Mills complained of was called out on cross-examination, purely a collateral matter, and that the territory was concluded by Mills' answers; and cites several authorities to the effect that when a witness makes statements on cross-examination collateral to the investigation the same are to be taken as conclusive, and it is not admissible to contradict him to show such statements to be untrue. From an examination of the testimony of the witness Mills it will be found that his statements as to the bad reputation of the deceased as to being a dangerous and violent man were without foundation in fact, and that the court would have been justified in striking out his entire testimony in that regard, and withdrawing it from the consideration of the jury, as he clearly showed that he had no basis or reason for stating that the reputation of the deceased in that regard was bad; but his testimony was permitted to go to the jury, and the witness Myrtle Jones was only permitted to deny the immaterial statements accredited to her by Mills. Conceding that the court erred in admitting this immaterial testimony we are unable to see how it could in any way prejudice the rights of the defendant; and also conceding that the defendant's counsel had a right to cross-examine Myrtle Jones, all that could possibly have been accomplished would have been to have shown that she told Mills what he testifies that she told him upon his cross-examination, and that, therefore, one of the statements upon which he based his opinion as to the general reputation of the deceased had actually been said—that is, that he had called her a liar, or something to that effect.

Finally, it is contended by the plaintiff in error that the verdict is not supported by the evidence; that it is simply and purely a compromise verdict, without any evidence to sustain it; and his counsel argues that, the defendant having admitted the killing, and claimed justification by the right of self-defense, that he should have either been con-

victed of murder or acquitted; that under such circumstances the jury would not be warranted in finding him guilty of manslaughter in the second degree. Under the statutes of Oklahoma (Wilson's St. 1903, § 5536): "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense." Section 5535: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 5490: "When it appears that the defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." The offense charged in this case is the felonious killing of a human being, and the facts and circumstances surrounding and attending the act determine whether the act amounts to murder or manslaughter in the first or second degree. The indictment gives formal notice to the accused of the charge made against him, which in this case was the killing of William L. Mitchell; and the jury, under proper instructions of the court, found him guilty of the unlawful killing, but, under the facts and circumstances, found him guilty of the lowest degree included within the indictment and instructions of the court. Under the statutes of this territory, "every killing of one human being by the act, procurement or culpable negligence of another, which is not murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree." The jury having found that the homicide was neither justifiable nor excusable, necessarily found it to be felonious, thus repudiating the contention of the defendant that the killing was in self-defense. It then became necessary to determine, under the instructions of the court, of what degree of the offense charged the defendant was guilty; and, where the jury entertain a reasonable doubt of which of two or more degrees the defendant is guilty, he can be convicted of the lowest only. The jury in this case undoubtedly entertained a reasonable doubt as to some of the elements necessary to constitute murder, or manslaughter in the first degree, hence they could only find him guilty of the lowest degree of felonious homicide; and, having found the lowest degree possible under the law, the defendant cannot be heard to complain that he was convicted of the lower degree, or, in other words, to say that he should have been convicted of a higher degree.

We have carefully examined each of the errors assigned by the plaintiff in error, and we find no error in the record prejudicial to the rights of the defendant. The judgment of the district court of Logan county is there-



fore affirmed, and the district court is directed and ordered to enforce its judgment herein. All the Justices concurring, except BURFORD, C. J., having presided at the trial below, not sitting.

### SHOWERS et al. v. CADDO COUNTY.

(Supreme Court of Oklahoma. June 8, 1904.)

#### APPEAL — REVIEW — HARMLESS ERROR — MISFEASANCE OF OFFICERS—ACTION BY COUNTY.

1. When errors are assigned, which, if they exist, are purely technical, and such as do not affect any substantial right of the parties, this court will not reverse a decision of the district court on account of such errors.

2. A general statute is not to be considered as applying to cases covered by a special act on the same subject, so as to change the procedure of such special statute.

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice Gillette.

Action by Caddo county against M. J. Showers and O. Draper. Judgment for plaintiff, and defendants bring error. Affirmed.

This was an action brought in the district court in and for Caddo county, Okl., under chapter 58 of Wilson's Revised Statutes of 1903, entitled "Officers" (sections 3745, 3746, and 3747), charging the defendants in that court (plaintiffs in error in this court), with malfeasance in office as clerk and director of School District No. 6 in Caddo county. Plaintiffs in error filed written objections to the legal sufficiency of the complaint, and assigned reasons why the complaint should be quashed and the action dismissed, which the court, after hearing arguments of counsel, overruled, to which ruling the plaintiffs in error excepted. The plaintiffs in error then denied the accusation and complaint, and a jury was impeled to try the case. The defendants below (plaintiffs in error in this court) objected to the introduction of any evidence, which the court overruled, and to which the defendants saved exceptions. The cause proceeded to trial, and the jury returned a verdict into court, announcing the defendants guilty. The court thereupon pronounced judgment upon said verdict, and made an order removing plaintiffs in error from office. Plaintiffs in error (defendants in the court below) filed a motion in arrest of judgment, which was by the court overruled, and exceptions saved. Plaintiffs in error (defendants in the court below) then filed a motion for a new trial, which was by the court overruled, and exceptions saved, to all of which the plaintiffs in error excepted, and bring the action here for review.

Dyke Ballinger and Glitsch & Glitsch, for plaintiffs in error. A. J. Morris, W. J. Matheny, J. C. Roberts, Atty. Gen., and Charles H. Woods, Asst. Atty. Gen., for defendant in error.

IRWIN, J. (after stating the facts). The first assignment of error insisted upon by plaintiffs in error for a reversal of this judgment is that the district court erred in overruling their objection to the complaint or accusation because it failed to allege that the defendants were duly elected or appointed officers of the said School District No. 6 of Caddo county, as provided by statute. This prosecution is under section 3745, Wilson's Rev. St. 1903, which reads as follows: "All elective or appointed, county, township and other officers, may be charged, tried and removed from office for any of the causes set out in paragraphs 'c' and 'd' of section 3443. \* \* \*" And as the complaint in this case does not contain the specific allegation that the defendants were elected or appointed clerk and director, respectively, of said school district, it is claimed by plaintiffs in error that the same is fatally defective. There are certain things the court will take judicial notice of. Among these is public office created by statute, the manner of election or appointment, and the term of office provided for by statute. The office of director and clerk of a school district comes within this class. In the seventeenth volume of the *Encyclopædia of Pleading & Practice*, at page 242, the rule is laid down thus: "Want of particularity in describing the office will not, in certain cases, render the indictment defective, if enough is set out to enable the court to take judicial notice of the fact that the office is one created by public statute, as well as the statutory duties thereby imposed." In the case of *Spalding v. People*, 172 Ill. 40, 49 N. E. 993, the court say: "An allegation that the defendant, an officer of a state university, was the treasurer of a municipal corporation, is immaterial, since the court will take judicial notice that the statute creating the university constitutes it a public corporation, and the officer a public officer." And in the case of *United States v. Bornemann* (C. C.) 36 Fed. 257, the court say: "A designation of the defendant as 'cashier of the assistant treasurer of the United States' sufficiently shows the particular character in which he is charged, since the court will take notice of the law applicable to his duties." In the case of *People v. Potter*, 35 Cal. 110, it is said: "An indictment for converting or embezzling the funds of a municipality, the government of which is vested by statute in a mayor, a common council, a city marshal, and other officers, which alleges that, at the time of the commission of the act charged, the defendant was 'the city marshal,' etc., sufficiently shows that at the time in question the defendant was an officer of the corporation." In the case of *People v. Doss*, 39 Cal. 428, it is said: "An allegation in an indictment found after the passage of an act 'to provide for the maintenance and supervision of common schools,' which designates the defendant as 'county superintendent of common schools,' sufficiently describes the

office held by defendant." The accusation in this case alleges that at the time the acts complained of were committed, and at the time this action was commenced, the plaintiffs in error were the duly qualified and acting officers of the district, and that as such officers they committed the acts complained of. This was enough to inform the plaintiffs in error of what, and in what capacity, they were charged, and sufficient for the court to take judicial notice of the statute creating the office, and defining the duties thereof. Section 5618, Wilson's Rev. St. 1903, vol. 2, p. 1252, provides: "On an appeal, the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." The parties were certainly informed by the allegations in the complaint that they were being prosecuted for acts done while acting in their official capacity, and these acts were set forth in detail. So we are unable to see how any substantial right was affected by omitting from the complaint the words "elected" or "appointed." Hence we think there is no merit in this contention.

The next contention is, "The accusation fails to show that the charges are brought by the board of county commissioners in the name of the county." The proceedings in this case are entitled as follows: "County of Caddo, Plaintiff, v. M. J. Showers and O. Draper, Defendants." It is insisted by plaintiffs in error that these proceedings should have followed the provision of section 1231, Wilson's Rev. St. 1903, which provides: "In all suits or proceedings by or against the county, the name in which the county shall sue, or be sued, shall be 'Board of County Commissioners of the County of \_\_\_\_'" (in this case, Caddo county). By the amendment of section 3462, as contained in the laws of 1895, p. 96, c. 15, § 5, in the chapter on "Counties and County Officers," under the head of "Elections, Suspensions, and Removals," it is provided: "The board of county commissioners in the name of the county shall make the charges and bring the action. \* \* \* There might seem to be a direct conflict in these two statutes. One provides that actions should be prosecuted in the name of the board of county commissioners, and the other provides that the action shall be brought in the name of the county. But this is all made clear, and the conflict reconciled, when we remember that section 1231 is a general statute, and the section under which these proceedings are brought is a special statute applying to this particular case. And taking the construction put upon such statutes by our Supreme Court in the case of *Carpenter v. Russell*, 73 Pac. 930, "A general act is not to be considered as applying to cases covered by a prior special act on the same subject," we think there is no conflict, and the proceeding, being in conformity to the statute providing for the prosecution of such cases, is correctly entitled.

It is also objected to the complaint that it does not show that the charges were signed by the board of county commissioners. We do not think there is any authority in the statute requiring this. All that is required is that the charges be brought by the county commissioners in the name of the county. It is expressly alleged in the complaint that on the 11th day of August, the board being duly convened in regular adjourned session, in the name of the county said board did present and accuse, etc. This, we think, fully meets the requirements of the statute in this particular. This case was tried by a fair and impartial jury, and there is no contention that the evidence does not fully sustain the verdict; and, as we find no error in the rulings of the court, the case is affirmed, at the costs of the plaintiffs in error. All the Justices concurring, except GILLETTE, J., who, having tried the case below, took no part in this decision, and BURFORD, C. J., absent.

#### CITY OF ENID v. WIGGER.

(Supreme Court of Oklahoma. June 11, 1904.)

##### APPEAL—MOTION TO DISMISS.

1. A judge of the district court has the authority in law to sign and settle a case-made while at a place outside of his judicial district and within the territory.

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice Clinton F. Irwin.

Action by Clara Wigger against the city of Enid. Judgment for plaintiff. Defendant brings error. Motion to dismiss denied.

Houston James and W. H. Hills, for plaintiff in error. Whittinghill & Hubbell, for defendant in error.

BURWELL, J. A motion to dismiss the appeal has been filed on the ground that the trial judge settled the case made at a place outside of the judicial district wherein the trial was had. This same question has been before this court a number of times, and it has been universally held that the judge who tried the case, during his term or after it has expired, may sign and settle a case-made anywhere in the territory, or even outside of the territory. It is true that a district judge has no judicial powers outside of his district except in special instances—as where he is in attendance upon the Supreme Court; but the settling of a case-made is not a judicial act, as contemplated by that rule. The trial judge is required to settle a case-made because of his personal recollection of what transpired on the trial, and his memory ordinarily would be just as good outside of the district as within it.

In the case of *Erisman v. Kerwin*, 56 Pac. 858, filed in this court on June 4, 1897, the case-made was settled in the city of New

¶ 1. See *Judges*, vol. 29, Cent. Dig. § 149.

York by the Honorable Henry W. Scott, after he had retired from the bench, and the appeal was considered, and the case decided upon its merits. Had this court not recognized the settling of the case-made, the right of appeal would have been denied altogether, as one whose term of office has expired should not be required to make a trip from New York City to Oklahoma for the purpose of settling a case-made, nor could he be compelled to do so. Therefore reason teaches and experience has demonstrated the wisdom of the rule stated, and we are unwilling to deny the right of a district judge to sign and settle a case-made outside of his district and within the territory. The settling and signing of a case-made is an act ministerial in its nature, although required to be performed by one clothed with, or who has been clothed with, judicial power.

The motion to dismiss is overruled, and the case will be taken and determined upon its merits. All of the justices concurring, except IRWIN, J., who presided at the trial below; not sitting.

#### STATE v. ZENNER.

(Supreme Court of Washington. June 23, 1904.)

#### PROSTITUTION—ACCEPTING EARNINGS—INFORMATION—STATUTES—VALIDITY.

1. Laws 1903, p. 230, c. 123, § 2, making it a felony for any male person to live with or accept the earnings of a prostitute, is not invalid because of the omission of the word "knowingly" or its equivalent, so as to make knowledge of the relationship an element of the crime.

2. Under Laws 1903, p. 230, c. 123, § 2, making it a felony for any male person to live with or accept the earnings of prostitutes, an information charging that accused, being a male person, willfully and unlawfully lived with and accepted the earnings of a prostitute, sufficiently states a crime.

Appeal from Superior Court, Chehalis County.

Frank Zenner was convicted of accepting the earnings of a prostitute, and he appeals. Affirmed.

W. H. Abel and T. H. McKay, for appellant. Sidney M. Heath and J. A. Hutcheson, for the State.

DUNBAR, J. Frank Zenner, the defendant and appellant, was charged by information as follows: "The said Frank Zenner, on the 4th day of September, A. D. 1903, in the county of Chehalis, in the state aforesaid, then and there being, did willfully, feloniously, and unlawfully, then and there being a male person, live with, and for a long time previous thereto had been living with, and lived off of, and accepted the earnings of, one Queen Adams, so called, she being then and there a prostitute." A verdict of guilty was rendered, motion for new trial and motion in arrest of judgment denied, and judgment of conviction rendered.

From such judgment this appeal was taken. The following errors are assigned: (1) The information fails to state a crime. (2) The evidence was insufficient to support a verdict of guilty.

It is argued by the appellant that the information is insufficient, first, because the act on which it was based is unconstitutional; second, because, in any event, an offense is not charged under the act. Section 2 of chapter 123, p. 230, Laws 1903, provides: "Any male person who lives with, or who lives off of, in whole or in part, or accepts any of the earnings of a prostitute, or convives in or solicits or attempts to solicit any male person or persons to have sexual intercourse, or cohabit with a prostitute, or who shall invite, direct or solicit any person to go to a house of ill-fame for any immoral purpose; or any person who shall entice, decoy, place, take or receive any female child or person under the age of eighteen years, into any house of ill-fame or disorderly house, or any house, for the purpose of prostitution; or any person who, having in his or her custody or control such child, shall dispose of it to be so received, or to be received in or for any obscene, indecent or immoral purpose, exhibition or practice, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than five years, and fined in any sum not less than one thousand dollars nor more than five thousand dollars." And it is contended that under the act the acceptance of the earnings of a prostitute renders the acceptor guilty, irrespective of whether such acceptor knew that the person from whom he accepted such earnings was a prostitute; that the law does not say that "knowingly accepting," etc., renders the person guilty, and that it is an acceptance, however innocent, that is made unlawful by the act; and that, therefore, the law is unconstitutional. This contention is not supported by authority. The rule is thus laid down in 16 Am. & Eng. Enc. of Law, p. 138: "Where the statutes are silent as to any scienter—as where they do not use the words 'knowingly,' 'willfully,' and the like, in describing the offense—it will not be necessary to allege and prove affirmatively that the defendant knew the relationship existing between him and the pariceps;" citing many cases in support of this proposition, and laying down the doctrine that the defendant's ignorance of such fact would constitute a valid defense. This identical question, embracing the construction of a statute of Washington territory, was passed upon by the federal court in *In re Nelson* (D. C.) 60 Fed. 712. In the following language: "It has been further argued in behalf of the petitioner that the statute of Washington territory is invalid because of the omission of the word 'knowingly,' or any equivalent word or phrase, to make knowledge of the relationship an element of the crime. I find by comparison, however, that

the statute of Washington territory is in this respect not unlike other statutes which have been upheld in numerous prosecutions, and there is really no merit in the argument. Bish. Stat. Crimes, §§ 727, 729." The same question was discussed by this court in *State v. Glindemann*, 75 Pac. 800, and the constitutionality of a similar statute sustained.

On the second proposition, if it were held to be necessary to allege knowledge, the information in this respect is sufficient, for it alleges that the defendant willfully committed this act, and it would be a strange construction of language to hold that one could willfully do a thing without knowingly doing it. In our opinion, the law is a valid law, and the information is sufficient under the provisions of the law. We are not inclined to disturb the verdict of the jury on the question of the insufficiency of the evidence.

The judgment will therefore be affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

#### HENRY H. SCHOTT CO. v. STONE, FISHER & LANE.

(Supreme Court of Washington. June 23, 1904).

#### CONTRACTS—CONSTRUCTION — SALES — BREACH BY PURCHASER—REMEDIES OF SELLER —PLEADING.

1. Where defendant contracted to purchase from plaintiff a stock of goods and take a lease of a store from plaintiff, but failed to perform, plaintiff had three remedies: First, he could hold the property subject to defendant's order, and tender a lease of the store, and sue for the contract price; second, he could sell the property, including the lease, after notice, and recover the excess of the contract price over the price received; third, he could retain the property, and recover the excess of the contract price over the market value at the time and place of delivery.

2. Defendant agreed to purchase from plaintiff a stock of goods and the good will of the business, and take from plaintiff a lease of a store at a certain rental. It was agreed that the stock should be sold out at such price as defendant should deem best, until it should be reduced to a specified value, when the remainder should be taken by defendant at a certain per cent. of its value, and that defendant should pay a specified sum for the good will of the business. The stock was so sold, but defendant refused to perform further, and plaintiff, retaining the stock, etc., sued for damages. *Held*, that the transaction was a mere sale, and the damages to which plaintiff was entitled were the excess of the contract price for the remainder of the goods, good will, and lease over the market value.

3. Where a complaint in an action for breach of contract was erroneously framed on the theory that the contract was not one for the sale of personality by plaintiff to defendant, but that it was a contract containing covenants to be performed by plaintiff, but it contained an allegation of damages based on the difference between the actual value of the goods which defendant had agreed to sell plaintiff and the contract price thereof, plaintiff was entitled to recover the damages claimed under such allegation.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the Henry H. Schott Company against Stone, Fisher & Lane, a corporation. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Graves & Englehart, for appellant. Hudson & Holt and Kerr & McCord, for respondent.

FULLERTON, C. J. The appellant brought this action against the respondent to recover damages for a breach of contract. The lower court on the motion of the respondent struck out, as immaterial and irrelevant, the several allegations of the complaint relating to the damages alleged to have been suffered because of the breach, and dismissed the action on the refusal of the appellant to plead further. The case is here on the sufficiency of these allegations.

The contract, the breach of which is complained of, is set out in the complaint in the following language: "That the plaintiff on or about the 10th day of October, 1902, and while engaged in carrying on its general merchandise business in said city of North Yakima, which said business was fully established, and had been carried on by it since about July, 1900, in said city, duly made and entered into a certain contract and agreement with the defendant above named wherein and whereby it was agreed by and between said plaintiff and said defendant that said plaintiff would sell its entire business which it was then conducting in said city, together with the good will thereof, and would retire from said business in said city, and would sell its stock of merchandise and store fixtures then owned by it and used by it in conducting its said business in North Yakima, except its shoe, clothing, hat, crockery, tinware, and grocery business and stock, and such articles used in conducting the same. That said defendant at said time agreed to purchase the same, for the purpose of acquiring all the business, good will, stock, fixtures, etc., of said plaintiff in said business, and for the purpose of establishing said defendant in the said business of said plaintiff in said North Yakima, and for the purpose of getting said plaintiff to retire from its said business in North Yakima, and allowing said defendant to engage in said business in said North Yakima in its place and stead, the terms and conditions of which said agreement were as follows, to wit: That said plaintiff would immediately surrender the sale of its entire stock of goods then held by it in its said stores in said city of North Yakima to said defendant which would remark all of said stock of goods of the said plaintiff, and sell the same for such prices as said defendant thought best and desired, and apply the proceeds of the sale, first, to pay current expenses and advertising expenses; second, accounts payable; third, bills payable. Said

stock to be sold under the direction of said defendant as aforesaid until the same was reduced to the value of about twenty-five thousand dollars, exclusive of shoes, clothing, hats, crockery, tinware, and groceries. That said defendant should receive 1% commission on all sales made under its direction. That said defendant would supply all necessary new merchandise to keep up the said stock in a fair condition while said sales were being made, and receive as compensation for said stock so furnished the invoice price of the same, with 10% added—the same to be payable monthly—and also receive the expenses of Mr. George Stone, the duly acting agent and president of said defendant, while engaged in working on said sales. In consideration of which, said defendant agreed that when said stock had been so sold as to be reduced to the value of about \$25,000, not including shoes, clothing, hats, crockery, tinware, and groceries, that said defendant would receive and purchase the said remaining stock of said plaintiff, and pay therefor the sum of eighty-five cents on the dollar of the inventoried cost of said remaining stock; said inventoried cost to be fixed between January 1 and January 15, 1903; the said stock to be received and paid for in cash at said time by said defendant. That said plaintiff then and there also agreed to transfer and convey all its said business, good will of the business, store fixtures, etc., except said crockery, hat, shoe, tinware, clothing, and grocery stock and business, to said defendant, at the agreed price of twenty-seven hundred (2,700) dollars, in addition to the sale of the above stock of about twenty-five thousand dollars of merchandise; said defendant to have a lease of the premises then occupied by said plaintiff with its said business, exclusive of the departments used for shoe and groceries, for five years, at a monthly rental of two hundred (200) dollars. That said defendant should also have the refusal of the space then used by said plaintiff for its grocery department, at a monthly rental of twenty-five (25) dollars, for the term of five (5) years, in so far as the influence of E. B. Moore and Henry H. Schott, stockholders in said plaintiff corporation, could be used to obtain the same. That said plaintiff and defendant then and there agreed, as a part of the consideration for the purchase of said business, store fixtures, good will of the business, and merchandise, by said defendant, that said plaintiff would retire from its said business in said North Yakima, and that said defendant would succeed to the same." It is then alleged that the appellant, pursuant to such agreement, took control of the stock of goods mentioned about October 12, 1902, and placed the same on the market, at a sacrifice sale, at an average reduction of about 25 per centum of what the same were reasonably worth where they then were, and between that date and January 1, 1903, made

sales amounting in all to \$61,539.70, reducing the stock to a cost value of between \$25,000 and \$26,000; that on the latter date the appellant, following instructions received from the respondent, proceeded to make an inventory of the goods remaining on hand, which it shortly thereafter completed, and so informed the respondent, requesting the respondent at the same time to carry out the agreement; that the respondent, in reply thereto, notified the appellant that it would not further comply with the agreement, saying that the appellant could either retain the business, or dispose of it elsewhere, as it saw fit; that the transaction, in so far as the respondent was concerned, was closed and at an end; and that it would proceed no further towards a compliance therewith. The appellant further alleged that, up to the time the respondent repudiated the contract, it had faithfully and fully complied with all of its terms and conditions on its part to be performed, and stood ready to comply with all of its remaining conditions, had the respondent consented to carry out its part of the contract.

The items of damage claimed in the complaint because of the breach of the contract, and which were struck out by the trial court, were, in substance, these: (1) For loss on the goods sold at the sacrifice sale while the stock was being reduced to \$25,000—being the difference between the amount received and their actual value—the sum of \$20,513.24; (2) for losses between October 15, 1902, and January 15, 1903, caused by the fact that its stock of goods was sold out, and run down so low that it was unable to supply many of its customers, thereby losing its customers and profits on sales, etc., the whole aggregating \$7,500; (3) for losses between January 15, 1903, and October 15, 1903, caused by the fact that the appellant was unable to procure suitable goods for the spring, summer, and fall trade after the respondent gave notice that it would not perform its part of the contract, thereby losing many of its customers, and profits on goods it would otherwise have made, aggregating the sum of \$15,000; (4) for damages to its business reputation and financial credit with the wholesale houses and commercial agencies of the United States, aggregating \$10,000. (5) The allegation concerning the fifth item of loss was as follows: "That when said defendant refused to purchase said business of said plaintiff, and refused to receive and pay for said stock of merchandise, it left said plaintiff with a stock of merchandise on hands of the apparent value of about twenty-five thousand (25,000) dollars; that said stock of merchandise consisted of remnants of a large stock of merchandise which said plaintiff had on hand in the month of October, 1902, when said agreement was made with said plaintiff; that said stock so left was unsalable by reason of the fact that many of the articles nec-

essary to be on hand, and a part of said stock, were missing; that said stock was, by reason of its having been so sold down and sold out by said defendant under said agreement, unsalable, and of a market value of not more than ten thousand (10,000) dollars; that the action of said defendant in selling said stock as aforesaid, and reducing the same, depreciated the market value thereof, to the injury of this plaintiff, in the sum of ten thousand (10,000) dollars." The complaint concluded with a demand for judgment for the several items above mentioned, which aggregate the sum of \$63,013.24.

The argument by which the appellant seeks to justify the several items of damage set out in its complaint can hardly be better stated than counsel on its behalf have stated it in their brief. They say: "This was no mere sale of personal property. It was a contract containing several covenants to be kept and performed by the Henry H. Schott Company. In order to carry out this contract, the Henry H. Schott Company was compelled to, and did, notify the wholesale houses with whom they dealt that they would go out of business; thereby severing their business connection with the wholesale firms from whom they purchased certain goods which could not be purchased elsewhere. They were compelled to, and did, notify the people who were in the habit of buying goods from them that they were going out of business. To reduce the stock, they were compelled to, and did, make a sacrifice sale, thereby losing several thousand dollars. When Stone, Fisher & Lane refused to comply with their part of the contract, the Henry H. Schott Company were compelled to re-establish their business relations with the wholesale houses at a loss. They were also without enough goods to continue their business, and they had lost heavily by making the sacrifice sale. They were losers by having a remnant stock of goods left on their hands, which could only be sold at a loss. The complaint in this action pleads a contract, with several covenants and conditions to be kept and performed by the Henry H. Schott Company. It then pleads a breach on the part of Stone, Fisher & Lane, and then pleads actual losses by the Henry H. Schott Company by reason of said breach of Stone, Fisher & Lane. All the damages pleaded are the direct result of the breach by Stone, Fisher & Lane. Stone, Fisher & Lane had all the acts performed by the Henry H. Schott Company in contemplation. At the time the contract was entered into, it was fully understood by Stone, Fisher & Lane that the Henry H. Schott Company would perform the acts alleged in the complaint to have been performed by it. Each party was fully informed as to all that was to be done by each party to carry out the contract."

Plausible as this reasoning may appear when first presented to the mind, we cannot think it sound. It is not disputed that the contract had been performed by both the par-

ties thereto down to the time the transfer was ready to be made. The respondent, to relieve itself from any liability on account of the terms of the contract at that time, was only required to do three things, viz.: (1) Purchase the stock of goods then on hand at the rate of 85 cents on the dollar of the inventoried cost of the same; (2) purchase the "business, good will of the business, store fixtures," etc., at the agreed price of \$2,700; and (3) enter into a lease of the store building for a term of five years at a rental of \$200 per month. These being the only things the respondent was required to do in order to comply with the contract, it is plain that the damages suffered and recoverable by the appellant are such as were caused by the failure of the respondent to comply therewith; that is to say, the appellant is entitled to recover for any loss it sustained because of the failure of the respondent to purchase the remaining stock and business, good will of the business, store fixtures, etc., at the prices agreed upon, and to enter into a lease of the store building at the rent reserved for the time named. As the utmost measure of the respondent's liability, had it taken the property, was the contract price, so the measure of its liability after its refusal to take it, and the appellant had elected to keep it, was the difference between the contract price and the actual value of the property, if the actual value was less than the contract price. On the failure of the respondent to comply with the contract, the appellant, of course, had a choice of remedies: (1) It could store and hold the personal property subject to the respondent's order, tender a lease of the store-room, and sue for the contract price; (2) it could sell the property, including the lease, after notice to the respondent, and recover the difference between the price received and the contract price; or (3) it could retain the property as its own, and recover the difference between the market value of the same at the time and place of delivery and the contract price, if the market value was less than the contract price. But as it elected to keep the property, it is clear that its measure of damages is found in the last of the three remedies mentioned. The contract, as we view it, was nothing more than a contract relating to the purchase and sale of personal property, and the remedies for a breach of the contract are such as ordinarily apply in such cases. It is suggested, however, that, while this remedy is definite and certain in so far as the goods themselves and the good will of the business and store fixtures are concerned, it is uncertain when applied to the lease, and hence the rules ordinarily applicable to a breach of contract for the sale of personal property do not apply. But we think differently. The respondent agreed to take the lease at a fixed rate per month for five years. The damage sustained by its failure to take it, if any,

is the difference between the actual rental value of the property and the amount the respondent agreed to pay as such rent, and is as capable of just admeasurement as is the loss on the personal property.

For these reasons, therefore, we are of the opinion that the court committed no error in striking from the complaint the allegations concerning items 1 to 4, inclusive, as we have numbered them above. With reference to the item numbered 5 (being paragraph 11 of the complaint) we think the court erred in striking it out. It was based upon the difference between the actual value of the remnant of the stock of goods and the price the respondent agreed to pay for the same. As such, it was a legitimate item of damage, and one for which recovery could be had. It may be, as the respondent suggests, that the appellant based its right of recovery even for this item on a different theory from that which we hold the item a legitimate one, but this would hardly justify the court in denying it the right to recover altogether. Moreover, the respondent's motion was not directed to this paragraph of the complaint with the idea of having it made to conform to correct pleading, but on the theory that it stated a nonrecoverable item of damage, and it was stricken out on that theory. As we hold it states a recoverable item, clearly it was error for the court to strike it out. The view we have taken of the pleading, however, may have rendered an amendment of the complaint desirable, and the remittitur will go with leave to amend if the appellant so elects.

The judgment is reversed and the cause remanded, with instructions to reinstate the case.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

RIVERSIDE LAND CO. v. PIETSCH et ux.  
(Supreme Court of Washington. June 20, 1904.)

SPECIFIC PERFORMANCE—CONTRACTS RELATING TO REALTY—POSSESSION AND IMPROVEMENTS—BURDEN OF PROOF—INSTRUCTIONS—APPEAL.

1. Where, in an action to recover possession of realty, the legal title to which was in plaintiff, defendants interposed an affirmative defense asserting an entry on the land with the plaintiff's consent, and the making of valuable improvements, relying on plaintiff's assurance that by so doing, and with 10 years' peaceable possession, they would become the absolute owners, because the improvements were of great value to other land claimed by plaintiff in the vicinity, and because the premises in their natural state were totally valueless, and claiming plaintiff ought to be estopped from questioning their title, they were not entitled to have their title quieted unless they showed by satisfactory proof an oral contract for the sale of the land to them in conformity to the issue tendered, and full performance by them of the conditions, or an offer to perform, sufficient to take the transaction out of the statute of frauds.

2. An instruction that the only issue was whether plaintiff put defendants into possession with the understanding that, if they cultivated the land for 10 years, it would become theirs, was erroneous, as it eliminated the allegation as to the nonvalue of the land when defendants took possession, and the improvements enhancing the value of the land in the vicinity.

3. In an action to recover possession of land, the Supreme Court will not determine as to compensation for improvements, which was not at issue in the court below.

Appeal from Superior Court, Spokane County; Leander H. Prather, Judge.

Action by the Riverside Land Company against Franz Pietsch and wife. From a judgment for defendants, plaintiff appeals. Reversed.

James Dawson and F. E. Langford, for appellant. W. S. Lewis, for respondents.

PER CURIAM. This action was brought in the superior court of Spokane county by plaintiff, the Riverside Land Company, against defendants, Franz Pietsch and Augusta Pietsch, husband and wife, to recover possession of certain lots situated in the Second Addition to West Riverside Addition to the city of Spokane. The cause came on for trial before the court and a jury, resulting in a verdict and judgment for defendants. Plaintiff appeals.

The complaint alleges appellant's incorporation under the laws of this state; that it is, and has been for 11 years last past, the owner in fee simple of the above-described real estate; that the respondents are in possession of said premises; that they wrongfully and unjustly withhold the same from appellant; that on March 20, 1902, appellant served notice in writing upon respondents to vacate and surrender possession of said property, and to remove the fence erected around the same. Appellant asks judgment for restitution and possession, together with its costs and disbursements. Respondents by their answer deny the incorporation of appellant, and also the material allegations of the complaint. The allegations of their first affirmative defense are as follows: "(1) That for more than twelve years last past the defendants have been, and they now are, in the actual, open, and peaceful possession of the premises described in the plaintiff's complaint, to wit, lots 12, 13, 14, 15, 20, 21, 22, and 23 in block 8 of the Second Addition to West Riverside Addition to Spokane Falls (now Spokane), in the city and county of Spokane, Washington, with color of title thereto, and have cultivated and improved the same, and planted thereon and grown and cultivated a large and fruitful orchard, which is of great value. (2) That at the time the defendants entered upon said premises it was wild, hilly, and rugged waste, and, in its natural state, a steep hillside, covered with rock and undergrowth and small pine timber, and regarded as of

no value whatsoever, and destitute of any water rights for irrigation and cultivation. (3) That, by and with the knowledge and consent of the plaintiff, defendants entered upon the said land, and cleared and improved the same, and reduced it to a high state of cultivation, and purchased and obtained water rights therefor, and conducted water thereon, and, in and about so doing, expended large sums of money, labor, skill, and care, and, during the time that defendants were so doing, plaintiff very well knew of such facts, and directed the defendants so to do, and positively assured the defendants that by so doing, and with 10 years' peaceable possession, they should become the absolute owners thereof, free from any claim or alleged claim of the plaintiff thereto, because of the fact that the improvements being made thereon by these defendants was of great value to other real estate claimed by the plaintiff in the immediate vicinity, and because the said premises in the natural state were totally valueless, without which assurance the defendants would not have so acted, nor made such improvements, nor purchased such water rights, nor so rested upon their said rights thereto; and the defendants further allege that the improvements and cultivation and fruit trees and other improvements are of such a character and so attached to the soil that they cannot be removed, but would be an utter loss to the defendants, at a great profit to the plaintiff, should these defendants be ejected therefrom, and that plaintiff is and ought to be estopped from questioning the defendants' right or possession thereof or title thereto, or from in any manner interfering with the peaceable and quiet enjoyment of the premises and improvements." The second affirmative defense alleges 10 years' adverse possession of the premises prior to the commencement of the action. This defense seems to have been abandoned at the trial. The reply denies the material allegations of the first affirmative defense, except that respondents entered upon these premises with the knowledge and consent of appellant.

Under the issues as formulated and tendered by the pleadings, the burden of proof was cast upon respondents regarding their plea of estoppel as alleged in their first affirmative defense above noted. Respondents' evidence at the trial tended to show that, in the month of February, 1892, they were the owners, by purchase from appellant company, of lots 16, 17, 18, and 19 in said block 8, which are contiguous to the lots in question; that at such time respondents inclosed these lots, with the lots in question, and also four other lots in said block 8, then being the property of appellant, by building a fence around all such real estate except portions of lots 12 and 27, abutting upon the east line of this block 8. Respondent Pietsch testified that in April and May, 1891, he cleared and grubbed the lots in controversy; using

the following language: "Well, those are side hills, you know—steep hills. They were overgrown with large pine timber and with dense growth of underbrush, and those trees were overshadowing it. One side is on the east, and the other side is on the south. So, when the sun came around, it would shade it. I could not raise anything. So I was to establish a nursery there. So I had to make me sunshine and air. \* \* \* Q. State whether or not it was in its natural state \* \* \* when you went upon it? A. What it was—in the natural state? Q. Yes. A. A wilderness, that is all; rocks, that is all it was; and trees." Mr. Pietsch further testified that he bought another lot of appellant, on which property there was located a spring, in order to irrigate the lots in controversy, and expended considerable labor and money in order to get water thereon from that spring; that, without water upon these lots, they were utterly worthless to witness; that witness in these transactions dealt with one C. F. Clough, as the agent of the appellant; that witness, during his occupancy of such lots, put the same in a high state of cultivation, and planted thereon 200 bearing fruit trees, which cannot be moved without great injury being done them; that the improvements and labor placed and expended on such lots by these respondents were over \$1,500 in value, and are of a permanent nature; that Clough, President Perkins, and Secretary Stevens of appellant company were cognizant of respondent's acts regarding the improvement and cultivation of this real estate, and encouraged his acts in that regard. It seems that Mr. Clough was the resident agent of appellant company, who testified that he had authority to sell this real estate and receive payments therefor. Mr. Pietsch swore that in the spring of 1892 Mr. Clough came there, looked everything over, and smiled, and said, "Mr. Pietsch, when you have this garden ten years in peaceful possession, it will be yours." His testimony continues: "And he came occasionally and told me the same story over and over again, more than five times to me, and I believed it in him, too. I took his word for it. \* \* \*

Q. Do you remember Mr. Clough being down there at any time with the president of the company? A. Yes, sir. \* \* \* Q. What did they say—Mr. Perkins and Mr. Stevens and Mr. Clough—on the occasion of that visit? State what they said and did with reference to this particular land now in controversy? \* \* \* A. They tapped me on the shoulder and they said, 'We wish we had half a dozen more men on our place here like you are yourself.' Q. Well, what did they say about your work there on the garden—this disputed land—now? A. Well, they said: 'You have done just right. Nobody can make— The hillsides are no good, anyhow. Nobody can make use of those hillsides but you, and you done just right,' they said, 'and we only wish we had half a dozen more



such men on the land as you are." This witness also testified that he induced appellant to sell four of the lots inclosed with those now in controversy, one of which was sold to one Murphy in 1895, and the other three to one Pritchard. Respondent Franz Pietsch was corroborated by members of his own family testifying regarding the knowledge of Clough of these improvements, which testimony is not seriously disputed. Augusta Pietsch, wife of Franz Pietsch, and one of respondents herein, testified that four years after they went into possession of this property the following conversation occurred between Mr. Clough and her husband: "Mr. Clough he said— He was outside of the fence, and I was inside of the fence, and Mr. Pietsch was there, too. He said, 'Mr. Pietsch, if you have these ten years in possession,' or how you call it, 'then it is yours,' he say; and we lived over it for a while. \* \* \* He said last year [1901], \* \* \* 'Mr. Pietsch, do you want to buy those lots?' Mr. Pietsch said, 'I don't have any money.' Then he said, 'If you have that one year more, it must be about the time when you have that ten years, then it is yours; must be about around the time.'" Louis Pietsch, a son of respondents, testified that the value of the labor and improvements expended and placed on these lots by his father was from \$1,000 to \$1,200. Respondents offered no testimony tending to show that the alleged improvements on these lots in controversy enhanced the valuation of other property in that vicinity belonging to appellant. The record shows that counsel for appellant made frequent objections and took numerous exceptions to the rulings of the trial court as to the introduction of testimony in behalf of respondents concerning the alleged statements of Agent Clough and the president and secretary of appellant company pertaining to the acts of respondents in improving the property in question. Clough testified in part as follows: "At some time in the summer or fall of 1891, Mr. Pietsch asked if there would be any objection to his cultivating a portion of the hillside, and I told him I did not think there would, providing, when the property was wanted by the company, he would vacate it. He says, 'Certainly.'" Witness denies telling Mr. Pietsch that if he went on these hillside lots, and cultivated and improved them for 10 years, he (Pietsch) would get title to the same. It further appeared from the evidence that this realty was valuable property when respondents took possession thereof; that the appellant had kept the taxes paid up on the same; that respondent Franz Pietsch offered to pay Clough, for appellant, the money which the company had already paid for the taxes of 1901 and 1902 on these lots, and the company refused to receive the same. The verdict and judgment above noted in effect established an estoppel against appellant's "claiming any

estate or right of possession in said property." The judgment decreed, among other things, that respondents' "title to said land be, and the same is hereby, confirmed."

The assignments of error practically present but one question for the consideration of this court on the hearing of this appeal—whether the evidence adduced by respondents was sufficient, under their first affirmative defense, to warrant the verdict and judgment rendered in the trial court. After a careful consideration of all the evidence found in the record, in connection with the able arguments of counsel on both sides of the present controversy, we are impelled to the conclusion that it was incumbent upon respondents to establish by a preponderance of testimony that appellant is estopped from asserting its title to the premises in question by reason of an alleged parol contract between appellant and respondents when the latter entered into the possession of and inclosed these lots with the other realty, or shortly thereafter. In other words, respondents took the burden of proving that they were in possession of this property under a parol agreement, complete and definite in its terms, for a valuable consideration moving from them to appellant, and that they (respondents) had fully complied, or were ready and willing to comply, with the terms of such contract on their part, entitling them to a specific performance thereof as against appellant. We are unable to conceive of any other theory, under the issues as formulated by the pleadings and evidence adduced on the trial, by which respondents were legally or equitably entitled to have judgment entered in their behalf, confirming their title in and to the lots described in the above complaint as against the appellant company. It is true that, in many instances, while a defense including matters pleaded as an equitable estoppel may not entitle a defendant to affirmative relief in a given case, still such defense performs the office of a negative resistance to and defeats plaintiff's cause of action. *Pomeroy's Code Remedies*, (3d Ed.) § 91. A defendant seeking affirmative relief in his answer becomes, *quoad hoc*, plaintiff, and must state the requisite facts constituting his right of action as if he were stating them in a complaint, except that he may refer to and adopt matters stated in the complaint. *Phillips, Code Plead.* § 260. There is no question but that at the time of the commencement of the present action the legal title to this property was in the appellant. If the respondents are entitled to recover, they must do so under the allegations of their answer, and the proofs in support thereof submitted at the trial. They failed to show that at the time they entered into possession "the said premises, in their natural state, were totally valueless," and "because of the fact that the improvements being made thereon by these defendants [respondents] was of great value to other real

estate claimed by the plaintiff [appellant] in the immediate vicinity," as alleged in their answer. As we read the record, the testimony, though somewhat obscure, tends to show that the market value of this real estate was at that time greater than the alleged improvements. It seems too plain for argument, even granting, without deciding, the sufficiency of this first affirmative defense as a matter of pleading, that the respondents could not ignore such important matters of proof at the trial in support of their alleged estoppel. Under their pleading in that behalf, the respondents became actors in this controversy. They were not entitled to the relief awarded them by the court below, confirming and quieting their title in and to these lots, unless they showed by clear and satisfactory testimony an oral contract for the sale thereof made between appellant company and themselves in conformity to the issues tendered, sufficient to take the transaction out of the operation of the statute of frauds. Warvelle on Vendors, vol. 2, p. 783, quoted with approval in O'Connor v. Jackson, 23 Wash. 229, 62 Pac. 761. Courts of equity, in the matter of defenses of this nature, will look to the substance rather than to the form thereof. The calling this defense an "equitable estoppel" does not lessen the responsibility of the parties invoking this doctrine, or warrant us in ignoring fundamental principles as the proper basis to the granting of equitable relief. As we view it, there is nothing disclosed by this record which would divest the legal owner of its title and interest in the property, and vest it in the respondents. *Chicago, B. & Q. R. Co. v. Reno*, 113 Ill. 39.

It is further assigned that the trial judge erred in giving the following instruction to the jury: "I will relieve the jury of some of the issues in the case, by holding and finding that the evidence on the part of the plaintiff shows that it is a corporation competent to sue in this court, and that the evidence on the part of the plaintiff shows a fee-simple title in the plaintiff, except that the allegations of the defense should be true; that is, that the plaintiff had placed the defendant in possession of the property with the understanding as I have mentioned. So that the only question of fact which the court will submit to you to find from the evidence in the case is whether or not the claim of the defendants that the plaintiff put them in possession with the understanding that I have mentioned was true—is the only issue which the court will submit to you." This instruction, and the understanding therein referred to, eliminate from the jury's consideration the above allegations in the answer pertaining to the nonvalue of this real estate when respondents took possession thereof, and the improvements placed by respondents thereon enhancing the valuation of other real estate in the immediate vicinity claimed by appellant. These were questions of fact,

under the issues, which the trial court had no right to ignore. This instruction was therefore misleading and prejudicial to appellant. Matters alleged as an estoppel must be proven as charged. "Estoppels never arise from ambiguous facts. They must be established by those which are unequivocal and not susceptible of two constructions." *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476; 8 Ency. Pl. & Pr. 9-11.

Whether the respondents are entitled to relief or recover compensation for their improvements, under issues properly tendered with that end in view, is a proposition not pertinent to this inquiry. This court on appeal will only consider those matters presented to the court below for decision. Within the scope of the issues, the case is considered and determined on the same theory in the appellate as in the trial court. *Sanders v. Stimson Mill Co.* (Wash.) 75 Pac. 975, and authorities cited. Having reached the conclusion that the judgment of the court below must be reversed, it becomes unnecessary to consider the remaining assignments of error.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

#### BOYLES et al. v. STATE.

(Supreme Court of Washington. June 23, 1904.)

#### APPEAL—BOND—NOTICE OF APPEAL—TITLE OF CAUSE—BAIL BOND—FAILURE TO PROSECUTE—JUDGMENT ON BOND.

1. On appeal by the sureties on a bail bond from a judgment on the bond, in which W. A. Lewis was principal, the title of the cause in the notice of appeal was, "In the Superior Court of the State of Washington in and for the County of Spokane. The State of Washington vs. W. A. Lewis." Then appeared the names of several persons followed by "Sureties on Bail Bond." And on the appeal bond the title was identical, down to and including the name of W. A. Lewis. Then followed the same names and "Sureties on Bond or Recognizance of Defendant." *Held*, that a motion to strike appellants' brief on the ground that none of the papers after the notice of the appeal had been entitled as required by statute was without merit, and the notice of appeal and bond were sufficient to give the Supreme Court jurisdiction; *Ballinger's Ann. Codes & St. § 6535*, providing that the Supreme Court shall hear and determine all causes removed thereto on the merits, disregarding all technicalities, and shall consider all amendments which could have been made as made.

2. *Ballinger's Ann. Codes & St. § 6535*, provides that the Supreme Court shall hear and determine all causes removed thereto on the merits, disregarding all technicalities, and shall consider all amendments which could have been made as made. *Held*, that where the sureties on a bail bond prosecuted an appeal from a judgment against them on the bond, and one of them afterwards withdrew from the appeal, his withdrawal not working to the prejudice of the other appellants, a motion by appellee to dismiss the appeal would be denied.

3. *Ballinger's Ann. Codes & St. § 6910*, provides that, when a person has been held to answer, if an indictment be not found or informa-

tion filed against him within 30 days, the court must order the prosecution dismissed, unless good cause to the contrary be shown. A month after one was held to answer a criminal charge, he moved that the prosecution be dismissed. No information or indictment was filed until more than three months after accused was held to answer, and subsequently, because of his nonappearance, his bail bond was forfeited, and judgment entered thereon, and thereafter the prosecution confessed the motion of accused for a dismissal of the prosecution. *Held*, that the forfeiture of the bond, and entry of judgment thereon, was error.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

From a judgment in favor of the state against E. F. Boyles and others, as principal and sureties on the bail bond of M. L. Lewis, all the defendants except W. A. Lewis and Harry Green appeal. Reversed.

William S. Lewis, George M. Nethercutt, W. M. Murray, and T. S. Griffiths, for appellants. Horace Kimball and Miles Poin Dexter, for the State.

PER CURIAM. On May 24, 1901, W. A. Lewis, waiving preliminary examination, was held to answer on the charge of embezzlement, by H. L. Kennan, justice of the peace, to the superior court of Spokane county. On May 25, 1901, W. A. Lewis, as principal, and E. F. Boyles, Otto Bringgold, M. L. Lewis, H. G. Brown, and Harry Green, as sureties, before such justice, entered into a bail bond or recognizance to the state of Washington, in the penal sum of \$3,000, for the appearance of said Lewis before the superior court. This instrument contained the following conditions: "Now, therefore, if the said W. A. Lewis shall be and appear in said superior court aforesaid at the city of Spokane to answer the said charge whenever it shall be prosecuted and at all times required until discharged according to law render himself amenable to the orders and process of the said superior court, then this obligation to be void and of no effect, otherwise to be and remain in full force, virtue and effect." This bail bond was approved by the justice May 31, 1901. The certified transcript of the justice of the peace and the bond were filed in the clerk's office of the superior court on June 13, 1901. On the 25th day of June, 1901, the defendant W. A. Lewis appeared in person and made and filed his motion in said court to dismiss such prosecution. Such motion, omitting title, is as follows: "Comes now the defendant in the above-entitled action, and, appearing in his own proper person and in open court, makes this motion, and files the same with the clerk, and moves the court: That the above-entitled action, and the prosecution thereof, be by the court dismissed, upon the following grounds, to wit: That on the 24th day of May, A. D. 1901, the defendant was by H. L. Kennan, a justice of the peace in and for Spokane county and precinct, held

to answer the charge of larceny by embezzlement theretofore preferred against him in the said justice court, and the proceedings therein were by the said justice duly certified and returned to the clerk of the above-entitled court wherein the above-entitled and said action ever since has been, and now is, pending, and more than thirty days have elapsed since the defendant was held to answer as aforesaid, and no indictment has been found and no information has been filed against him within thirty days or at all. Wherefore the defendant demands that this action and the prosecution thereof be dismissed, and he go hence without day, and that his bond be exonerated, and his bondsmen discharged of and from any and all further liability thereon. This motion is made upon the record, pleadings, files, and papers in this action, and upon the annexed affidavit." This motion was accompanied with an affidavit on the part of Lewis purporting to substantiate the grounds thereof, and which alleges "that this defendant has called the attention of Horace Kimball [prosecuting attorney] to this matter at divers times; the last time being Saturday, June 22, 1901, at which time this affiant informed the said Horace Kimball that he had been waiting here at Spokane for over four weeks to answer any information that might be filed against him in the premises, and that this affiant had business interests elsewhere which demanded his attention, and that it would be very inconvenient for this affiant to wait longer than Monday, the 24th day of June, A. D. 1901, for the said Kimball to take action in the premises." On the 27th day of June, 1901, defendant Lewis filed his affidavit in the above prosecution that on the 25th day of June, 1901, he personally served upon Horace Kimball, at the city of Spokane, true copies of such motion and affidavit. The record further shows that defendant Lewis on the 26th day of June, 1901, served upon the prosecuting attorney a written notice stating "that the defendant has called your attention thereto at divers times during the last month—the last time being Saturday, June 22, 1901—and at all times told and informed you he was ready to plead and dispose of the said action at the earliest possible time."

On September 23, 1901, no indictment having been found nor information filed against defendant W. A. Lewis, this cause came on for hearing in the court below on motion of defendant to dismiss the prosecution. The order thereon recites that the court was of the opinion that the presence of defendant was necessary at such hearing, and thereupon "ordered that bench warrant issue forthwith for the arrest of the defendant W. A. Lewis, and that he be brought before the court at 9:30 a. m. to-morrow, to wit, Tuesday, September 24, 1901, to which time the hearing of this motion is adjourned." On September 26, 1901, this motion was again called up in the superior court, when the

sheriff of Spokane county reported in open court that he had made diligent search for defendant Lewis, and could not find him. The hearing of this motion for dismissal was continued from time to time, on account of the absence of such defendant, until October 10, 1901, when the motion again came on for hearing in the lower court, and the defendant appeared by his counsel, Messrs. W. S. Lewis and Frank H. Graves. The court below at that time ordered that the hearing of this motion be continued till the defendant should be personally present in court. The defendant, by his counsel, excepted to this order. On October 9, 1901, the prosecution, without making any showing, filed in the court below an information charging defendant Lewis with the crime for which he was held by the justice of the peace on May 24, 1901, and October 14, 1901, was the time set for the arraignment of defendant on such charge. On October 10, 1901, the prosecution was granted leave to withdraw its motion to forfeit the above bail bond. On October 14, 1901, the defendant, by W. S. Lewis, insisted on the hearing of the motion to dismiss the prosecution, and also moved a discharge of the bail bond, as against the principal and sureties thereon, on substantially the same grounds as stated in the defendant's motion to dismiss. On the day last named, on motion of plaintiff, the state of Washington, the court below, on default of defendant W. A. Lewis to appear personally and answer such charge, rendered judgment against defendant for \$3,000, and against the sureties in the amounts following: M. L. Lewis for \$1,000; E. F. Boyles, \$500; Otto Bringgold, \$500; Harry Green, \$500; and H. G. Brown in the sum of \$500. The defendant and appealing sureties excepted to the entry of this judgment. On the 2d day of December, 1901, the motion to dismiss the prosecution came on for hearing in the superior court, and the prosecution confessed this motion, which was granted, the action was dismissed, and the defendant was discharged from custody. He did not appear personally at this hearing, but was represented by counsel.

The sureties E. F. Boyles, M. L. Lewis, H. G. Brown, and Otto Bringgold appeal from this judgment, which was entered herein on October 14, 1901. H. G. Brown afterwards withdrew from such appeal.

The respondent moves to strike from the files herein appellants' opening brief, for the reason that neither such brief, the appeal bond, "nor any of the papers in the said appeal after the notice of appeal had been given and served, are entitled as required by statute and by rule of this court." Respondent also moves the dismissal of the appeal of H. G. Brown on account of his withdrawal of the same, as above noted. No question is raised by respondent as to the correctness of the title of the cause in the notice of appeal, which is as follows: "In the Superior

Court of the State of Washington in and for the County of Spokane. The State of Washington vs. W. A. Lewis, Harry Green, E. F. Boyles, M. L. Lewis, H. G. Brown, and Otto Bringgold, Sureties, on Bail Bond." On the appeal bond the title of the cause is identical, down to and including the name of "W. A. Lewis." Then follow the words and names, "Defendant Harry Green, E. F. Boyles, M. L. Lewis, H. G. Brown, and Otto Bringgold, Sureties on Bond or Recognizance of Defendant." We think, unquestionably, that the notice of appeal and bond are sufficient to give this court jurisdiction. Respondent's counsel do not claim to have been misled or prejudiced by the action of appellants in the premises. The state has entitled its brief in the same manner and style as that of appellants. Section 6535, Ballinger's Ann. Codes & St., provides: "The Supreme Court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made." The withdrawal of H. G. Brown as one of the appealing parties cannot work to the prejudice of the other appellants in the present controversy. The motion to strike and dismiss the appeal is therefore denied.

The assignments of error present the single proposition of law for our consideration: Were the proceedings had in the court below regular and valid, with regard to the forfeiture of the above bail bond, and in rendering judgment in the case at bar against the appellants now before this court? Section 6910, 2 Ballinger's Ann. Codes & St., provides: "When a person has been held to answer, if an indictment be not found or information filed against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown." The next section (6911) further provides: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown." This court, in *State v. Brodie*, 7 Wash. 442, 35 Pac. 137, while having the latter section under consideration, used the following language: "As the record stands, we are of the opinion that no sufficient cause appears for not having brought the defendants to trial, and, in the absence of such cause, they were entitled to their discharge, under said section. The failure to call a jury, without any good reason being made apparent why one was not called, was not sufficient to warrant holding them in custody beyond the time specified in said section." The same line of reasoning being applied to the above section 6910, as well as the language therein contained, clearly implies that the provisions

of this section are mandatory; that, "if an indictment be not found or information filed against him [the defendant] within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown"; that such cause should appear or be shown by the record, unless waived in some manner by the defendant or accused. In other words, when the indictment shall not have been found, nor information filed, within the 30 days after the defendant has been held to answer a criminal charge, the prosecution must assume the burden of showing a reasonable excuse or justification for its omission so to do. Otherwise the defendant is entitled to his discharge, and a dismissal of the prosecution, as a matter of right. When it shall have been determined that such right to discharge and dismissal exists in defendant's behalf, it would seem to logically follow that this right inures to the advantage of the sureties on the defendant's bail bond. The above sections contained in Ballinger's Statutes are substantially identical with section 1382 of the California Penal Code. In *People v. Wickham*, 113 Cal. 283, 48 Pac. 123, defendant was convicted in the trial court of embezzlement, and appealed. In the opinion the following language is used: "The only point made for a reversal is that the court erred in denying defendant's motion to dismiss the prosecution upon the ground that the information against him was not filed within thirty days after he was held to answer." The court held in this case that, "if there was any good cause for not filing the information sooner, the burden was on the prosecution to show it." The judgment of conviction was reversed for want of such showing in the record. There are authorities holding that where a bail bond has been executed by a defendant and sureties, conditioned that the principal shall appear at the next term of the court named in the instrument to answer a criminal charge, and continuances are had from term to term, without the finding of any indictment or the presentment of any information against the principal, such delays are sufficient, in law, to release the sureties from liability on the recognizance. *Rogers v. State*, 79 Ala. 59; *Jones v. State*, 11 Tex. App. 412; *Lane v. State* (Kan. App.) 50 Pac. 905.

Bail bonds, when executed, should be construed with reference to the laws of the sovereign jurisdiction relating thereto, where given. While the liability of the principal and sureties is to be measured by the terms of the bond, the obligors—especially the sureties—have the right to expect and insist that the prosecution observe the mandates of the statute. While the defendant Lewis in the case at bar may not have had sufficient excuse or justification to absent himself from the jurisdiction of the trial court, still such

conduct on behalf of Lewis did not excuse the prosecution in neglecting to perform a positive duty, enjoined by the provisions of section 6910, Ballinger's Ann. Codes & St., to either file an information within the 30 days, as therein provided, or show good cause for the delay in that particular. The record fails to show any good cause for the neglect on the part of the state to file the information herein charging the defendant W. A. Lewis with the commission of a crime till October 9, 1901, more than three months after the expiration of the time limited. If the state can omit the performance of so important a duty in our criminal jurisprudence for three months, why may it not do so for six months, or for an indefinite period, and in the meantime insist upon the forfeiture of defendant's recognizance? We cannot conceive this to be the law. True, the sureties may seize the person of their principal, and surrender him into the custody of the law, and thus exempt themselves from future liability. Still we think that they should not be mulcted simply because they omitted so to do, having acted, as reasoning beings, on the presumption that the prosecution would discharge its duties as required by the statute, or that otherwise it had elected to abandon such prosecution.

The following language is found in the brief of the learned counsel for the respondent: "The dismissal of the prosecution does not necessarily follow the failure to file an information within thirty days, and is not an absolute right, but 'good cause to the contrary may be shown.' \* \* \* Defendant's sureties had no right to suppose either that they were exonerated, or that the prosecution would be dismissed, because an information was not filed within 30 days. This was a matter which could only be determined upon a hearing, when the prosecution might have shown 'good cause to the contrary.'" But as we view the record of the judgment entered on December 2, 1901, wherein the prosecution confessed defendant Lewis' motion of June 24, 1901, in open court, which was granted, judgment of dismissal was thereupon entered, and the defendant ordered discharged from custody. In our opinion, this entry is a very significant feature in the present controversy. It shows on the face of the record, in the absence of any explanation, that at the time the above motion was made, June 24, 1901, the prosecution had no case against the principal, Lewis, and had no right to hold him further in these proceedings; that he (Lewis) was then entitled to his discharge. In view of these facts, we think that it would be illegal and inequitable to uphold the judgment of the court below against these sureties, who are now before this court insisting upon their legal rights; that such judgment should be reversed, and the proceedings ordered dismissed as against these appellants.

**CULLY v. NORTHERN PAC. RY. CO. et al.**  
(Supreme Court of Washington. June 23, 1904).

**MASTER AND SERVANT—PERSONAL INJURIES—SAFE PLACE TO WORK—TRIAL—INTERROGATORIES—DISCOVERY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.**

1. Under 2 Ballinger's Ann. Codes & St. § 6009, providing that a plaintiff may at the time of filing his complaint or afterwards file interrogatories "for the discovery of facts and documents material to the support of the action," to be answered by the adversary, an employé of a railroad in a suit for personal injuries could not compel it to answer interrogatories disclosing confidential communications from its agent reporting or in regard to the accident.

2. The rule that a master must furnish a safe place for the servant to work has no application to the employment of a man by a railroad company to excavate gravel from a gravel bank and load it on the cars, as the place to work is being constantly changed, and is necessarily incomplete and dangerous.

3. In an action against a railroad company by an employé for personal injuries, evidence examined, and held insufficient to carry the question of defendant's negligence to the jury.

4. In an action against a railroad company by an employé for personal injuries, the burden of proving negligence of the defendant was on the plaintiff.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Alvin Lewis Cully, by Charles Cully, guardian ad litem, against the Northern Pacific Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Gable & Seabury and Million & Houser, for appellant. Jas. F. McElroy, B. S. Grosscup, and Wilbra Coleman, for respondents.

**PER CURIAM.** This is an action brought in the superior court of Skagit county by Alvin Lewis Cully, by Charles Cully, his guardian ad litem, plaintiff, against the Northern Pacific Railway Company and T. B. McDermott, defendants, to recover compensation for personal injuries sustained by said plaintiff. From a judgment of nonsuit and dismissal entered against him in the lower court, plaintiff appeals.

Appellant alleges in his complaint that on or about August 5, 1901, he sustained serious injuries through the negligence of respondents in failing to provide him a safe place in which to work. The following facts are amply borne out by the record: On or about the 29th day of July, 1901, respondent Northern Pacific Railway Company was engaged in taking gravel from a gravel bank near the town of Sedro-Woolley, in Skagit county. The crew of men engaged in the work of excavating the gravel and loading it on the cars was under the direction and control of respondent T. B. McDermott as foreman of the crew. On or about the day last mentioned, appellant, being at that time between 17 and 18 years of age, although doing a man's work and drawing a man's pay, was

employed by said McDermott to assist the crew in the work in hand, the particular duties assigned him being to assist those of the crew whose duty it was to attend the jackscrews on the steam shovel and take up and relay the track upon which the steam shovel was operated, as the necessity of the work from time to time required its position to be changed. In the process of removing gravel from the bank and loading it on the cars a steam shovel was used. Respondents had been engaged for some time in taking gravel from the bank in question prior to the employment of appellant, and in the process of so doing had cut into the face of the bank to a considerable extent, necessitating the building of the track on which the steam shovel was being operated and the side track used for the gravel cars within the cut. The excavation had advanced into the bank to such an extent that the height of the embankment caused by the excavation was between 30 and 40 feet on the day of the accident. Either early on the same day or the day before, a stratum of blue clay had been struck, which undoubtedly added to the danger of a slide taking place. On the afternoon of the 5th day of August, 1901, appellant was assisting another workman by the name of Hale Rhodes in laying and spiking down track in the rear of the steam shovel preparatory to moving the shovel to another position. Rhodes was engaged in spiking and appellant was holding or "pinching" the rails in position to be spiked by the use of a "claw" or "pinch" bar, respondent McDermott standing by. The bar which appellant was using was not working satisfactorily, and some one—it does not clearly appear who—suggested, "Get a line bar," whereupon McDermott, by pointing, directed attention to a bar lying a short distance away between the steam shovel and a car standing opposite on a parallel track. Appellant immediately proceeded down between the steam shovel and the standing car to get the bar pointed to, and was in the act of picking it up, when a large mass of the bank broke away from the top, and, before appellant had time to change his position, came down with great violence, striking the steam shovel with such force as to carry it off the track, carrying it over against the opposite car, and pinning appellant between the steam box of the steam shovel and the deck of the car, resulting in the injury. The separate answers of respondents put in issue the material allegations of the complaint, and further alleged, as separate defenses to the action, assumed risk, contributory negligence, and negligence of fellow servants. The affirmative matter in each answer was denied in the reply.

Prior to the trial, appellant, pursuant to section 6009, 2 Ballinger's Ann. Codes & St., propounded to respondent company certain written interrogatories, to all of which the respondent made answer, except interroga-

ories numbered 19 and 20, which are as follows: "No. 19. If such report was ever made, who made it, and to whom was it made, and what action, if any, was ever taken by the company with reference thereto? No. 20. Attach to your answers herein all reports regarding the accident, and all correspondence with the person or persons reporting said accident with reference thereto." On motion of counsel for the railway company these two interrogatories were stricken out by the lower court, on the ground that the same were incompetent, irrelevant, and immaterial, to which ruling appellant excepted. It appears from the transcript that the respondent company answered in the affirmative interrogatory No. 18, that a report of appellant's said injury was made to the company. We are clearly of the opinion that these interrogatories were properly stricken. It seems to us that it would be a very dangerous and unjust practice to require the defendant in this character of cases to produce all of the correspondence, reports, and documents which he may have touching a case at issue, all of which must necessarily be of a strictly confidential character. Assuming that this correspondence disclosed admissions of the confidential agents of the defendants against the interests of the defendants, they are not such admissions as would be admissible in evidence. We can conceive of no reason why a different rule should apply in this case than prevails in the case of privileged communications generally. The statute which authorizes the filing of "interrogatories for the discovery of facts and documents material to the support," etc., "of the action," does not contemplate that the plaintiff shall be permitted to have free access to the defendant's private correspondence and papers, in order that he may not only discover whether facts and documents material to the issue existed therein, but learn the defendant's line of defense as well. It is highly probable that sections 6009 and 6047, 2 Ballinger's Ann. Codes & St., were intended to supersede the old practice which authorized a bill of discovery; but Mr. Pomeroy, in his work on Equity Jurisprudence, at section 201, in referring to the old practice, says: "The fundamental rule on this subject is that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material to his own title or cause of action. It does not enable him to pry into the defendant's case, or find out the evidence by which that case will be supported," etc. The record fails to disclose the particular evidence sought to be obtained. Mr. Hageman, in his work on Privileged Communications, at page 32, says: "So where a plaintiff, at the instance of the solicitors, sent out a gentleman to India for the express purpose of acting as the solicitors' agent in the collection of evidence respecting a pending suit, letters written by the agent

either to the plaintiff or his solicitors on the subject of the evidence have been regarded by the court as confidential communications." At page 750, vol. 6, Enc. Pl. & Pr., the rule is laid down that "communications to any person whose intervention is necessary to secure and facilitate the communication between attorney and client are privileged." It seems to us that the communications sought to be obtained in this suit come squarely within the rule above laid down as privileged. It may well be doubted whether, under section 6009, 2 Ballinger's Ann. Codes & St., the production of any documentary evidence could be demanded in view of the provisions of section 6047, 2 Ballinger's Ann. Codes & St., which makes ample provision for the inspection of books and papers in the hands of the opposite party material to the issue, and for permission to make copies thereof.

Granting a nonsuit is the next error assigned. The appellant seeks to invoke the rule in this case that it is the duty of the master to furnish the servant with a safe place in which to work. This rule, however, has no application to this class of employment. As was said in *Kath v. Wis. Cent. Ry. Co.*, 99 N. W., at page 221: "The place to work is being changed constantly, and is necessarily incomplete and dangerous; and the employé knows it, and accepts such risks as are ordinarily present in such operations;" citing *Porter v. S. O. & M. Co.*, 84 Wis. 418, 54 N. W. 1019; *Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48, 12 O. C. A. 507; *Moon Anchor, etc., Mines v. Hopkins*, 111 Fed. 298, 49 C. C. A. 347; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. To the same effect, also, is *Swanson v. Great Northern Ry. Co. (Minn.)* 70 N. W. 978, and the statement of facts in that case is almost identical with that in the case at bar. In a concurring opinion by one of the justices it is said: "In this case the inferior servant injured knew, or should have known, as much about the dangers which he was encountering as the foreman knew, or could have been expected to know. They stood upon an equal footing. \* \* \* In this respect the case is different from *Carlson v. Exchange Co.*, 63 Minn. 428 [65 N. W. 914], where a large crack had formed in the soil above the excavation, which the foreman knew, but which the inferior servant injured did not know, and was not in a position to observe. He was injured by reason of the foreman's neglect in failing to warn him." The evidence shows that the foreman repeatedly informed the workmen of the danger incident to the employment; that the workmen frequently talked over the liability of a slide occurring, and were constantly on the lookout for a slide; and, although the plaintiff went upon the stand, he failed to give any evidence to the effect that he was not warned, or that he did not hear the talk between the workmen to the effect that

a slide was likely to occur at any time. The appellant uses this language in his brief: "Nor is there a scintilla of proof to show that appellant ever joined in these discussions or ever heard them." From this statement we are led to believe that the appellant must have been laboring under the impression that the law imposed the duty upon the defendant to prove want of negligence. This, however, is not the law. The burden was upon the appellant to prove negligence upon the part of the respondents. The labor being performed was of a hazardous character, and the appellant's own witnesses upon cross-examination testified that the respondents constantly kept men upon the top of the bank to watch for indications of a slide, to keep the bank clear of logs, etc., and shoot down the bank when it became undermined. And there is no evidence that these men were not carefully selected with reference to the duty which they had to perform.

In our judgment, the respondents were clearly entitled to a nonsuit, and the judgment should be affirmed.

#### ALLEN v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. June 21, 1904.)

#### CARRIERS OF PASSENGERS—PERSONAL INJURIES —NEGLIGENCE — EVIDENCE — SUFFICIENCY— ACCIDENT—PRESUMPTION OF NEGLIGENCE.

1. In an action by a passenger against a carrier for personal injuries, the question of negligence is one of law, for the court, where the facts are such that all reasonable men must draw the same inference from them, and when the conclusion follows, as a matter of law, that no recovery can be had on any view of the evidence.

2. The fact that a passenger is injured by something under the control of the carrier is not necessarily prima facie evidence of negligence of the carrier.

3. A passenger who had left the train and entered a restaurant on a ferry, being informed that his train was leaving him, attempted to climb on the steps of a moving car, when a jerk of the train occasioned by an increase of speed necessary to ascend an incline overbalanced him, and he was struck by some obstruction close to the car, but necessary in the operation of the road. *Held*, that no negligence was shown on the part of the railroad company.

4. There was no presumption of negligence arising from the accident.

Hadley and Dunbar, JJ., dissenting.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by W. J. Allen against the Northern Pacific Railway Company. There was a verdict for plaintiff, and, from an order granting a new trial, plaintiff appeals. Affirmed.

Walter S. Fulton and Vince H. Faben, for appellant. Jas. F. McElroy and B. S. Grosscup, for respondent.

PER CURIAM. This action was brought in the superior court of King county by W.

J. Allen, plaintiff, against the Northern Pacific Railway Company, a corporation, defendant, to recover compensation for personal injuries. The cause was tried before the court and a jury. A verdict was returned for plaintiff, which, upon the motion of defendant, was set aside and a new trial granted by the lower court upon the sole ground, as stated in the record, "that the evidence introduced at the trial herein failed to show any act or acts of negligence on the part of the defendant." The plaintiff excepted and appealed from the order granting the new trial. The only error assigned is that the trial court erred in making said order. The court having stated the ground of its decision in the order granting the new trial, the sole proposition presented for our consideration upon this appeal is whether any act or acts of negligence on the part of respondent appeared in the evidence which became a question for the consideration of the jury at the trial. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

On January 13, 1902, appellant, W. J. Allen, was a passenger on one of respondent's trains, bound from Portland, Or., to Seattle, Wash. When this train reached the Columbia river, an employé thereon informed appellant that he would have sufficient time in which to get breakfast on the ferry. Thereupon the appellant left the train, went into the restaurant on the ferry, and ordered his breakfast. Ordinarily the time occupied in crossing this river on the ferry was about 20 minutes. Soon after commencing his meal, he heard the train give what he believed to be a signal for its departure from the ferry. The man in charge of this eating house said to appellant: "You better hurry up. The train will pull out and leave you." Mr. Allen testified in this connection on his direct examination as follows: "So I just quit eating right there, and paid him for my meal, and walked out, and as I went out the train was moving off. Q. Let me ask you right there, where was the train when you went out, with reference to where you were; that is, on the ferry? A. Well, it was towards the other end of the boat. Q. That is, it was towards this side—the Washington side? A. Towards the Washington side; yes, sir. Q. And you saw it moving, did you, as you came out? A. Yes, sir. Q. And believed that to be your train, did you? A. Yes, sir. Mr. McElroy: I object now to the leading of the witness, if the court please. The Court: I think the questions are leading. Q. What did you do, then, upon coming out and seeing your train? A. Well, I saw the train moving out, and started to catch the train, and I started with a little run to catch it, and it was close to the other end of the ferry, and, as I jumped on the step of the platform—on to the platform of the last car—why, I got one foot on and stepped up to the second step, and as I did so the train gave a very sudden lurch or jerk, and overbalanced me



and threw me off the car, and I struck some timber or piling or something. I don't know what. Q. How fast was the train moving when you came out of the eating house there? A. Well, it was not going fast at all. I did not have no trouble to catch it. I have often caught trains. \* \* \* It was not going over a mile an hour, I don't think. \* \* \* Q. Now, where was this obstruction, with reference to the right of way or the passageway leading from the ferry up on to the mainland? \* \* \* A. Well, it could not have been only just— It was right close to the car, because I remember when I overbalanced on the step with the jerk—with the forcible jerk—that the engine or the car gave, it overbalanced me, and I just tipped backwards, and it struck me some way. I don't know how." Appellant suffered severe injuries, and was picked up in an unconscious condition, in which state he remained for several days. Appellant testified that he received no warning that he should not board the train. Timothy Mahoney, a witness for respondent, testified, in part, that in January, 1902, he was a deckhand on this ferryboat; that witness had his regular work to perform; that it was witness' duty, if he saw anybody about to board the train, whom he thought was liable to get hurt, to stop him. "The train was in motion. Mr. Allen made a move to get on the train, and I told him not to get on, and that is all there is to it." E. E. Weymouth, one of respondent's witnesses, testified that he was the supervisor of bridges and buildings on the Pacific Division of the respondent company; that the clearance between the platform of the coach and the lever or upright with which appellant came in contact when injured was about 26 inches; that this appliance is absolutely necessary for the operation of the pontoon and the receiving of the ferryboat. It also appeared by the testimony that the engine while attached to the cars first moved slowly, and then, as the incline from the ferry to the station at Kalama was approached, it was necessary to increase the speed in order to make the ascent. It would seem from the evidence that the cars must have been in motion for at least 200 feet when appellant boarded this particular car. The following statement, explanatory of appellant's contentions, appears in the brief of his counsel: "The acts of negligence which were alleged and found by the jury to have caused appellant's injuries were the failure of respondent to provide facilities which would have enabled the appellant to safely board the train; starting the train suddenly after appellant had boarded the same; and placing and maintaining in the passage and right of way leading from the ferry a pile, or obstruction of like nature, which rendered the right of way dangerous to passengers situated as was appellant, on trains leaving the ferry." The jury by its verdict affirmed that appellant was free from contributory negligence in

boarding the train, and that he was not warned against so doing by any employé of respondent. All conflict in the testimony was settled by the jury. Therefore the sole question raised on this record is whether the evidence adduced at the trial shows or tends to establish that appellant was injured by the negligence of respondent company, as alleged. Appellant, under the issues as formulated by the pleadings, assumed the burden of proof in that behalf.

The question of negligence is one of law, for the court, only where the facts are such that all reasonable men must draw the same inference from them, and when the conclusion follows, as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish. *Towle v. Stimson Mill Co.* (Wash.) 74 Pac. 471.

It is urged by appellant that, whenever a passenger is injured by something which is under the control of the carrier, the fact of the injury is itself prima facie evidence of negligence on the part of the carrier. In *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, which was an action to recover compensation for injuries sustained by Marie Hawkins, one of the respondents, while she was a passenger riding upon one of appellant's street cars, the trial court, among other things, instructed the jury that "It is the law that, where a passenger being carried on a train is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it." This court held that "such is not the law as laid down by very numerous authorities." At page 597, 3 Wash. St., page 1023, 28 Pac., 16 L. R. A. 808, 28 Am. St. Rep. 72, in the opinion delivered by Stiles, J., the following language, from *Meier v. Pa. R. R. Co.*, 64 Pa. 223, 3 Am. Rep. 581, is quoted with approval: "Prima facie, where a passenger being carried on a train is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care by those employed, or by any other thing which the company can and ought to control as a part of its duty to carry passengers safely; but this rule of evidence is not conclusive." Again, in the opinion of the court in *Klepach v. Donald*, 8 Wash. 164, 35 Pac. 622, this language is used: "A passenger on a railroad train is injured, and the fact of injury alone does not sustain a charge of negligence; but, if the train was derailed by reason of a broken wheel, the presumption arises that the carrier was negligent in not providing a sound one." In *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, the court held that an accident happening to a passenger riding on the railway of the carrier, caused

by the train coming in contact with a landslide, raises, when shown, a presumption of negligence on the part of the carrier, and throws upon it the burden of showing that the slide was in fact the result of causes beyond its control. The general language employed in the court's opinion, quoted by the appellant, should be considered with reference to the facts of the particular case decided. "It is therefore too broad a statement of the rule to say that in all cases a presumption of negligence on the part of the carrier arises from the mere happening of the accident, or an injury to a passenger, regardless of the circumstances and nature of the accident. The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." Elliott on Railroads, vol. 4, § 1644, and authorities cited. In *Fearn v. West Jersey Ferry Co.*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366, the court said: "The cause of the accident was known as well to the appellant as to the company. In such case the presumption of negligence arising from the mere fact that a passenger was injured while on the appellant's boat has no application. \* \* \* As the appellant failed to show any omission or violation of duty by the company in connection with the cause of the accident, we think the nonsuit was properly ordered." The presumption "arises not from the naked fact that an injury has been inflicted, but from the cause of the injury, or from other circumstances attending it." *Pa. R. Co. v. MacKinney*, 124 Pa. 402, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601. In a case where the fact of no negligence is fixed by the proofs, a mere presumption cannot overcome it. *Bernhardt v. Railroad*, 159 Pa. 363, 28 Atl. 140. See, also, exhaustive note, *Barnowski v. Helson*, 15 L. R. A. 33. *Etson v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 68 N. W. 298, was an action to recover damages for alleged negligence on the part of the carrier. The point decided is succinctly presented in the syllabus: "In an action against an electric street railway by a passenger for personal injuries, evidence merely that plaintiff, who was upon the platform to alight as soon as the car, which was slowing up, stopped at the far side of the street—its usual stopping place—was thrown from the car by a sudden jerk when the car was only halfway across the street, is insufficient, in the absence of evidence as to the cause of the sudden jerk, to warrant a recovery by

plaintiff." If this proposition be correct, it follows logically that, if it had appeared that such lurch was necessary to effect a legitimate purpose, there would have been no negligence on the part of the railroad company. See, further, *Schmidt v. North Jersey St. Ry. Co.* (N. J. Sup.) 49 Atl. 438.

The able counsel for appellant argue that the case of *Anderson v. City & Suburban Ry. Co.* (Or.) 71 Pac. 659, is an authority directly in point in support of their contentions in the present controversy. It appeared that a street railway company constructed its tracks so near the superstructure of a bridge as to leave only 18 inches between the frame thereof and the outer edge of the footboard of its open cars; that a passenger, while riding on the footboard with the knowledge and consent of the carrier—the seats inside of the car all being occupied—was injured by coming in contact with a strut of the bridge; and there was evidence tending to show that the car was going at an unlawful rate of speed, and that no warning was given. It was held—and we think correctly—that the company's negligence was a question for the jury. In the case at bar it is not pretended that appellant, when injured, was on this particular step or platform of respondent's car with the knowledge or consent of any of respondent's servants or trainmen. The engine and cars thereto attached had proceeded a considerable distance from their starting point on the ferry when appellant boarded the car without invitation, express or implied, on the part of respondent. In so doing, could he impose upon respondent company the duty of warning him of possible danger? Was the respondent bound, at its peril, to know that a passenger was liable to board one of its cars while in motion at an unusual place, just as the engine was about to make the ascent of this incline? We think that these questions must be answered in the negative. The lurch or jerk of the car on which appellant was riding, and of which he complains, was occasioned by the increase of power necessary to ascend such incline. We fail to see how the appellant can justly charge negligence on respondent or its servants by reason of such sudden movement of the engine and cars, under the evidence and circumstances as disclosed by this record. True, this lurch caused appellant's body to swing out about 26 inches from the car, which brought him in contact with the up-right; but it appeared in evidence that this appliance was necessary to operate the pontoon, and there was no testimony tending to show that it was in a dangerous position. The verdict of the jury settled the question in appellant's favor—that he received no warning at or about the time he boarded the car in question. Still we think that respondent was not bound to warn passengers against boarding its cars under the circumstances shown by this record. A carrier, acting as a prudent and careful person, with a

proper regard for human safety, cannot be held as an insurer against all possible accidents happening to its passengers in consequence of boarding its trains at unusual places while in motion, and coming in contact with objects near the railway track, rightfully placed there for the purpose of operating its line of railroad. We are unable, after a careful research, to find any authority which goes to the extent for which appellant contends.

Appellate quotes from North Chicago Street R. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, the following paragraph:

"Where a railroad company places its tracks so near an obstruction which it is necessary for its cars to pass that its passengers, in getting on and off the cars, and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence."

But that case is plainly distinguishable in principle from the action at bar. The court then adds: "The negligence charged against the company is that it placed the temporary track too near the curb line of the street and the telegraph poles on the east side thereof." Plaintiff, Williams, boarded one of defendant's cars while in motion—propelled by horse power—came in contact with the telegraph pole, and was injured. An important feature in the case is mentioned in the opinion: "When an open car was passing, there were from nine to twelve inches between the telegraph pole and the east ends of the seats; and, if a man stood on the rail or platform running along the east side of an open car passing that point, the distance between his shoulders and the pole would vary from two to five inches in different cars." The evidence tended strongly to show that the street railroad company was negligent in laying its temporary track so near the telegraph pole, which was an obstruction. This pole was in no sense an appliance necessary to operate its business, pertaining to the conveyance of its passengers along its line of road. In that case the proof also showed that the conductor saw the plaintiff before he stepped upon the car, and shouted to him (plaintiff) to "look out" just before he was struck by the pole. In the present controversy it is not claimed that the conductor or any of the train crew saw appellant board the car, or had any reason to believe that he had placed himself in a position to receive injuries when the engine and car made this sudden movement, which became necessary, under the evidence, as we have heretofore stated. While it has been held that boarding a slowly moving train of cars is not per se negligence on the part of the passenger, in case of accident resulting therefrom, still it would seem to follow, as a corollary of this proposition and as a logical sequence, that the carrier ought not to be held liable for actionable negligence in such cases unless the passenger is able to

show affirmatively that the carrier was in some manner at fault in causing the injuries for which damages are sought to be recovered. Elliott on Railroads, supra, and citations.

Applying the foregoing propositions of law to the facts in this controversy, we think that the evidence fails to make out a case of actionable negligence against respondent, that the trial court committed no error in granting the motion for a new trial, and that the order appealed from should be affirmed.

HADLEY, J. I dissent from the conclusion reached by the majority of the court in this case.

Briefly stated, testimony as to the following facts appears in the record: The appellant was a passenger upon one of respondent's trains, making the trip from Portland, Or., to Seattle, Wash. The trains of respondent between Portland and Seattle are transferred across the Columbia river upon a large ferryboat. Coming from Portland, this boat starts at Gobel, on the Oregon side of the river, and lands at Kalama, on the Washington side. Three sets of tracks are arranged upon the boat, and, by means of pontoon approaches, the engines and cars of the trains are run upon these tracks, and drawn from the boat to the shore in the same manner. The trains are usually separated into sections, which are placed upon the tracks aforesaid. At one end of the boat is a lunchroom, which upon the occasion in question was toward the Oregon shore. Appellant inquired of some employé upon the train if he would have time to get breakfast in the lunchroom. He was informed that he would have sufficient time. The usual time consumed in crossing the river is about 20 minutes. Appellant thereupon left his car, went to the lunchroom, and ordered some breakfast. He testified that, before he had finished eating, the bell rang, and that the man in charge of the lunchroom said: "You better hurry up. The train will pull out and leave you," that he thereupon quit eating immediately, paid for his meal, and walked out; that as he went out the train was moving away and he started to catch it; that he jumped onto the step of the last car; that while holding to the railing he got one foot on, and stepped up to the second step, and as he did so the train gave a sudden lurch or jerk, by which he was overbalanced and thrown against a piling or some timber placed in the boat. After he was struck he says he does not remember what occurred. Other testimony shows that he was thrown off the boat, and fell upon some timbers resting upon the water below. He was taken up and left at Kalama in charge of a physician. The accident happened on the 13th of January, and he says he did not recover consciousness until the 1st of February following. He testified that he believed it was his train which he saw moving out; that the person in charge

of the restaurant told him it was, and that he had to catch it to go through; that he had no trouble in getting on, but by the sudden lurch of the train he was thrown against the timber aforesaid. It appeared in evidence that the car in which appellant had been riding was not in the section of cars which he saw moving, but it was still standing upon another track on the boat. He testified, however, that he saw no one to give him warning, and that no one did so, except the man at the restaurant, who told him his train was leaving, and he would have to catch it. Another witness testified that he was an employé of respondent, and that he was at the time stationed upon the boat; that it was his duty to warn passengers against danger; and that he did warn the appellant. From his testimony, the warning which he says he gave must have been given as appellant was about in the act of getting upon the steps. He says that after he gave the warning he turned away, and did not look further after appellant. It was testified that the lurch of the train was necessary in its operation at that place, by reason of ascending the incline leading from the boat to the shore. It was also testified that the timber against which appellant was thrown was about 26 inches from the steps of the car, and that it was a necessary timber for the operation of the boat, as constructed. The foregoing is a substantial statement of the material testimony that may be said to relate to the question of negligence on the part of respondent. The court denied the challenge to appellant's evidence, and afterwards submitted the case to the jury: evidently believing at the time that sufficient evidence of negligence had appeared to require its submission. Upon motion for new trial the court, however, concluded that negligence had not been shown.

It may well be said that the conditions surrounding appellant at the time of the accident were not ordinary. It is not usual to transfer trains of cars across streams in the manner described. The method used is doubtless reasonably safe, and no criticism is to be lodged against respondent for adopting such method. But the method required the separation of the cars of the train into sections. These were placed upon different tracks, and were necessarily moved at different times. It was also necessary to pull them up the incline from the boat to the shore, thus involving the application, suddenly or otherwise, of the required power to effect the ascent. It is manifest that under such circumstances a high degree of care was required of respondent both in the construction and operation of its boat, in the movement of its cars, and in guarding its passengers against confusion and danger. If passengers were permitted to leave the cars at all, the duty rested upon respondent to see that they were warned against danger, and so informed as to train movements that

they need not become confused thereby. No restrictions seem to have been placed upon passengers leaving the cars. The porter of the rear car, called the "observation car," testified that the rear platform thereof was surrounded by an inclosed railing, with a gateway opening through it; that he opened the gateway when upon the boat; and that a number of passengers went out upon the boat and returned to the cars by the same way. He says when the train started he closed this gateway, so that no one could have entered the car from that way afterward. This was the car which appellant attempted to enter, and by way of this platform. Appellant testified that when he jumped upon the steps the way to the platform was open, so that he could have entered. This fact is in dispute between the porter and appellant. But be that as it may it appears, in any event, that a number of passengers, including appellant, were out of the cars and moving about the boat. Passengers thus permitted upon the boat were under the special care of respondent, and were entitled to reasonable warning of liability to danger, and against the probability of confusion by train movements. Appellant says that he received no warning, and saw no one there to give it. This testimony, if true, we think, under all the circumstances, showed at least some negligence upon respondent's part. It is true, as stated, that a witness for respondent testified that he gave appellant warning, but that made the matter of a warning merely a disputed fact, which it was the jury's province to determine. Again, while it was testified that the upright timber which appellant struck was necessary for the operation of the boat as constructed, yet it became a question whether its location so near the side of the cars was necessary and proper in view of the apparently necessary lurching of the train as it passed that point. It has been often held that it is not necessarily negligence per se for one to get aboard a slowly moving train, the fact of negligence depending upon the circumstances of each particular case. Respondent was therefore bound to take notice that, in the absence of proper care or warning, passengers might attempt to get aboard slowly moving cars at or about the point in question, and might possibly, by the necessary lurch of the train, be thrown in contact with the timber only 26 inches in the clear from the cars. I think all these circumstances bearing upon the question of respondent's negligence were at least sufficient to call for their submission to the jury.

It is said in the briefs that the court was mainly influenced in its ruling on the motion for new trial by the decision of this court in *Blakney v. Seattle Electric Co.*, 28 Wash. 607, 68 Pac. 1037. The negligence alleged in that case was the sudden lurch of a street car by which the respondent claimed she was thrown to the ground while in the act of getting off the car. The evidence uncontradict-

ed in the record showed that the respondent did not fall at a street crossing but at a point near the middle of a block while she was attempting to step off the car. She did not notify the conductor, who was busy collecting fares, that she desired to leave the car, but she went to the rear platform for the purpose of getting off. She admitted that she was preparing to alight when she fell, and claimed that a sudden lurch of the car caused her to fall. She was in the act of getting off while the car was in motion, and at a place where it did not usually stop, without any notice to the operators of the car that she desired or was attempting to do so. Witnesses called by the respondent herself testified that there was no jerk of the car, but that the car, already in motion, simply increased its speed while the respondent was in the act of stepping off about the middle of a block. The court held that it was not negligence per se to increase the speed of the car, and that it was not negligence to do so when a passenger was in the act of alighting unless the car company knew, or by the exercise of reasonable diligence could have known, of that circumstance. I do not think that the circumstances of that case are similar to those in the one at bar. The accident occurred at a place where the car company could not reasonably have expected that a passenger would attempt to alight without notice to that effect. It was at a place where the car was properly proceeding on its course, and the company had a right to increase the speed under those circumstances. In the case at bar, however, the passenger was attempting to board a train at a place where it was just starting. Other passengers had gone outside of the cars and returned. The testimony of the porter showed that this was a common occurrence. Respondent must have known that those who had been permitted to leave the cars would expect to return when the train was ready to move. It must have known that, if it permitted its passengers to go out upon the boat, the necessary and reasonable information, warning, and facilities for their safe and timely return should be provided, and those in accordance with the peculiar nature of the surroundings and possibility of attendant danger. Respondent was also chargeable with knowledge of all the conditions, appliances, and surroundings attending the movement of the train at that time and place, and the possibility of accidents happening to passengers returning to the cars. It was therefore for the jury to say whether due care was exercised at that time and place; whether there was lack of proper care in placing the timber so near the cars, particularly when the lurch of the train was necessary as it passed that point; and whether these conspiring together were the proximate cause of appellant's injury. "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the ques-

tion is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed fair-minded men will honestly draw different conclusions from them." *Richmond, etc., Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642. See, also, *Lane v. Spokane Falls, etc., Ry. Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821. As based particularly upon facts somewhat similar to those here involved, and where the question of negligence was held to be for the jury, see *North Chicago, etc., Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Anderson v. Railway Co. (Or.)* 71 Pac. 639; *Kulman v. Erie R. Co. (N. J. Err. & App.)* 47 Atl. 497; 5 Am. & Eng. Enc. of Law (2d Ed.) 581.

I believe the court's first impression of the evidence in this case was the correct one, within the rules governing facts which are for the jury. I therefore think the verdict should not have been set aside on the ground that there was no evidence of negligence on respondent's part.

DUNBAR, J. I concur in what is said by Judge HADLEY.

DAVIS et ux. v. TACOMA RY. & POWER CO. et al.

(Supreme Court of Washington. June 20, 1904.)

PUBLIC RESORTS—RIGHT TO FREQUENT—VIOLATION — DAMAGES — ELEMENTS—SLANDEROUS LANGUAGE—MENTAL ANGUISH—APPEAL—NOTICE—SUFFICIENCY.

1. Under the statute a notice of appeal must be served on all the parties who have appeared in the action and who do not join in the notice, and where this is not done the appeal will be dismissed.

2. Every person, not belonging to a proscribed class, has the right to go to any public place or resort, and to remain there during all proper hours, free from molestation by any one, so long as he conducts himself in a decorous and orderly manner; and a manager of such a resort, who violates this right by subjecting a person to insult, personal indignities, or humiliation while at such a place, is liable to the person injured for any actual damages suffered, irrespective of whether the wrong is one of pure negligence or wanton and willful.

3. If a person operating a place of public resort has the right to exclude therefrom persons whose conduct, dress, or demeanor proclaim them to be members of a disreputable class, that fact does not exempt such person from liability for a mistake made in the effort to exercise that right.

4. Where a wrong sued for is the violation of plaintiff's right to go to and remain in a place of public resort, it is immaterial, except on the question of damages, whether the words accompanying the exclusion of such person from that place were of themselves defamatory or not.

5. Mere words of common abuse are not actionable per se unless a special injury be shown.

6. Where mental suffering is the result of some wrongful act against the sufferer, such

§ 5. See *Libel and Slander*, vol. 32, Cent. Dig. § 16.

mental suffering may be taken into consideration in assessing damages for the wrong, even though there may be no physical injury.

7. In an action for the wrongful exclusion of a person from a place of public resort, mental suffering is a proper subject for consideration in the estimation of damages.

8. In an action for the wrongful exclusion of a person from a place of public resort, where the evidence showed that the person in charge of the place had been informed that a disreputable person had entered the ground and taken a certain direction, whereupon, finding no other person there, he mistook plaintiff for the person meant, and asked her to leave the grounds, but on discovering his mistake almost immediately apologized to plaintiff and her husband for so accosting her, and also called the attention of the proprietor's manager to the mistake, who likewise openly apologized to them, and there was little evidence of actual damages, a verdict for \$750 was excessive.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Wesley Davis and wife against the Tacoma Railway & Power Company and others. From a judgment for plaintiffs, defendants appeal. Reversed as to railway and power company.

B. S. Grosscup, Frank S. Carroll, and A. G. Avery, for appellants. John C. Stallcup, J. W. A. Nichols, and Albert E. Joab, for respondents.

FULLERTON, C. J. This is an action for damages. The respondents, who were plaintiffs below, alleged in their complaint that the appellant railway company was in the year 1902 operating a line of street railway from the city of Tacoma to Spanaway Lake; that for the purpose of increasing its passenger business it had acquired certain lands at the lake named, which it had made into an attractive park, or place of resort, and had placed the appellants Shreeder & Green in charge thereof; that on June 8th of the year named the respondents, attracted by the announcements for that particular day, visited the park, where the wrong occurred of which they complain. This wrong is thus described in the complaint: "That these plaintiffs, seeing said advertisement, procured tickets and took their seats in one of the cars of said defendant railway company, and were thereby conveyed to said park on said day, arriving there a few minutes after 9 o'clock in the evening. That the cars and the park were covered with people, and music and other attractions were there for the entertainment of the visitors. That a very few minutes after alighting from the car upon said grounds, and while plaintiffs were quietly viewing the attractions then upon the said park grounds of said defendants, one Charles W. Cromwell, an employé of said defendants, in charge of said grounds, approached the plaintiff Lenora Davis, and, after staring her in the face in a rude and insolent manner, seized her by the arm in a rough, brutal and insulting manner, and in a loud tone of voice, in the presence and hearing of a large group of people, said to this plaintiff, Lenora Davis:

'You must leave these grounds. You can take the next car, coming in or going out. You are not allowed on these grounds'—at the same time exhibiting a metallic star or badge, and claiming to be an officer and a deputy, attracting the attention of a large number of people to said plaintiff, meaning and imputing by his words and action that said plaintiff Lenora Davis was a lewd and base woman, unfit to be or remain upon said grounds. That she, the said plaintiff is of the age of twenty-seven years, has always conducted herself as a lady of refinement and respectability, and has never at any other time been charged with anything derogatory to her good name, character, and reputation, always having enjoyed a good and spotless name and the high esteem of all her acquaintances. That she was then and there so dazed, shocked, humiliated, insulted, and wounded in her feelings by said words and actions of said Cromwell that she became faint and sick, and could scarcely remain standing, and has not yet recovered in physical health, nor from the great mental anguish and wounded feelings, resulting from such treatment. That the defendant Green was upon the said grounds at the time, and directed the said Cromwell to order the said plaintiff off the said grounds, and aided and participated in said violent and unjust treatment of said plaintiff." Damages were demanded in the sum of \$5,000. Issue was joined on the complaint; the defendant railway company and the defendants Shreeder & Green appearing separately and by different counsel. On the issues made a trial was had before a jury, resulting in a verdict and judgment against all of the defendants for the sum of \$750.

The evidence introduced at the trial did not support the complaint in all of its particulars. It appeared that the managers of the park, desiring to keep the place suitable as a place of resort for respectable people, had employed one Cromwell to warn off of the grounds all persons whose conduct, demeanor, or dress marked them as belonging to or being associated with the criminal or vicious classes; that Cromwell had been informed that such a person had entered the ground and taken a certain direction, whereupon he went in the direction indicated, and, finding no other woman there, mistook Mrs. Davis for the person meant, and addressed her, asking her to leave the ground; that he discovered his mistake almost immediately, and apologized to her and her husband for so accosting her. He also called the attention of the railway company's manager to his mistake, who likewise openly apologized to them therefor. The evidence discloses clearly that there was nothing willful or malicious in the action of the employé. It was a mistake simply, and one that was atoned for by the employé and the manager of the railway company, who was present, in the only manner then possible.

Notice of appeal was first given by Shreeder & Green, and afterwards by the railway company. The respondents move to dismiss the appeal of Shreeder & Green for the reason that they did not serve their notice of appeal on their codefendant, the railway company, nor join in the appeal of the railway company when appeal was taken by it. This motion must be granted. Under the statute a notice of appeal, to be effectual, must be served on all of the parties who have appeared in the action and who do not join in the notice of appeal. This was not done in this case. The appeal of the defendants Shreeder & Green is therefore dismissed.

The appellant railway company insists that, if any actionable wrong is stated in the complaint at all, it is an action for defamation of character, and that the proofs are insufficient to support a recovery for that wrong, because there was no publication of the defamatory matter, and because, further, the words alleged and proved to have been spoken are not actionable per se, and no special damages were proved to have been suffered because of them. But whether this may be called an action for defamation of character, for insult, or for personal indignities, or by some other name, we are clear that an actionable wrong was both alleged and proven. Every person not belonging to a proscribed class, has a right to go to any public place, or visit a resort where the public generally are invited, and to remain there, during all proper hours, free from molestation by any one, so long as he conducts himself in a decorous and orderly manner. This right to freedom from molestation extends not only to freedom from actual violence, but to freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace; and any one guilty of violating any of these rights is liable in all cases for the actual damages suffered therefrom by the injured person. It matters not whether the wrong be one of pure negligence or a wanton and willful wrong, an action will lie for the actual damages suffered. Actual malice or wanton and willful conduct on the part of the defendant is material only on the question of punitive or exemplary damages, and must be shown in order to recover such damages; but the plaintiff may recover actual or compensatory damages regardless of whether there was any actual malice or intent to commit a wrong on the part of the defendant. When the employé of the appellant ordered Mrs. Davis from the grounds in question, he committed a wrong for which she is entitled to recover for any actual damages suffered. If it were true that the company had the right to exclude from these grounds persons whose conduct, dress, or demeanor generally proclaimed them to be, or whom it knew to be, members of a class with whom decent people do not associate, this fact would not exempt it from liability for a mistake made in the effort to exercise that right.

An actual voluntary injury must be compensated for by the person who commits the injury, no matter how innocent he may be of intentional wrong. It is unnecessary, therefore, to inquire whether the words spoken at the time were of themselves defamatory, or whether they were published in the legal sense of the term, as the words spoken were not of themselves the basic wrong. The wrong consisted of the act itself, of the violation of a right of the plaintiff; and the manner in which the act was done and the words spoken are material only on the question of the amount of damages. If the conduct of the employé was rude and insolent, if his tone was loud and boisterous, if the words spoken were indecent or profane, or if a number of people were witnesses to the transaction, the insult, indignity, humiliation, and disgrace felt by the injured person would be much greater than it would be if the conduct of the party and the situation were the opposite of these. While the act partakes of the nature of defamation of character, it has in it, in addition, some of the elements of an assault, although strictly speaking it is not either. It must not be understood, however, that we hold mere words of common abuse actionable per se. They are not so unless a special injury be shown. But if an actionable wrong is otherwise committed, it can be shown that it was accompanied with words of common abuse to enhance the damages.

The court instructed the jury that they were not limited to the actual physical injuries suffered by the person injured, but might take into consideration her sense of wrong, feeling of humiliation, disgrace, and mental suffering in estimating her damages. The appellant assigns error on this instruction, contending that mental suffering, apart from a physical injury, is not an element of damages. The rule, however, is not so broad as this. It is probably true that no court has allowed a recovery for mental suffering, even though it resulted in a bodily injury, where the defendant has been guilty of no wrongful act as against the person seeking the recovery. If, for example, a person passing along a public street should be forced to witness an injury inflicted upon the person of another by the negligence of a third person, there could be no recovery by the first against the third, even though the shock caused by the horror of the sight produced such mental suffering as to materially affect the health of the first person. But when the mental suffering is the result of some wrongful act against the sufferer, even though there may be no actual physical injury, this court has held, and the courts generally hold, that such mental suffering may be taken into consideration in assessing the damages for the wrong. *Wilson v. N. P. R. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Gray v. Washington Water Power Co.*, 30 Wash. 667, 71 Pac. 206. See, also, *Voorheis on Measure*

of Damages, §§ 97, 98, and cases cited. Furthermore, mental suffering on the part of the person wronged has always been held a proper subject for consideration in estimating damages in an action for slander or libel, and the principle which allows such damages in cases of that character applies with all its force to a case of this kind. We do not think the court erred in giving the instruction complained of.

What we have said covers the exceptions to the purely legal phases of the case, but the appellant complains, and, we think, justly, that the verdict is so grossly disproportionate to the injury proven as to show that it was the result of passion and prejudice on the part of the jury, and not the result of a consideration of the evidence. The evidence going to show actual damages was meager indeed. As we view it, it showed but little more than a bare violation of a technical legal right, which caused a momentary annoyance to the respondents. But giving them the benefit of all doubts, and making a liberal allowance for the mental suffering the injured respondent testified that she had been subjected to because of the wrongful act of the appellant, we can find no warrant for the verdict of the jury. It seems clearly to have been the result of passion and prejudice.

The judgment will be reversed as to the appellant the Tacoma Railway & Power Company, and a new trial awarded as to it.

MOUNT, HADLEY, DUNBAR, and ANDERS, JJ., concur.

#### BECHTEL v. EVANS.

(Supreme Court of Idaho. June 8, 1904.)

##### APPEAL—DISMISSAL—COSTS—WITNESS FEES.

1. Where a party has collected a judgment in his favor, and by the prosecution of an appeal from such judgment, in seeking to gain more, thereby incurs the hazard of eventually recovering less, his appeal should be dismissed.

2. If, however, the appeal is from such an order or judgment that the appellant could in no event recover a less favorable judgment, and that he incurs no hazard of ever obtaining less than the amount received or collected by him, the reason for the rule ceases, and his appeal should be allowed.

3. A successful party should not be disallowed fees for witnesses, who were subpoenaed and attended on the trial, for the reason alone that they did not testify; but the party claiming fees for such witnesses should be required to make a satisfactory showing as to the reasons for their attendance and causes which made it unnecessary for them to testify.

4. Record in this case examined, and held, that there is no error in the order of the trial judge taxing costs.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Shelton Bechtel against William M. Evans. Judgment for plaintiff. From

an order made taxing costs, plaintiff appeals. Affirmed.

George W. Tannahill, for appellant.  
Charles L. McDonald and Forney & Moore, for respondent.

AILSHE, J. This is an appeal from an order, made after final judgment, taxing the costs of the case. On the 7th day of December, 1903, judgment was rendered and entered in the district court in favor of the plaintiff and against defendant in the sum of \$400, and on the 9th day of the same month the plaintiff filed his memorandum of costs and disbursements, claiming the sum of \$420.75 costs taxable therein. Thereafter, and on the 14th day of the same month, the defendant filed his motion to have the costs taxed by the court, and accompanied the same by the affidavit of his attorney, C. L. McDonald, Esq. The plaintiff filed a counter affidavit, and on the 28th day of January, 1904, the matter was heard by the district judge upon the affidavits of the respective parties and the subpoenas and returns thereon, which were among the files in the case. After the hearing the judge made an order disallowing the per diem and mileage for a number of character witnesses subpoenaed by the plaintiff, and further reducing the per diem allowance for other witnesses, disallowing the cost bill in the total sum of \$181, and allowing it in the sum of \$239.75. The judgment was accordingly entered in favor of the plaintiff for the sum of \$239.75 costs. From this order the plaintiff on the 2d day of March, 1904, filed and served his notice of appeal.

The defendant has moved to dismiss the appeal upon the grounds that the judgment has been paid and satisfied, and that therefore the plaintiff cannot prosecute any further appeal. On this motion defendant has submitted a certified copy of the judgment docket of the district court, from which it appears that the defendant on the 4th day of February, 1904, paid in to the clerk of the district court the sum of \$646.80 in full of the judgment, costs, and accrued interest to that date. On the same date this sum was paid over by the clerk to the attorney for the plaintiff, and a satisfaction of the judgment was entered upon the docket and signed by plaintiff's attorney in the following words: "Received from J. R. Lyden, clerk of court, \$646.80, and judgment satisfied in said sum of \$646.80." It will be observed from the foregoing statement that the appeal from the order taxing costs was taken nearly a month after the plaintiff had received the amount of the judgment and entered this satisfaction thereof. The defendant rests his motion to dismiss the appeal upon the ground that, the judgment having been paid and satisfied, the plaintiff cannot prosecute an appeal therefrom. It seems to us, as a general proposition of law, that a successful party should not be allowed to gather in and

¶ 3. See Costs, vol. 13, Cent. Dig. § 718.



enjoy the fruits of his judgment, and thereafter prosecute an appeal and complain of error committed against him. *Estate of Baby*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239; *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37; *Webster-Glover Lumber & Mfg. Co. v. St. Croix County*, 71 Wis. 317, 36 N. W. 864; *Murphy v. Murphy*, 45 Ala. 123; *Corwin v. Shoup*, 76 Ill. 246; *Carll v. Onkley*, 97 N. Y. 633; *Moore v. Floyd*, 4 Or. 200; *Lamprey v. Henk*, 16 Minn. 405 (Gil. 362); *Ruckman v. Alwood*, 44 Ill. 183; *Hall v. Lacy*, 37 Pa. 366; *Fly v. Bailey*, 36 Tex. 119; *Garner v. Garner*, 38 Ind. 137; *Ind. School District of Altoona v. District Township of Delaware*, 44 Iowa, 201.

Upon reason and principle, however, it appears to us that the test should be this: If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal, thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed. If, on the other hand, the appeal is from such an order or judgment as that he could in no event recover a less favorable judgment, and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeal. *Clowes v. Dickenson*, 8 Cow. 328; *Knapp v. Brown*, 45 N. Y. 207; *Alexander v. Alexander*, 104 N. Y. 645, 10 N. E. 37. In this case it should be observed that the appeal is not from the final judgment, and is merely from the subsequent order made by the court striking \$181 from the cost bill. As the appeal comes to this court, however we might determine it, and whatever disposition we might make of the matter—the defendant not having appealed—plaintiff could in no event receive less than the amount allowed him by the district judge. This is not a case where a new trial could be ordered.

For the foregoing reasons we have examined the case on its merits as presented by this appeal. We do not think the court erred in its rulings in taxing costs. It is true the trial judge has not designated in his order the reasons for striking from the cost bill the items enumerated in the order; but, having before us the affidavits and records which were considered by him, we infer that the reasons upon which the order is founded are those contained in the records and files considered. We agree with appellant in his contention that a successful party should not be disallowed fees for witnesses who are subpoenaed and attended upon the trial, for the reason alone that they were not sworn and examined in the case; and we do not understand the case of *Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704, as going to that extent. We do think, however, that, where a party claims fees for witnesses who are not sworn and examined in the case, he should make a satisfactory showing as to the reasons for the attendance of the witnesses and the causes which made it unnecessary for

them to testify. The principal objection made here by appellant is the refusal of the district judge to allow per diem and mileage for 12 witnesses, who, it is claimed, were subpoenaed and attended for the purpose of meeting an anticipated attack upon the plaintiff's character, or, rather, his reputation. After an examination of the respective affidavits, and in view of the weakness of the showing made by the plaintiff as to the reason for the attendance of these witnesses, and the strength of the counter showing by the defendant, we are not prepared to say that the trial judge committed any error in taxing the costs.

The order from which this appeal is prosecuted will be affirmed, and it is so ordered. Costs awarded to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

### ROBY v. ROBY.

(Supreme Court of Idaho. June 7, 1904.)

APPEAL—REVIEW—CONFLICTING EVIDENCE—DIVORCE—WILLFUL DESERTION—WILLFUL NEGLECT—COSTS.

1. Where a trial has been had entirely upon depositions and the trial court has not seen and heard the witnesses, the appellate court is in as favorable position for judging of the truthfulness of the witnesses and the weight of the evidence as the trial judge, and will consider the same as if originally heard in the appellate court.

2. Where the husband establishes a new home, and requests his wife to follow him to the new domicile, and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting his wife.

3. Evidence examined, and held insufficient to entitle the plaintiff to a decree of divorce.

4. A wife, who willfully and without good cause refuses to follow her husband to the home and place of residence selected by him, cannot obtain a decree of divorce from him because he fails to provide for her during the period of her refusal to reside with him.

5. Where the wife appeals in good faith, and the district judge does not order the husband to pay a sufficient sum to defray the expenses of appeal, and it appears that the wife has not sufficient property or means for that purpose, this court will tax any deficiency against the husband, to the end that justice may be done.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Emily H. Roby against Elbert C. Roby. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. W. Tannahill, for appellant. C. L. McDonald, for respondent.

AILSHIE, J. This action was commenced in December, 1902, by the plaintiff praying a decree of divorce on two causes of action. The first cause of action charged willful neglect by the defendant to provide plaintiff with common necessities of life for a period

¶ 2. See Divorce, vol. 17, Cent. Dig. § 123.

of more than one year immediately preceding the commencement of the action, and the second cause was on the grounds of willful desertion. The defendant answered, denying the charges, and by way of separate defense set up what was apparently intended as a plea of former adjudication. The case was referred to a referee, who took the testimony and reported it to the court. After a consideration of the evidence the trial court made and filed his findings of fact and conclusions of law, which were adverse to all of plaintiff's allegations, and thereupon judgment was entered denying plaintiff any relief. This appeal is from the judgment and an order denying a motion for a new trial.

Since the trial judge did not see the witnesses upon the stand and did not hear them testify, but determined the case on depositions, we are in as favorable position to judge of their truthfulness and the weight to be given to the evidence as was the trial judge. In such case the rule that this court will not disturb the judgment where there is a conflict in the evidence does not apply. We have therefore made an original and independent examination of the evidence in the case, with a view to determine its weight and preponderance. It is only necessary to recite briefly some of the leading facts of the case. The plaintiff and defendant were married in 1883, and lived together on a farm until 1890, and reared three children. In 1890 they rented the farm and moved to the town of Orofino. In the spring or summer of 1900, the defendant went into the Pierce City mining district, in Shoshone county, and found employment at what is known as the "French Creek Mines," at a salary of \$40 per month in the winter time and \$60 in the summer time, together with buildings and conveniences for a residence in the neighborhood of the mines. At this time it seems they had the two girls in school, one at Lewiston, Idaho, and the other at Uniontown, Wash., and the husband was paying the expenses. The youngest child, a boy about five years old, remained with the mother at Orofino. After securing employment, and about the month of November, 1900, the defendant wrote to his wife and sent her the money necessary to pay her expenses in making the trip from Orofino to the place of his employment, and requested her to come to him. This the plaintiff did not do, but spent the money for other purposes, and replied to him that she would not live there, and claimed that she could not make the trip at that time of year, and that it was not a fit or convenient place for her to reside with her minor child. No further communication took place between the parties, but some time thereafter, and in the following year, the defendant caused to be published in an Orofino paper a notice to the effect that his wife had refused to live with him, and that he declined to be

further responsible for any bills contracted by her. Matters ran along in this condition without further communication between them until about October, 1901, when, according to the separate defense of defendant, an action for divorce between these parties was tried in the district court upon the same grounds involved in the present action, and which resulted adversely to the plaintiff. No written or personal communication seems to have taken place between them from that time up to July, 1903, when this cause was tried.

It seems that the husband was still willing to support and care for his wife, if she would take up her residence with him at the domicile he had selected; and still he has never manifested any great anxiety to have her with him, by writing or communicating with her in any way. On the other hand, the wife seems to have been willing to live with her husband at Orofino, or on the farm, or some other place which might be suitable to her; but still she did not seem to be pining on account of his absence. In the meanwhile the respondent was steadily employed, and using his earnings to defray the expenses of keeping the two girls in school, while the wife was going from place to place, working for different families, and earning a reasonably fair livelihood for herself and minor child. She had also been given some money and clothing by her father, and some by other relatives and friends. It seems from the evidence that she was fairly well provided with apparel fit to wear in public and to keep up appearances, while, on the other hand, she was very scantily furnished with clothing for comfort and protection from inclement weather. She claims that at the close of the first trial she made overtures to her husband to settle their differences and live together; but the evidence shows conclusively that whatever effort may have been made was done through her attorney, and not by her personally. It would seem that the wife could better convey her feelings and sentiment in such a matter herself in person, and that if she were acting in good faith she would scarcely have cared to impose upon her attorney the delicate, if not pleasant, duty of wooing back her recalcitrant husband. It is significant, at least, that there is nowhere shown any personal request or entreaty on her part for the return of her errant spouse. His absence, we are persuaded, was not very much "against her will." *Schuman v. Schuman*, 93 Mo. App. 106.

The principal point relied on by appellant is that, owing to the ill health of both herself and child, the domicile selected by her husband was not a fit or proper place for them to live, and that the husband knew such fact, and that his selection thereof amounted to a desertion; that by reason of the selection of such domicile, and failure thereafter to provide for the wife while she lived

apart from him, he thereby became guilty of willful neglect. The evidence shows that for about five months of the year it is cold and disagreeable in the French Creek country, and that the snowfall is from two to five feet, and most of the travel for any distance is on snowshoes. It appears that other women live there contented with their families. It is no colder there than at many other places in the state. It appears, however, that very little is doing in society there, and that the theater and ballroom have not yet made their appearance; nor have churches and schools yet been organized in the immediate neighborhood. These conditions, however, are not new to the pioneers of our Western country. Counsel for respondent has so felicitously and eloquently and with reason portrayed this situation in his brief that we quote the following therefrom: "It is true, no doubt, that pleasanter places in which to reside could be found than that where the respondent was working; but the exigencies of business, the necessity of seeking employment where it can be found, frequently cause people to take up their residence at places where they would not live from choice. Yet to say that, simply because of lack of society, churches, etc., at a place where a husband takes up his residence for the purpose of earning money for the support of his family, the wife can refuse to follow him, and at the end of a year secure a divorce from him for desertion, or on the ground of neglect, when he cannot afford to support her at any other place, would place a premium on lethargy, and deaden the ambitions of a man who desired to seek a place in the van of the onward march of civilization, where conditions at the time would be crude, and perhaps for that reason inhospitable. If such were the law, how would our Western prairies and valleys ever have been settled by the daring pioneers who have built up this magnificent country? The history of every Western state shows how sturdy emigrants, taking their families and possessions, traveling in the humble ox wagon, journeyed hundred of miles into the then unknown West, and set up their household gods in places where naught but vastness surrounded them, society, neighbors, schools, and churches being unknown quantities; and these brave men and still braver women were the nucleus around which has grown up a country unexcelled in everything which goes to make it great. Would not the settlement of our frontiers have been retarded for generations if a wife could have refused to accompany her husband for the flimsy reasons attempted to be shown by the appellant herein?"

The wife gives as an additional reason for not following her husband that she was suffering, and had been suffering for many years, from some ailments common to her sex, and that her little son was troubled with a cough which made it necessary for

them to be where they could consult a physician. This has not been satisfactorily shown. It does not appear that she was under the care of a physician, nor that she was suffering seriously from any ailment. In this case we think the husband has taken about as little interest in his wife as she has manifested for him. If he had been more zealously concerned for the happiness and welfare of his wife, he would now, perhaps, have less cause for complaint. A little more consideration and forbearance on his part might have avoided, for them both, the wasting of their substance and revelation of their differences in the divorce courts. Under all of the facts in this case, we think the trial judge did right in denying the divorce.

Appellant complains of some of the findings, and the failure to make findings as to separate and community property. After the court found that no decree of divorce should be granted, it became unnecessary to find anything about the property owned by them or either of them. The third finding, which relates to the plea of a former adjudication, became immaterial in this case, because the facts were against the plaintiff on the merits. It is true there was no evidence justifying this finding, and we are not informed how it came to be made. It could not have changed the decree, whatever the findings might have been on this issue. The judgment was not based upon a former adjudication, but upon the merits. It is clear to us that, when the defendant left his home and went to the mines to seek employment, he had no intent of abandoning his wife. It is equally clear that he sent her the money in good faith with which to make the trip to his new home. While, to his discredit, he has failed to provide for her since her refusal to take up her residence with him, the law, however, for obvious reasons, does not require a husband to provide for his wife so long as she declines, without good cause, to live with him. Page v. Page (Mich.) 18 N. W. 245; Hardenbergh v. Hardenbergh, 14 Cal. 654; Schuman v. Schuman, 93 Mo. App. 99; Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; Beck v. Beck, 163 Pa. 649, 30 Atl. 236.

Appellant complains of the action of the trial judge in not making more liberal allowance for suit money and attorney's fees for the prosecution of her action and the preparation and prosecution of her appeal. It seems that \$80 was allowed to cover all of plaintiff's costs for the trial in the lower court, and she managed to get along with that sum; but we are not informed as to just what the costs and expenses were there. She was also allowed \$75 to cover the expenses of prosecuting her appeal to this court. The transcript in this case covers 192 printed pages, and appellant's brief consists of 15 printed pages. In addition to this is the expense of having the stenographer's notes extended, fees in this court, and attorney's fees. The record shows that the plaintiff has no sep-

arate property, and is certainly not prepared to meet these heavy expenses. The amount allowed for the prosecution of the appeal would be exceedingly meager fees for the attorney in prosecuting the case on appeal. We shall therefore direct that, in addition to the \$75 allowance already made, the costs of this appeal be paid by the respondent.

Since we have reached the foregoing conclusion, it is unnecessary for us to consider any other matters discussed in the briefs. Judgment affirmed, and costs awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

#### SPOTSWOOD et al. v. MORRIS et al.

(Supreme Court of Idaho. June 6, 1904.)

REAL ESTATE BROKERS—ACTION FOR COMMISSION — PLEADING — FACTS UNKNOWN TO PLAINTIFF—ELECTION BETWEEN COUNTS.

1. In an action to recover commission for the sale of real estate, under circumstances where the exact legal nature of plaintiff's right and defendant's liability depends upon facts within the peculiar knowledge of the defendant, the plaintiff may set forth the same single cause of action in several counts and with different averments, so as to meet the possible proofs which will appear on the trial. In other words, when a plaintiff has two or more distinct and separate reasons for the right to the relief he asks, or when there is some uncertainty as to the ground of recovery, the complaint may set forth a single claim in several distinct counts.

2. *Held*, that the complaint states a cause of action.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by A. T. Spotswood and others against J. B. Morris and others. Judgment for defendants, and plaintiffs appeal. Reversed.

I. N. Smith, for appellants. James E. Babb and Daniel Needham, for respondents.

SULLIVAN, C. J. This is an appeal from a judgment of dismissal given and entered after demurrers to the complaint were sustained. The action was brought to recover commission alleged to have been earned in a real estate transaction. It is alleged in the complaint that the defendants are a voluntary unincorporated joint-stock company. The plaintiffs, who are appellants here, are real estate dealers. The defendants owned a large tract of land situated in Idaho county, which they, through their vice president and secretary, placed with plaintiffs for sale at a specified price. Said contract was entered into in the month of May, 1902, and was for the sale of 2,720.80 acres of land so as to net the defendants \$17.50 per acre and to pay the plaintiffs 5 per cent. commission over and above that price. It is alleged in

the complaint that after the employment as aforesaid they entered upon the discharge of their contract, and procured a purchaser for said lands who was ready, willing, and able to purchase the same and pay therefor, and introduced said purchaser to the defendants through said association's vice president, but that thereafter, and while plaintiffs were still negotiating with said purchaser for the sale of said lands, the defendants concluded and perfected a sale of said lands to said purchaser for the sum of \$47,000 on August 15, 1902, the same being a smaller sum than that for which the defendants had listed said land with the plaintiffs, and that the plaintiffs thereafter demanded the payment of their commission, amounting to the sum of \$2,350, with interest at 7 per cent. per annum from August 15, 1902, no part of which has been paid. And by way of charging the same cause of action in a different form and as a second count, the appellant alleged, after reiterating several allegations of the first cause of action or count, that the transactions had between the defendants and said purchaser, after the introduction of said purchaser to them by the plaintiffs, are peculiarly within the knowledge of the defendants, and for that reason plaintiffs asked to be permitted to and did state their cause of action on a quantum meruit, and allege that their services in procuring said purchaser were reasonably worth 5 per cent. on the amount for which said lands were sold, amounting to \$2,350, and that the same had not been paid. By way of charging the same cause of action in a different form, and as a third count of the complaint, the plaintiffs reiterate numerous allegations found in the first cause of action, and aver that the transaction had between the defendants and said purchaser, after the introduction of the purchaser to said defendants by the plaintiffs, were peculiarly within the knowledge of said defendants; and plaintiffs therefore ask to be permitted to charge the same cause of action in a third form, and aver that by the various actions of the said defendants, in so making such sale to such purchaser at a sum less than that to which said lands had been listed by the defendants to the plaintiffs, the plaintiffs became and were prevented from concluding the sale with the purchaser upon the terms and for the price which said lands had been listed with plaintiffs, and had thus prevented the plaintiffs from completing said sale and deprived them of their commission, and that by said acts of the defendants plaintiffs became and were damaged by the breach of said contract by the defendants in the sum of \$2,350, with interest, and pray for judgment for that sum. Thereafter the defendants moved that the plaintiffs be required to elect as between the three causes of action or counts stated in the complaint, and demurred to the complaint on several grounds. The court sustained the motion requiring the plaintiffs to elect, and they elected to stand on the second count of

the complaint, and the other two counts were stricken out by order of the court. The court also sustained demurrers to the complaint. Counsel for appellants refused to amend the complaint, and judgment of dismissal was entered, from which judgment this appeal is taken.

The appellants have specified seven errors. The first is that the court erred in sustaining the motion to compel plaintiffs to elect. It appears from the complaint that the same cause of action is stated in three different counts. It appears from the allegations of the first count that the recovery is sought on the contract alleged to have been entered into for the sale of said real estate, and the allegations of the second count show that the recovery is upon a quantum meruit, and the third that the defendants were prevented from concluding the sale with the purchaser by the acts of the defendants by their selling the land to said purchaser at a lower price than they had listed it to plaintiffs, and that they were therefore injured in the amount of their commission, \$2,350. It is contended by counsel for appellants that the facts constituting the sale of said real estate between the purchaser and the defendants were peculiarly within the knowledge of the defendants, and for that reason the plaintiffs are permitted to state their cause of action in as many forms as may be necessary to meet the contingency of the proof. In support of that contention counsel cites *Rucker v. Hall* (Cal.) 38 Pac. 962, where it was held, in an action to recover commissions for a sale of real estate under a contract for payment thereof at a certain rate if certain facts were true, and at another rate if other facts were true, and all the facts are peculiarly within the knowledge of the defendant, plaintiff may state his cause of action in different counts accordingly, and should not be compelled to elect on which one he will proceed. Section 576 of Remedies and Remedial Rights, by Pomeroy, is also cited. Inter alia, the author there states: "Under peculiar circumstances, when the exact legal nature of plaintiff's right and of the defendant's liability depends upon facts in the sole possession of the defendant, and which will not be developed until the trial, the plaintiff may set forth the same single cause of action in varied counts and with different averments, so as to meet the possible proof which will for the first time fully appear upon the trial. This proposition is plainly just and right, and is sustained by the authority of able courts." It was held in *Wilson v. Smith*, 61 Cal. 200, under the Code of California, which provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, the plaintiff may set them out in two separate forms, when there is a fair and reasonable doubt of his ability to safely plead them in one mode only. In 5th Ency. P. & P. p. 321, the author states as follows: "When a plaintiff has two or more

distinct and separate reasons for the obtaining of the relief he asks, or when there is some uncertainty as to the grounds of recovery, the complaint may set forth the same claim in several distinct counts or statements." Numerous authorities are cited in support of that statement. In the case of *Smith v. Anderson*, 2 Idaho, 495 (Hasb. 537) 21 Pac. 412, the cause of action was stated in two different counts—the first on a contract, and the second upon a quantum meruit. But it does not appear to have been decided whether the plaintiff could have been compelled to elect on which count he would rely.

Counsel for respondent cites, in support of the action of the court in compelling the appellant to elect, section 576, Remedies and Remedial Rights, and *People v. Slocum*, 1 Idaho, 62. In the latter citation it appears that a demurrer was interposed to the complaint, the third ground of which was that the complaint was ambiguous, uncertain, etc. Chief Justice McBride, in passing upon the demurrer, stated: "The complaint contains four counts, setting up claims for recovery; but whether they are really one claim stated in different forms, or separate and distinct claims, it is difficult, on reading the complaint, to discover. Whether the plaintiff intends to say that they have suffered losses amounting in the aggregate to \$14,000, or whether they intend to fix them at \$8,000, or \$5,000, it is impossible to tell on a comparison of the counts with one another"—and the demurrer was sustained on the ground of ambiguity and uncertainty. It is then stated by the learned Chief Justice that "the rule under the Code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint; but it does not permit a party to set out the same cause of action under different forms." The last statement there made, to wit, that it does not permit a party to set out the same cause of action under different forms, was not necessary to a decision of the point there under consideration, and was dictum, and is overruled. We think that the rule is well settled by an overwhelming weight of authority that where a plaintiff has two or more distinct and separate reasons for the relief he asks, or when there is some uncertainty as to the grounds of recovery, he may set forth such claim in several distinct counts or statements in his complaint. The court erred in compelling the plaintiffs to elect on which count of the complaint they would proceed.

The other errors assigned may be considered under the one assignment, to wit, that the court erred in sustaining the demurrers. It is shown by the record that counsel for defendants, after the motion to elect had been sustained by the court, and after counsel for appellants had elected to proceed on the second count of the complaint, filed their demurrers to said second count on the ground that it does not state facts sufficient to con-

stitute a cause of action, and that the same is uncertain, or ambiguous, or unintelligent, in that it seeks a recovery upon an express contract for a certain sum, also on an implied contract for a reasonable sum; each of said grounds of recovery being inconsistent with the other. While it is true that plaintiffs reiterate and repeat the allegations numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the first cause of action as the complaint stood after the election of plaintiffs to stand on the second count, those allegations must be considered as a part of the second count of said complaint; and, as we have determined above that it was error to compel the plaintiffs to elect on which one of the counts they would proceed to trial, we must then consider whether the complaint as it originally stood states a cause of action, although the demurrer sustained by the court was aimed at the second count of the complaint alone. After a most careful consideration of the allegations of the complaint, viewed in the light of the very thorough and exhaustive oral arguments and briefs of respective counsel, we conclude that the complaint states a cause of action, and there was error in sustaining said demurrers. We do not intend to, nor do we, hold that under the articles of association referred to in the complaint the vice president and secretary of said association had the authority to list said real estate with the plaintiffs for sale; but we hold, under all of the facts alleged in the complaint, that a cause of action is stated, and, if the defendants have a defense to said action, it must be made by answer and proof.

The judgment of dismissal must be reversed, and the cause remanded, with instructions to the trial court to permit the defendants to answer. Costs of this appeal are awarded to the appellants.

STOCKSLAGER and AILSHIE, JJ., concur.

#### ROBERTSON v. MOORE et al.

(Supreme Court of Idaho. June 4, 1904.)

COMPLAINT—FORECLOSURE OF LABORERS' LIENS—CONFLICTING EVIDENCE—JUDGMENT—NOTICE OF LIEN—APPLICATION FOR CONTINUANCE—FEES IN MECHANICS' LIEN CASES.

1. A complaint for the foreclosure of a laborer's lien that sufficiently describes the property, fixes the time and manner of labor, the amount due, and that the lien was filed within the statutory time, together with necessary requirements in ordinary suits in equity, is sufficient.

2. Where there is a substantial conflict in the evidence on material issues involved, this court will not reverse the trial court, either in law or equity cases, where the case has been tried on oral evidence.

3. By the provisions of "An act to secure liens for mechanics, laborers, materialmen and other persons," found in Sess. Laws 1899, p. 148, § 4, the trial court is required to ascertain the amount of land necessary for the convenient use of the property to be sold, and it is error not to do so.

4. The notice of lien should contain a statement of the demand, the name of the owner or reputed owner, if known, the name of the person by whom employed, and a description of the property, which claim must be verified.

5. An application for the continuance of a cause appeals to the sound discretion of the trial court, and his ruling thereon will not be disturbed by this court, unless it appears that there has been an abuse thereof.

6. Attorney's fees are allowed in the foreclosure of mechanics' and laborers' liens.

7. In an action to enforce a mechanic's or laborer's lien, where it is shown by counterclaim or cross-complaint that there is a demand for affirmative relief, either party is entitled to a jury trial on that issue, if it is in the nature of an action at law.

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Action by P. C. Robertson against A. W. Moore and others. Judgment for plaintiff. Defendants appeal. Modified.

Fogg & Nugent and W. H. Cassady, for appellants. L. Vineyard, for respondent.

STOCKSLAGER, J. This cause was tried in the district court of Idaho county. Judgment was in favor of the plaintiff, from which, and an order overruling a motion for a new trial, the appeal was taken. A demurrer was sustained to the first and fourth causes of action, and overruled as to the second and third, set out in the complaint. Thereafter a motion was submitted to the court to strike out of the complaint all of the second and third causes of action, designated as paragraphs 5, 6, 8, and 9; also all of paragraph 7 except the following words: "Plaintiff avers that the sum of \$625.25, and no more, has been paid on said contract above mentioned, which is described in said lien;" also all of Exhibit A, designated in said complaint as "laborer's lien"; also all allegations in relation to said claim of lien that appear in his said second and third causes of action in said complaint—on the ground that the same is irrelevant and redundant matter, for the reason that it appears on the face of said causes of said action and said claim and notice of lien that no lien or right to a lien exists upon said causes of action, and that said notice of lien does not comply with the statutory requirements essential to a valid lien in such matters, and that the same is void. This motion was overruled. The second and third causes of action set out in the complaint are as follows: "Plaintiff, for a second cause of action against the said defendants, alleges that on the 13th day of May, 1902, he entered into a second agreement with the said defendant Wilbur E. Moore, as the agent of the said defendants, and on their behalf, by which agreement plaintiff agreed to transport and place said mill machinery upon the site where the same was to be erected and constructed, to wit, upon the said Crystal Butte mine, for which said work and

¶ 6. See *Mechanics' Liens*, vol. 24, Cent. Dig. §§ 651, 653.

labor the plaintiff was to be paid, under said agreement, what the same should be reasonably worth per day, in the event the plaintiff should succeed in so moving said mill machinery. Plaintiff avers that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendants, nor either of them, has not paid anything on said agreement, except as hereinafter mentioned; that under said last agreement the said plaintiff worked in moving said machinery to said Crystal Butte mine for the period of 74 $\frac{3}{4}$  days; that the same was and is reasonably worth the sum of \$10 per day, which is due and owing plaintiff from said defendants under said agreement. To avoid repetition, plaintiff hereby incorporates paragraphs 5, 6, 7, 8, and 9 of this complaint as parts of this second cause of action, and for that purpose refers to the same." The third cause of action alleges "that on the 1st day of August, 1902, the plaintiff entered into an agreement with the said Wilbur E. Moore, agent for and acting on behalf of said defendants, to erect and construct said mill machinery, as specified in second cause of action, into a quartzmill of ten stamps, complete in all its parts, on said Crystal Butte mine, together with tramway running from said mill to the lower tunnel of the Wise Boy mining claim, a distance of about 1,000 feet; the said defendants to furnish the plaintiff all materials necessary and requisite to do and perform said agreement on his part, and to board said plaintiff while performing said agreement at the rate of \$1 per day, and to pay the plaintiff for building said mill and tramway what the same should be reasonably worth per day, until the same was completed; and plaintiff avers that he completed said quartzmill building and tramway under said contract on the 11th day of November, 1902, and that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendants, nor either of them, has not paid the said sum of \$10 per day for the period of 103 days, the period of time consumed in performing said contract, nor have the defendants, or either of them, paid any part thereof, except as hereinafter mentioned, but the same is due and owing from the defendants to plaintiff. To avoid repetition, plaintiff hereby incorporates paragraphs 5, 6, 7, 8, and 9 of this complaint as a part of this third cause of action, and for that purpose refers to same." The fifth allegation is "that the lands upon which said quartzmill and tramway was so erected, and upon which plaintiff worked and labored as aforesaid, are described as follows, to wit: The Crystal Butte lode mining claim and the Wise Boy lode mining claim, situate in Robbins mining district, Idaho county, Idaho; the same being prominent and well-known mining claims in said district, and being duly recorded in the records of quartz in said county and state. And plaintiff avers that the whole of said mining claims are re-

quired for the convenient use and occupation of said quartzmill building." The sixth allegation is "that at the dates of the said above several contracts the defendants were the owners and the reputed owners of the said two lode mining claims, and ever since have been and now are the owners of said mining claims, and the said quartzmill building and tramway erected and constructed thereon." The seventh relates to the filing of lien which is termed "Exhibit A" of the complaint. The eighth shows the amount paid for verifying and recording lien. The ninth alleges that \$250 is a reasonable attorney's fee, etc. The answer denies all the allegations of the complaint, including the sufficiency of the lien set out in Exhibit A of plaintiff's complaint. Avers that plaintiff represented himself as a skilled and competent millwright, as an inducement to his employment to perform the services mentioned in his third cause of action, and also that he was a skilled and competent mill builder and operator, and a competent sawyer; that plaintiff undertook and agreed to perform all the services in a skillful and workmanlike manner, and that said representations and agreement on plaintiff's part were the inducement and consideration of said contract of employment upon which said plaintiff's cause of action is based; that by reason of the unskillful, careless, and unworkmanlike manner of construction, a certain retaining wall, being an essential part of the foundation of said quartzmill, fell during the progress of said construction, and that by reason of extra expense and delay the defendants were damaged in the sum of \$350; that plaintiff, in his unskillful, careless, and unworkmanlike manner of operating the sawmill, caused the destruction of a certain saw, of the value of \$100, and they were thus damaged in the sum of \$100, making a total damage of \$450, which they ask may be offset against any sum that may be found for the plaintiff; that defendants did not at any time agree to pay plaintiff for his services what the same should be reasonably worth per day, or any sum greater than \$5 per day.

Upon the issues thus framed this cause was tried without a jury, and on the 20th day of May, 1903, the court filed its findings of fact and conclusions of law. The court finds "(1) that for the period of 74 $\frac{3}{4}$  days, commencing on the 13th day of May, 1902, the plaintiff, P. C. Robertson, performed work and labor for said defendants, at the instance and request of Wilbur E. Moore, the authorized and acting agent of said defendants, in transporting and moving certain quartzmill machinery to the Crystal Butte mining claim, to the place on said claim where the same was to be erected, in the Robbins mining district, Idaho county, Idaho; the said mining claim being owned and possessed by the defendants, except defendant Wilbur E. Moore." The second finding is "that said work and labor were and are reasonably worth the sum of \$7.50 per day, the same being in all

things fully performed by the plaintiff according to the terms of the agreement set forth in the complaint herein, for which the plaintiff has been paid; that nothing is due and owing thereon from defendants to plaintiff; that the sum of \$625.25 has been paid by defendants to plaintiff, which overpays the above amount in the sum of \$64.37." The third finding is "that for the period of 103 days, commencing on the 1st day of August, 1902, the said plaintiff, under a contract made with Wilbur E. Moore, as the agent of said defendants, erected said quartzmill machinery into a ten-stamp quartzmill, complete in all its parts, on the said Crystal Butte mining claim, mentioned in finding No. 1 of these findings; and did, during said period of 103 days, under said contract, construct and build a tramway, about 1,000 feet in length, from said mill, and connected therewith, and running therefrom to what is known as the lower tunnel of the Wise Boy mining claim; that said tramway is used in conveying ore or quartz rock from said Wise Boy mining claim to said mill; that, under said contract so made for building said quartzmill and tramway, the defendants agreed to pay the plaintiff, by and through their said agent, Wilbur E. Moore, what the same should be reasonably worth per day; that the same is reasonably worth the sum of \$7.50 per day for the said period of 103 days, as set forth in the complaint herein." The fourth finds "that \$64.37, and no more, has been paid by defendants on account of building in said quartzmill and tramway described in finding No. 2 above." The fifth finds "that the amount of \$703.13, and interest thereon at 7 per cent. per annum from the 1st day of January, 1903, is now due and unpaid, according to the terms of said contract, as set forth in said finding No. 3, and complaint herein." The sixth is "that the lands and premises upon which the said quartzmill and tramway were constructed and erected, to wit, the Crystal Butte lode mining claim and said Wise Boy lode mining claim, set forth in the complaint herein, and situated in Robbins mining district, Idaho county, Idaho, were and are owned and possessed by the said defendants, they being the owners and reputed owners thereof, except defendant Wilbur E. Moore, who has no interest as owner in said Crystal Butte mining claim." The seventh is "that all that part of the Crystal Butte mining claim upon which said quartzmill and appurtenances and tramway are built, together with so much of the grounds as the Wise Boy mining claim, in and upon which said lower tunnel is run and connected with the said mill by said tramway, are requisite for the convenient use and occupation of said quartzmill building and tramway." The eighth is "that on the 20th day of December, 1902, the plaintiff, to perfect a lien for the moneys so due him from defendants, set forth in the complaint, filed for record in the recorder's of-

fice of Idaho county, Idaho, his notice of lien, and the same was duly recorded in said office." The ninth is "that plaintiff paid out as costs for filing and recording said lien the sum of \$2.80, and that \$110 is a reasonable attorney's fee." The tenth is that all the above sums, together with interest and accruing costs, are each and all a valid lien upon the said quartzmill building and tramway, together with so much of the land and premises of the said Crystal Butte and Wise Boy mining claims as is requisite and necessary to the convenient use and occupation of said mill building and tramway, and upon which the same is secured by the notice of lien mentioned in the complaint in this action. The eleventh finds "that each and all of the allegations and averments in the complaint herein, except as modified and qualified by these findings, are true." The twelfth finds "that the said defendants are not entitled to recover of the plaintiff any of their said alleged damages mentioned in their answer in this action." The thirteenth is "that each and all of the terms and conditions of said lien have been broken by the said defendants."

As conclusions of law, the court finds that plaintiff is entitled to judgment for the sum set out in the findings, and that plaintiff is entitled to have his lien enforced. The judgment follows the findings of fact and conclusions of law.

The first assignment of error is that the court erred in overruling defendants' demand for a jury trial. We obtain the following facts from the record: "Be it remembered that on this 7th day of March, 1903, in open court, the plaintiff demanded that this cause be heard by the jury, and the court overruled the demand, and held the cause to be one in equity and triable by the court; and at this time the jury was permanently discharged for the term. And now, on the 17th day of March, 1903, the cause was called for trial before the court without a jury, and the defendants demanded that the cause be tried by a jury; claiming the lien, under the facts, to be an invalid lien, and that the matters to be tried were therefore issues of law. And be it further remembered that, before entering upon the trial of said cause, the following objection was made: 'Come now the said defendants severally, and object to the trial of this cause before the court without a jury, for the reason that the complaint does not state facts showing any cause of action in equity, or entitling the plaintiff to any equitable relief, particularly in that there are no facts shown creating any lien upon the property, and that the complaint, at best, simply states an account for work and labor against defendants, or a portion of the defendants.'" It is here shown that defendants did not join plaintiff in his demand for a trial by jury, but 10 days afterward, and 10 days after the jury had been discharged for the



term, when the case was called for trial, a jury trial is demanded, not on their demand for damages in the sum of \$350 for the unskillful manner in which plaintiff has constructed the retaining wall, or the sum of \$100, alleged to be the result of plaintiff's unskillful manner of operating the saw, but for the reason there were no facts shown creating any lien upon the property. If the demand had been made for the submission of the question of damages set up in the counterclaim, then the court should have submitted that issue to the jury for a determination thereof, and it would have been error to refuse to do so. Under the circumstances, we find no error in the ruling of the court. *Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211.

It is urged that attorney's fees cannot be allowed in cases of this character. This court recently passed upon this question. *Thompson v. Wise Boy M. & M. Co.* (Idaho) 74 Pac. 958.

The second assignment is based on the refusal of the court to grant the defendants a continuance until the evidence of W. E. Kelly could be secured. The affidavit of Wilbur E. Moore states: "W. E. Kelly is, and for a long time past and ever since the 1st day of February, 1903, has been, at the mill situated on the Crystal Butte quartz claim, near Hump, Idaho; that his duties there are such as to require his constant attention, and he could not absent himself from his said business at said place without great loss to said business; that said W. E. Kelly had arranged to be in attendance as a witness at the trial of this cause, and to come out immediately upon notification that the case was set for trial; that this cause was set for trial on Saturday, the 14th day of March, 1903; that, immediately after the court set the cause for trial on said day, W. H. Cassady, one of the attorneys for the defendants, wrote said Kelly, notifying him that the case was so set, and also notifying him to come out immediately as a witness; that, in addition to said notice, this affiant wrote the said Kelly to the same effect; that, owing to the extraordinary storms and the impassable condition of the roads, the said W. E. Kelly did not receive the said communication in time so that he could reach the village of Grangeville, the place of holding this court, on the said 14th day of March, or at any time earlier than the 17th day of March, 1903; and that said Kelly, believing that the said trial had already been had, or would be had before he could possibly arrive in Grangeville, did not come out in response to said letter. Affiant positively avers that the reason of the nonattendance of the said witness Kelly at the trial of this cause has been because of the said extraordinary condition of the roads, thereby delaying and impeding communication between Grangeville and the said residence and place of business of the said Kelly, and could not

have been foreseen or prevented by either this affiant or any of the defendants hereto." Applications of this character are largely within the discretion of the trial court, and unless it is shown that there has been an abuse of discretion, the order will not be disturbed by this court. Now, what are the facts? The witness Kelly is a party to the suit. It is shown by the affidavit of Wilbur E. Moore that he was at the time ready to come out when notified. The affidavit did not inform the trial court of the nature or importance of his occupation or employment there. He says: "His [Kelly's] duties there are such as require his constant attention, and he could not absent himself from said business without great loss to said business." This is merely the conclusion of the witness, no facts being stated that would inform the court of the necessity of Kelly's presence at the mill. Applications for a continuance based on the absence of a party to the suit do not appeal with the same force as an application for an absent witness who is a stranger to the litigation. All parties to the suit are supposed to be in attendance, ready for trial, and especially if they are necessary witnesses. On the other hand, a stranger to the litigation may try to avoid the service of process, or purposely absent himself from the jurisdiction of the court; and, even under such conditions, diligence must be shown to procure the attendance of the absent witness, and that such diligence has failed to procure the attendance of the witness through no fault of the party making the application. We find no error in this ruling of the court.

The third assignment of error is based upon the ruling of the court in overruling defendants' demurrer to plaintiff's second and third causes of action. This assignment is not discussed in appellants' brief. We find no error in this ruling of the court.

The fourth assignment relates to the ruling of the court in refusing to sustain defendants' motion to strike out certain portions of plaintiff's second and third cause of action. This assignment is not discussed in the brief. We find no error in this ruling of the court.

Learned counsel who represent the defendants in this case in their brief say: "The main contention between the parties hereto is in relation to the contract of employment under which the services of the plaintiff were performed. It is the contention of the plaintiff that the services set out in his second and third causes of action were performed under implied contracts of employment, and that such services are reasonably worth the sum of \$10 per day. The position of the defendants is that such services were performed under an express contract, and that the plaintiff was to be paid therefor at the agreed rate of \$5 per day." Counsel for respondent accepts this theory, and devotes nearly his entire brief in the discussion

of the evidence bearing on this question, and ably and earnestly insists that the findings and conclusions of the court are amply supported by the evidence. The evidence is too voluminous to quote very extensively from it, and the trial court having heard it all as it came from the witnesses, and having passed upon it, under the long-established rule of this court we should hesitate before disturbing his findings. It is only where it is plainly shown that there is no substantial conflict in the evidence on the material issues, or the trial court has ignored the evidence entirely, and rendered judgment without support from the evidence, that this court will interfere and order a new trial. An examination of the evidence in this case discloses that there is a direct conflict as to the employment of plaintiff; plaintiff insisting that his contract was that he should be paid what his services were reasonably worth, and defendants insisting that it was under the contract price of \$5 per day—A. W. Moore and Wilbur E. Moore so testifying.

The seventh assignment is based on the ruling of the court on the objection of defendants to the admission of any evidence of any acts of Wilbur E. Moore tending to create any liability against the other defendants, or against their property, without proof of the agency of said Wilbur E. Moore, and of his authority to make such contracts. It is shown by the evidence that Wilbur E. Moore was the only representative of the company with whom a contract could be made where the work was being done at or near the mines. He had charge of the checkbook, and says himself that he told plaintiff he could proceed with the work of transporting the machinery. Other defendants were on the ground afterward, and made no complaint that plaintiff had done or was doing the work. Indeed, it is contended by defendants that he was employed to do this work by A. W. Moore, the only dispute being as to wages for the work. There is no error in this ruling.

The eighth assignment is based upon the ruling of the court in admitting any evidence showing or tending to show a lien upon the property of defendants under the complaint and notice of lien. We have already said the complaint was sufficient, and an examination of Sess. Laws 1899, p. 148, § 6, convinces us that the lien complies with the requirements of the statute; hence no error in this ruling.

We now come to the most serious question presented by this record, and that is the sufficiency of the description of the property to be sold to satisfy the judgment, which is as follows: "It is adjudged and decreed that, all and singular, the ten-stamp quartzmill building and tramway situated upon the Crystal Butte and Wise Boy mining claims, lying and being in the Robbins mining district, Idaho county, Idaho, upon which plaintiff filed his notice of lien, and men-

tioned in plaintiff's complaint, or so much of the land and premises upon which said mill building and tramway are situated as may be sufficient for the use and occupation of said mill building and tramway, to satisfy the amount due to the plaintiff from defendants on said judgment, interest, and costs of this suit, and expenses of sale, be sold at public auction by the sheriff of Idaho county, Idaho, in the manner prescribed by law, according to the course and practice of this court," etc. Under the head of "What land or interest therein is subject to lien," our lien law, and the law upon which the lien is founded and this action is prosecuted, says (section 4, p. 148): "The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof to be determined by the court on rendering judgment is also subject to the lien." It will be observed that the court did not comply with this provision of the statute, and fix the amount of land that should be sold for the necessary requirements for the convenient use and occupation thereof, but left it to the sheriff to determine this question. The intention of the Legislature in this provision of the law is obvious. The court has the power to call witnesses to ascertain the amount of land necessary for the convenient use and occupation of the property to be sold under the terms and conditions of the lien and judgment, whilst the sheriff has no such power. It was error on the part of the trial court not to comply with this provision of the statute, and the case is remanded, with direction to the trial court to ascertain the amount of land required for the convenient use and occupation of the property ordered sold under the lien, and, if necessary, to call witnesses for such purpose, and, after such fact is ascertained, to make a proper finding and modify the judgment accordingly.

Other errors are assigned, but, in our view of the case, it is unnecessary to pass upon them.

The judgment is affirmed, with the above modification. Costs are awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

#### EWIN v. INDEPENDENT SCHOOL DIST. No. 8.

(Supreme Court of Idaho. June 4, 1904.)

TEACHER'S CONTRACT—POWER OF TRUSTEES TO DISMISS TEACHER—DISCRETION OF TRUSTEES.

1. A contract between a teacher and a school district, wherein E. is designated as party of the first part, and "the board of trustees of School District No. 8," etc., designated as the party of the second part, and the contract is signed by E. and the individual members of the school board, whose names are followed by the

further subscription, "The Board of Trustees of School District No. 8, in and for the County of Shoshone, State of Idaho," it is *held* to be a sufficient compliance with section 34 of the school act (Sess. Laws 1899, p. 92), to constitute such agreement the contract of the school district and enforceable as such.

2. Under section 45 of the school law (Sess. Laws 1899, p. 96), which authorizes a board of trustees to discharge a teacher "for neglect of duty, or any cause that in their opinion renders the services of such teacher unprofitable to the district," but requires that "no teacher shall be discharged before the end of his term without a reasonable hearing," *held*, that before such a teacher can be removed he must have notice and an opportunity to be heard.

3. Under section 84 of same act (Sess. Laws 1899, p. 106), which empowers the board of trustees of an independent school district "to employ or discharge teachers," without specifying any cause or requiring any notice to the teacher, such board has unlimited and unrestricted power to dismiss, either with or without notice to the teacher, and the exercise of such discretion by the board is not subject to review or control by the courts.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by Elizabeth Ewin against Independent School District No. 8. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Heyburn and John P. Gray, for appellant. C. W. Beale, for respondent.

AILSHIE, J. This case was commenced in the district court of Shoshone county by the plaintiff, Elizabeth Ewin, for the recovery of \$300 damages for her wrongful dismissal as a teacher in the public schools of the town of Wallace. By her complaint she alleges that on the 6th day of April, 1901, the town of Wallace constituted school district No. 8 of Shoshone county, and that Angus Sutherland, J. H. Wourms, and D. O. McKissick were at that time the members of its board of trustees. She alleges that on that date, and while she was the holder of a valid teacher's certificate authorizing and entitling her to teach in any of the schools of Shoshone county, she entered into a contract in writing with the board of trustees of said district whereby they employed her to teach in the public schools of that district at the monthly salary of \$75 for a period of nine months from and after the 2d day of September, 1901; that on the 17th day of May, 1901, and in pursuance to the provisions of chapter 10 of an act of the Legislature approved February 6, 1899, entitled "An act to establish and maintain a system of free schools" (Laws 1899, p. 85), the town of Wallace and the territory formerly comprising school district No. 8 of Shoshone county, was established and created into what was thereafter, and is now, known as the "Wallace Independent School District No. 8," and that thereupon the said independent school district by virtue of law succeeded to all the rights and privileges, and assumed all the duties and obligations, of the old district; that, pursuant to the contract between the

plaintiff and the board of trustees of the old district, she entered upon the performance of her duties as a teacher, and continued to discharge such duties until the 25th day of February, 1902, upon which date the board of trustees of the independent district, "without cause and in violation of their said contract, assumed to discharge the plaintiff as such teacher, in disregard of the terms and conditions of the said contract"; and that they thereafter excluded her from the school building and prevented her from discharging the duties of a teacher for the remainder of the term, to her damage in the sum of \$300, balance due her under and by virtue of her contract for the full period of nine months. The foregoing are, in substance, the allegations of the plaintiff's amended complaint. The contract upon which the action is brought is pleaded in *hæc verba*. To this complaint the defendant district demurred, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment was entered for the defendant, and this appeal is taken therefrom.

The only question presented for our consideration upon this appeal is as to the sufficiency of the complaint. The defendant seems to have urged two reasons in the lower court why its demurrer should be sustained, and has presented the same questions in this court. The first reason presented is that the contract pleaded was never a legal or binding contract between the plaintiff and school district No. 8. This contention is predicated upon the terms of the contract and manner of its execution. The contract on its face purports to have been entered into "between Elizabeth Ewin, party of the first part, and the board of trustees of school district No. 8 of the county of Shoshone, in the state of Idaho, party of the second part," and is signed as follows: "In testimony whereof we have hereunto set our hands the day and year first above written. Angus Sutherland, John Wourms, D. O. McKissick, the Board of Trustees of School District No. 8, in and for the County of Shoshone, State of Idaho. Elizabeth Ewin, Teacher." Section 34 of the school law (Sess. Laws 1899, p. 92) provides that "each regularly organized school district in the state is hereby declared to be a body corporate by the name and style of 'School District No. —, in the County of —, in the State of Idaho,' and in that name the trustees may sue and be sued, hold and convey property for the use and benefit of such district, and make contracts the same as municipal corporations in this state." Under this provision of the statute it is contended by respondent that the contract should have been executed by "School District No. 8, in the County of Shoshone, State of Idaho," by and through its proper officers, and not by the board of trustees in their individual capacity. As a matter of law we think this

contention is correct, but the contract here pleaded discloses upon its face that it was executed for the school district, and as its contract and agreement, and for its use and benefit. It is such a contract as the district could enforce in its corporate capacity, and, on the other hand, one which the individuals composing the board could not have enforced in any other capacity than as trustees of and for the school district. It is true that this is not executed in the manner and form in which the contracts of corporations are usually executed, but it is not so deficient that we would hold it void as between the plaintiff and the school district represented by the trustees who executed it.

The other contention made by the school district is founded upon the provisions of section 84 of the act of February 6, 1899, entitled "An act to establish and maintain a system of free schools." Sess. Laws 1899, p. 105. This act contains 88 sections, and is divided into 10 chapters. Chapter 6 deals with the election and powers and duties of trustees, the employment of teachers, and raising of revenue for the ordinary school district, while chapter 10 provides, *Inter alia*, for the organization of independent school districts, the election, qualifications, powers, and duties of a board of trustees, the raising of revenue, and employment and discharge of teachers. That portion of section 84 upon which the defendant relied for the sustaining of its demurrer is as follows: "The board of trustees of said district must have power to and it is their duty: \* \* \* (2) To employ or discharge teachers, mechanics and laborers, and to fix, allow and order their salaries and compensation, and to determine the rates of tuition for nonresident pupils." It is claimed that this statute gives to the board of trustees of an independent school district absolute power and authority to discharge a teacher, without notice and without assigning any reason or cause whatever therefor. It is argued by the appellant that, since this contract was entered into by the board of trustees of the old district, it must be tested by the provisions of the law governing such boards, and that it could not be terminated in any other manner than that provided for the termination of such contracts by a board of trustees of the ordinary school district. In support of this contention the appellant relies upon that portion of section 45 which provides that: "It shall be the duty of the trustees of each district to employ teachers, on a written contract, and to discharge the same, and to fix, allow and order paid their salaries and compensation and the compensation of the clerk of the board, and to determine the rate of tuition of nonresident pupils, and they shall have power to discharge any teacher for neglect of duty, or any cause that, in their opinion, renders the service of such teacher unprofitable to the district, but no teacher

shall be discharged before the end of the term, without a reasonable hearing." Sess. Laws 1899, p. 96.

It will be seen from the foregoing that a board of trustees of an ordinary school district cannot discharge a teacher before the end of his term without giving him a reasonable hearing, and that such discharge, when made, must be founded upon a neglect of duty, or some cause that in the opinion of the board renders the services of the teacher unprofitable to the district. It will also be seen that, when the Legislature came to providing the powers and duties of a board of trustees for an independent district, they authorized them to "discharge teachers," and that such power and authority is not coupled with any limitation as to cause for such discharge or notice of hearing thereon. Appellant urges that, since section 85 provides that "all the provisions of this act providing for a public school system, wherein not contradictory to or inconsistent with the provisions of this chapter and which may be made applicable to the objects thereof, are adopted as a part of the law governing the establishment and management of independent school districts," the Legislature must be understood as having intended to read section 84 in connection with section 45, and thereby require all removals to be made for cause and upon reasonable notice. It seems to us, however, that such an interpretation and construction of these statutes is unauthorized. In fact, such a construction would do violence to the intent and purpose of the statute and the objects of the Legislature. It was clearly the intention of the Legislature to provide that no teacher of an ordinary school district should be discharged prior to the end of his term, except for cause, and in no event without a hearing. An examination, however, of the subsequent portions of that act, and especially chapter 10, convinces us that the Legislature meant to, and did, give to independent school districts much more ample and plenary powers upon every subject connected with the schools within such districts than they had granted or intended to grant to the ordinary school district. Indeed, the object of converting a district into an independent district is to enlarge the powers and extend the privileges of the new district thus formed, in order to more thoroughly organize, establish, and maintain its public schools, and secure a higher degree of efficiency and discipline in the school work. It is significant to our minds that the Legislature, after having made these requirements as to the discharge of a teacher from a school of the ordinary district, immediately passed to the subject of independent school districts, and authorized the discharge of a teacher without attaching any requirements as to cause for discharge or notice of intention to do so. Under the ordinary and generally accepted rules of construction, the Legislature, in the same

act, having in one section provided that a set of trustees for one class of districts should not discharge a teacher except for cause after reasonable notice, and in a subsequent section providing that the board of trustees for another class of districts might discharge a teacher without limiting that discharge to any cause or requiring any notice, they must be deemed to have purposely omitted the cause and notice from the latter section. It was evidently the intention to authorize a board of trustees of an independent school district to discharge a teacher at will or pleasure. The contract must be read in view, equally, of the provisions of both sections 45 and 84, and the appellant must be deemed to have agreed to subject herself to the contingencies of section 84 in the event the district should, in the meanwhile, become organized into an independent school district.

We do not think the authorities cited by appellant upon this branch of the case support her contention under a statute like ours. In *Farrell v. School District No. 2*, 56 N. W. 1053, a contract was entered into between the board of trustees and a teacher, and before the opening of the school year an election was held, and a majority of the old board went out of office, and the new board immediately met and organized and passed a resolution rescinding the contract executed by the old board in hiring the teacher, and notified him of their action. Of this procedure the Supreme Court of Michigan said: "For this action no reason was given. It was not in the power of the subsequent board to rescind a contract which was lawfully made by the old board without some valid reason therefor. These school contracts are governed by the same rules as other contracts, and, when once lawfully made, are equally binding upon both parties. Neither can violate them without compensating the other for the damages sustained." Here, it will be observed, the decision of the court was not founded upon any statutory provision as to the right of dismissal of the teacher; and the opinion rests squarely upon the general law of contracts. *Thompson v. Gibbs*, 37 S. W. 277, 34 L. R. A. 549, denies the rights of a board of trustees to discharge a teacher except for cause and after notice to him, and a stipulation in the contract authorizing them to do so was held invalid. An examination of that decision and the statutes of the state of Tennessee, upon which it is based, discloses the fact that under section 1192 of the 1884 Statutes of that state it is provided that the school directors are authorized and empowered "to employ teachers and to dismiss them for incompetence, improper conduct, or inattention to duties." In *Morley v. Power*, 5 Lea, 700, the Supreme Court of Tennessee considered the foregoing provision of their statute and the right of a board of trustees to dismiss a teacher, saying: "The right to remove for the causes mentioned in the act is clear, but the very fact that the

causes of removal are specified demonstrates that the discretion is not unlimited. Whenever there is a limitation in the power, the determination whether the case is within the power rests with the courts, not with the officers authorized to remove; for, otherwise, the limitation would be of no avail, the discretion being practically unlimited. Their judgment as to what the law allows them to determine, or as to the extent of their jurisdiction, will be controlled." *School District v. Hale*, 25 Pac. 308, seems to have been decided upon the general principle applicable to the termination of ordinary contracts. The Colorado Supreme Court there says: "It was always true that, where a contract of hiring was entered into between two parties for a fixed period at a definite price, the employer could not escape liability for a discharge without cause. If the contract was broken by the employer, a cause of action at once arose in favor of the one discharged, who might, upon the expiration of the period of hiring, recover damages resulting from the breach." It is worthy of observation, however, that section 3055 of the Code of Colorado, referred to in that opinion, provides that "no teacher shall be dismissed without due notice and upon good cause shown and such teacher shall be entitled to receive pay for services rendered." Here, it will be seen, the statute was positive in its terms both as to the cause and as to the giving of notice. *Kennedy v. Board of Education (Cal.)* 22 Pac. 1042, seems to turn upon the provisions of section 1793 of the Political Code of California, which provides that when certain teachers have been elected they "shall be dismissed only for violation of the rules of the board of education, or for incompetency or unprofessional or immoral conduct." A decision resting upon a statute like that of California cannot be much authority under a statute like ours. *Fairchild v. Board of Education of the City and County of San Francisco*, 40 Pac. 26, simply follows the *Kennedy* Case, and rests upon section 1793 of the Code. In Wisconsin, section 404 of the Revised Statutes provides that a school board may "remove at their pleasure any principal, assistant or other officer or person from any office or employment in connection with any such school," and the Supreme Court of that state, in *Gillan v. Board of Regents of Normal Schools*, 58 N. W. 1042, 24 L. R. A. 336, said: "This power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in a given action cannot be inquired into, or questioned, by the courts." And again they say: "The statute became a condition of his contract, as much as if it was written in it, that the board might remove him at pleasure. He accepted the employment with knowledge of the law on this condition of his contract, and he has no reason to complain of it. These principles appear to be unquestionable. \* \* \* If the exercise of

this discretionary power conferred on the board by the statute is not effectual to remove a teacher in the normal schools and terminate his wages, then the statute is nugatory, and has no force whatever, and it had better be repealed." In *Regina v. Governors of Darlington School*, 51 Eng. Com. L. Rep. 68, the school was founded by royal charter, authorizing the governors thereof to select a master of such school "so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher from the said school, according to their sound discretion." In passing upon the right of the governors to dismiss the master without notice, the Court of Queen's Bench, through Lord Denman, said: "The power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they have been induced to exert it." This case was taken by error into the Exchequer Chamber in 1844, and the judgment of the Queen's Bench was affirmed, Chief Justice Tindal saying: "And there seems nothing unreasonable in the founder's giving such authority to the governors; for there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighborhood, the very suspicion that he has been guilty of the offenses stated against him in the return, the common belief of the truth of such charges amongst the neighbors, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval, fully sufficient in the exercise of a sound discretion, might be suggested." So far as we are able to find, the rule established in this case has never been departed from in the English courts, and the principle, it seems to us, is as sound now and in this country as it was then. In *Eckloff v. District of Columbia*, 135 U. S. 240, 10 Sup. Ct. 752, 34 L. Ed. 120, the Supreme Court of the United States discusses the right of removal where the general power to do so is granted without limitation. The conclusion reached by that court is stated by them as follows: "The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice."

After an examination of the various authorities cited by respective counsel, as well as others, we conclude that the general principle running through them all is that, where the power to remove is restricted or limited to certain reasons or causes, the final determination as to whether the case falls within any of those causes rests with the courts, and may be reviewed or inquired into

by them, and that, on the other hand, where the power is general, unlimited, and unrestricted, and is once exercised, it cannot and will not be questioned or examined into by the courts. It may be exercised either with or without notice. The complaint in this action, showing upon its face, as it does, that the plaintiff was removed by the board of trustees of the independent district, failed to show facts sufficient to constitute a cause of action, and the demurrer was properly sustained.

The judgment of the trial court is affirmed, with costs to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

### CHEMUNG MIN. CO. v. HANLEY.

(Supreme Court of Idaho. May 4, 1904.)

AMENDMENT OF PLEADINGS—TIME—STATUTE OF LIMITATIONS—PLEADING STATUTE AS DEFENSE—DEMURRER RAISING DEFENSE—DEFECTIVE PLEADINGS—WAIVER OF OBJECTIONS—JUDGMENT ON PLEADINGS.

1. Where the plaintiff's attention is directed by demurrer or answer to the uncertainty, insufficiency, or want of certain facts in his complaint, and he reposes and slumbers on his rights for a considerable period of time (in this case two years) without applying to the court or asking leave to amend in those respects, it is not error for the court to refuse an application to amend at so late a date.

2. The plea of the statute of limitations may be taken either by demurrer or answer—by demurrer if it clearly appears upon the face of the complaint that the cause of action did not accrue within the statutory time; otherwise by answer.

3. In this state the bar of the statute must be specially pleaded, and cannot be raised by general demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

4. An allegation that a transaction occurred "on or about the 1st day of August, 1897," and where charging a material and essential fact, is open to demurrer on ground of uncertainty, but, if not taken advantage of by demurrer, will be deemed waived, and proofs will be admissible to establish the real fact thus defectively pleaded.

5. Where a cause of action is stated, and the answer pleads the bar of the statute of limitations, it is error to enter judgment in favor of defendant on the pleadings, even though it should appear to be barred as shown on the face of the complaint.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; R. T. Morgan, Judge.

Action by the Chemung Mining Company, a corporation, against Kennedy J. Hanley, to establish and enforce a trust. From a judgment on the pleadings in favor of defendant, plaintiff appeals. Reversed.

W. B. Heyburn, John P. Gray, and Albert Allen, for appellant. John R. McBride and M. A. Folsom, for respondent.

§ 3. See Limitation of Actions, vol. 33, Cent. Dig. § 674.

AILSHIE, J. This was a suit in equity, commenced by the Chemung Mining Company, a corporation, against Kennedy J. Hanley, charging him with having acquired an undivided one-eighth interest in the Skookum mine as the agent of and in trust for the plaintiff, and seeking to have the trust established by proper judgment and decree. The complaint was filed on December 3, 1901, and summons was thereupon issued and served. On December 17, 1901, the defendant appeared, and filed a demurrer charging that the facts pleaded were not sufficient to constitute a cause of action, and also setting up the plea of the statute of limitations. This demurrer was overruled, and the defendant was granted time in which to answer, and thereafter, and on April 30, 1902, filed his answer, denying the material allegations of the complaint, and again setting up the plea that the cause of action was barred by the provisions of section 4053, and subdivision 4 of section 4054, and section 4060 of the Revised Statutes. The action slumbered until November 30, 1903, without any further proceedings whatever being taken therein by either plaintiff or defendant. On the latter date defendant moved for judgment on the pleadings, and plaintiff moved for leave to file an amended complaint, which it presented along with its motion. The trial court denied the application to file an amended complaint, and granted the motion for judgment on the pleadings, and thereupon judgment of dismissal and for costs was entered in favor of the defendant and against the plaintiff.

Plaintiff appealed from the judgment, and assigns three errors as follows: "(1) The court erred in refusing leave for the plaintiff to file its amended complaint. (2) The court erred in granting defendant's motion for judgment on the pleadings. (3) The court erred in entering judgment against the plaintiff and in favor of defendant."

The defendant contended that the complaint upon its face showed the cause of action barred by the statute of limitations, and accordingly raised that objection upon demurrer. The only substantial change in the amended complaint is that which tends to avoid the bar of the statute and relieve plaintiff from the provisions thereof. That portion of the original complaint, and over which the controversy arose, alleges: "That the said Hanley, pursuant to the said agreement to acquire and purchase said interest in said Skookum mining claim for the complainant, did enter into a contract for the purchase of said interest of the said W. N. Morphy, and on or about the 1st day of August, 1897, said Hanley, pursuant to said contract with the complainant, for and on behalf of the said complainant, did purchase the one-eighth interest in the Skookum mining claim of the said W. N. Morphy for the sum of seven hundred (\$700.00) dollars. But

in violation of the understanding and agreement so had and existing between the said Hanley and complainant, as aforesaid, said Hanley procured the deed for the one-eighth interest in the said Skookum lode mining claim to be made from the said W. N. Morphy, to himself as grantee. And the said Hanley, now, and ever since procuring said deed, fraudulently and wrongfully refuses to convey to the said complainant the said one-eighth interest in the Skookum claim, as under and by virtue of the terms of the agreement so existing between the complainant and the said Hanley, as aforesaid, should of right he do." By the amended complaint it was alleged that the defendant entered into a contract with Morphy for the purchase of the one-eighth interest in the Skookum claim on or about August 1, 1897, but that the purchase was not consummated until October 22, 1897, at which time a deed of conveyance was executed and delivered to Hanley, and that it was recorded in the office of the recorder of Shoshone county on the 3d day of December, 1897, and that the defendant acknowledged to plaintiff's board of trustees that he held such interest in trust for plaintiff, and continued to admit and acknowledge the same until April, 1898, when he began to assert that he held such interest in his own right, and disclaimed holding it as agent or in trust for the plaintiff.

The appellant argues that under the provisions of sections 4229 and 4231 of the Revised Statutes of 1887 the amendment should have been allowed, and that the trial judge abused his discretion in refusing to allow the proposed amended complaint. This court has always held that the trial court should be liberal in allowing amendments in furtherance of justice, but we have never held that a trial judge had abused the discretion vested in him under section 4229 where it clearly appeared from the record that the party seeking the amendment had reposed and slumbered upon his rights for a period of two years after having had the matter specifically called to his attention by his adversary for such period of time. Section 4229 was enacted for the protection of the diligent, and those who have acted in good faith, and not for those guilty of inexcusable laches, or who have neglected to preserve their rights when they have had abundant opportunity accorded them for that purpose. The plaintiff had notice two years before applying to the court for leave to amend that the defendant would avail himself of the plea that the cause of action was barred by the statute, and, if it had then asked leave to amend—or even when the answer was filed setting up the same plea—the court would undoubtedly have granted the application and permitted the amendment. These were facts necessarily within the knowledge of plaintiff, and no reason or excuse whatever appears why, if facts existed which would

take the case out of the operation of the statute of limitations, the plaintiff should not have pleaded them at once upon its attention being called to them, rather than lull the case to so long a rest. If facts were pleaded which the plaintiff could not have reasonably known, or that had to be learned from outside sources, or had been kept from the knowledge of plaintiff, or other good reason had been shown for not pleading them sooner, a much different case would be presented. The court did not abuse its discretion in refusing to allow the amendment at so late a date.

We now come to a consideration of the action of the court in granting judgment upon the pleadings. The determination of this ruling involves several collateral questions. It is generally conceded that the plea that an action is barred by the statute of limitations may be taken either upon demurrer or by answer—by demurrer if it clearly appears upon the face of the complaint that the action did not accrue within the statutory time; otherwise by answer. *Kraft v. Greathouse*, 1 Idaho, 254; *Smith v. Richmond*, 19 Cal. 481; *Harmon v. Page*, 62 Cal. 404; *Wise v. Williams*, 72 Cal. 548, 14 Pac. 204; *Wise v. Hogan*, 77 Cal. 189, 19 Pac. 278; *Pleasant v. Samuels*, 114 Cal. 38, 45 Pac. 998. In this state it must be specially pleaded, and cannot be raised by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. Section 4213, Rev. St. 1887; *Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44. In fact, a complaint may state a good cause of action, and be sufficient to support a judgment, although it shows conclusively upon its face that the cause of action is barred by the statute of limitations. The fact that the cause of action is barred does not deprive it of any of the elements which would otherwise constitute a good cause of action, but merely leaves it open to the exercise of the personal privilege given the defendant by law to plead its limitation, which merely cuts off the remedy. Facts which constitute a cause of action do not cease to be facts simply because of the application of the statute of limitations. When the plaintiff states his cause of action in such a manner that it appears upon the face of his pleading that the action is barred, he takes his chances of being met with a demurrer setting up the bar of the statute. In that event he must rest upon his pleading or amend. On the other hand, if the plea is raised in the answer, then an issue of fact arises, and he is entitled to go upon his proofs. In this case the defendant pleaded the statute of limitations by demurrer, and was overruled. Upon what grounds it was overruled we are not informed, but the case is not here upon defendant's appeal, but rather upon plaintiff's appeal. It will be observed from the original complaint that the plaintiff has not alleged a definite and certain date upon which defendant, Hanley, came into the trust

which is sought to be established; nor is it alleged definitely and certain as to the date upon which he repudiated the trust, and refused to carry out the same, and asserted ownership in his own right. The allegation is that it was "on or about the 1st day of August, 1897." This allegation is uncertain, and, where alleging a fact which may become material and essential to the right of recovery, as in this case, it was open to a demurrer on the ground of uncertainty. No such objection, however, was taken to this pleading, and in the absence of such an objection it would be sufficient to let in proofs to establish the real facts thus uncertainly and indefinitely pleaded (*San Joaquin Lumber Company v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643); and we think if those facts were even as remote from the date alleged "on or about" as to remove the bar of the statute of limitations, it would not be such a variance as would be fatal. Again, when the defendant pleads in his answer that plaintiff's cause of action is barred, the statute (section 4217, Rev. St. 1887) immediately interposes, and gives the plaintiff specific denials to each and every such allegation. *Alspaugh v. Reid*, 6 Idaho, 223, 55 Pac. 300. The facts constituting that bar must be proven the same as any other facts in the case. In rebuttal thereto the plaintiff would be entitled to introduce any evidence he might have which would tend to bring him within any of the exceptions of the statute, and thereby remove or avoid the bar of limitations. This issue, when raised by answer, must be established by the defendant, and does not devolve upon the plaintiff. It is not, properly speaking, a defense to the case, and is not so considered. It is a plea which the defendant may make, and, when established by proofs, is sufficient to defeat the plaintiff's right of recovery, although a good cause of action has been fully established, and but for such plea plaintiff would be entitled to his judgment. When the defendant moved for judgment upon the pleadings, the court was not at liberty to consider his plea of the statute of limitations. For the purpose of such motion neither the court nor the plaintiff could take notice, or be required to take notice, of the fact that defendant would rely upon the bar of the statute of limitations to defeat plaintiff's right of recovery. In *Walling v. Bown*, 72 Pac. 960, in passing upon the right of a plaintiff or defendant to a judgment upon the pleadings, this court said: "When a party moves for judgment on the pleadings, he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary." This rule would also extend to all such denials as the statute gives a plaintiff to any matter of defense set up by the defendant.

With the issues thus made the court was



not authorized to enter judgment for the defendant on the pleadings. The case stood upon complaint and answer, and every material fact pleaded in the case was at issue, and the proofs in support of those issues should have been heard.

The judgment of dismissal is reversed and vacated, and the cause remanded for further proceedings in harmony with this opinion. Costs awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

#### LAWRANCE v. WARD et al.

(Supreme Court of Utah. June 27, 1904.)

#### BILLS AND NOTES—PLACE OF PAYMENT—CHANGE—NOTICE—TENDER.

1. A note secured by mortgage provided for payment of interest in quarterly installments at a certain bank, and that on default in such payment the principal and all interest should become due at the option of the holder. On transferring the note to plaintiff he requested the obligors not to pay the interest at said bank, stating that he would call for it. *Held*, that on plaintiff's failing to call for the interest he was estopped from enforcing the terms of the note.

Appeal from District Court, Salt Lake County; W. C. Hall, Judge.

Action by Harry Lawrance against Patrick J. Ward and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. S. Patterson and Geo. W. Moyer, for appellant. Powers, Straup & Lippman, for respondents.

BASKIN, C. J. In this action the appellant sought to foreclose a mortgage on certain real estate. The complaint was dismissed in the lower court. It appears, in substance, from the evidence, as also from the findings of fact, that the mortgage was executed by the respondents to secure the payment of a promissory note, with interest, made by them, the principal being payable in three years, and the interest thereon in quarterly installments, at the Zion's Savings Bank, Salt Lake City, Utah. The note contained a provision that, in case default should be made in the payment of the interest, the principal and all accrued and unpaid interest should at once become due and payable at the option of the holder of the note. Before the first installment of interest became due, the note and mortgage were transferred to the appellant, who, being a nonresident, and absent from this state, was represented by and acted through his agent, Addison Cain, of Salt Lake City. On the same day the transfers were made Cain called upon the respondents at their place of business in Salt Lake City, and upon exhibiting the note to them said that he had bought the note, and requested them not to pay the interest at the Zion's Savings Bank, and that he would call for it at the respondents'

place of business when the same became due. To this the respondents agreed. Relying upon this arrangement, the respondents did not pay, at said bank, the first installment of interest, \$24.50, which became due November 12, 1902, but were then ready, willing, and able to pay the same whenever called for by Cain, and would have paid it at said bank if the place of payment had not been changed at the request of Cain. Cain never called for the interest at respondents' place of business, as he had agreed to do, and, the respondents not having paid the same, they received, on the 26th of November, 1902, the following letter, to wit:

"Salt Lake City, Utah, Nov. 24, 1902.

"Patrick J. Ward and Nora Ward, City—Dear Sir and Madam: Your note of Aug. 12, '02, has been declared due and payable by the holder thereof by reason of the non-payment of the interest thereon. Kindly call and see me at once in regard to the same as I am unable to get out your way.

"Truly yours, Addison Cain."

To this the respondent P. J. Ward immediately replied by letter, as follows: "If you wish to see me please call at my place of business, as I can not leave my business to go so far away, and oblige." On the 28th of November Cain answered: "Would like to accommodate you, but am very busy. Your loan was sent by Mrs. Lawrance to Patterson & Moyer for interest collection. You better see them as it might put you to expense otherwise." On the 29th of November Ward sent the following letter to Cain: "Find enclosed check for \$24.50 for interest on mortgage. You said when you were here you would call for the money, and we have had the same since the 12th awaiting your call. Who is this Mrs. Lawrance of whom you speak?" Cain, at the time he called upon the respondents and told them that he had purchased the note, did not disclose his agency, and they were not informed of the appellant's connection with the transaction until the institution of this suit. The respondent P. J. Ward had money in the bank upon which the check sent to Cain was drawn, and it would have been paid upon its presentation. Cain failed to present the check for payment, and it was returned to Ward, and on the same day that it was sent to Cain this suit was commenced. Upon the return of the check the interest due was tendered by the respondents to the Zion's Savings Bank, but, as the note had not been left with the bank, and it knew nothing of the transaction, and had not been requested or authorized to receive any such payment, it refused to receive the interest so tendered. Afterwards, on two occasions, respondents tendered to Cain the interest due.

As no arrangement with the Zion's Savings Bank for the payment of the interest then due was made, and the place of payment was changed at the request of the agent of the appellant, who transacted the

business for and in behalf of his principal, the respondents were not in default. Under the facts disclosed the appellant cannot, in good conscience, claim that there was any default. By the law of estoppel, one who by his language or conduct induces another to do or omit that which he would not otherwise have done or omitted to do, is estopped from asserting any claim or maintaining any action against him who is so misled, on account of any act or omission of the latter so induced by the former. *Insurance Co. v. Mowry*, 96 U. S. 544-547, 24 L. Ed. 674; *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173, 24 Atl. 1024; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159-161; *Stayton v. Graham*, 139 Pa. 1, 21 Atl. 2. Under the circumstances of this case the appellant had no right to declare the note due, or insist upon a default. The complaint was therefore properly dismissed.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

#### FARES v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah. June 28, 1904.)

RAILROADS—ADJOINING HIGHWAY—INJURIES TO TRAVELER—NEGLIGENCE—EVIDENCE—WARNING—CONSTRUCTION OF TRACK—LOOK-OUT.

1. Plaintiff, driving along a highway, approached where it ran parallel with a railroad track through a canyon for several hundred feet, and saw an engine, at a tank in the canyon, headed in the direction plaintiff was driving. Plaintiff started to drive along the highway through the canyon, when the engine, without warning, and making no more noise than usual or necessary, backed toward him, and on its approach he was injured by his horses becoming frightened. *Held*, that there was no evidence of negligence on the part of the railway company.

2. Plaintiff having testified that the engine was in plain view, and that he saw it when it started, and that the sounding of the bell or whistle might have added to the fright of his horses, no negligence was shown in the failure to give warning.

3. A railway company has a right to construct its track through a canyon, though it is compelled in doing so to run parallel with and in close proximity to a highway.

4. Where plaintiff, suing for personal injuries, alleged that a railroad company was negligent in the construction and operation of its railroad so close to a highway that a team could not pass in safety, but offered no proof to sustain the allegations, it will be assumed that the railroad was lawfully constructed at such point.

5. A railroad company having a track adjoining a highway is not responsible to travelers whose horses become frightened by the appearance of its engines or trains, if the same are operated prudently, and without unnecessary noise or willful disregard of a traveler's perilous position, after it has been discovered by the servants of the company.

6. A railroad company is not required to keep a lookout specially for travelers on a highway running parallel with and in close proximity to the railroad track, nor to keep its trains

so under control that they can be stopped if a team is found at a point of danger on such highway, nor to exercise the same degree of care as is required at grade crossings.

7. A railroad company has the right to operate its road in a lawful manner, and, when it does so without negligence and without malice, it is not responsible for injuries occasioned thereby.

Baskin, C. J., dissenting.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Joseph Fares against the Rio Grande Western Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover damages for physical injuries which the plaintiff claims he received because of the negligence of the defendant. The essential allegations of the complaint are, substantially, that the defendant is operating a railroad between Salt Lake City and Park City, through Parley's Canyon, which extends east and west; that, at a point about 300 feet west of the company's water tank in the canyon, the public highway runs parallel with and adjoins the railroad, the railroad being on the south side and a cliff of rocks on the north side of the highway, leaving insufficient space to drive a team along the highway with safety while an engine is being operated on the railroad track; that because of the close proximity of the highway to the railroad it was the duty of the defendant, in operating its engine or cars, to give timely warning of the approach of its engine and cars at that point, and to keep a lookout for teams that might be traveling along the highway, and keep its engine under control, so it "could be stopped if any team was at that point on the highway"; that "when its engine stopped at the water tank it was its duty to look ahead and allow any passing teams to reach a safe place, and to blow the whistle and ring the bell before starting, and, in running its engines westward, to keep a lookout for passing teams, and stop should any be passing that point, and to approach said point with due care, and in such a manner that the engines could be readily stopped"; and that "on September 16, 1901, notwithstanding the defendant's knowledge of the danger, it failed in its duty in the foregoing respects, while plaintiff was at that point driving his team, and its engine collided with said team and wagon," causing the injuries of which complaint is made.

The facts and circumstances connected with the accident appear from the testimony of the plaintiff and the witness Mrs. Jennie Priestly, who was riding with the plaintiff at the time of the occurrence. It appears that on September 16, 1901, the plaintiff and his lady companion left Salt Lake City for Park City with a light wagon and team. Traveling through Parley's Canyon in an easterly direction, they crossed the railroad track to the north side thereof, and, looking up the

\* 5. See *Railroads*, vol. 41, Cent. Dig. § 1241.

canyon, they saw an engine headed toward Park City, standing still and taking water at the water tank. At, and for some distance above, the crossing, there was considerable space between the track and the cliff of rocks on the north, but as they approached the engine the space became narrower until they reached a point about 200 feet west of the engine, where the space between the bottom of the cliff and the track was about 12 feet wide. This narrow space continued for a distance of about 60 or 70 feet, when it widened out again. As they thus drove along the railroad track, they saw the engine at the water tank nearly all the time, but saw no one on or about the engine. After the team had started into the narrow place and gone to a point about 175 feet from the engine, the engine started towards them without blowing the whistle or ringing the bell, and making just "the ordinary noise of an engine as it rolls over the rails—nothing unusual." Neither the plaintiff nor his companion made any effort, by calling or otherwise, to attract the attention of those in charge of the engine, until it started to move towards them, when they called, but apparently were not heard by them. At the sight of the moving engine the horses were frightened, and when it was about opposite them they whirled suddenly around toward the track, and in doing so one of them was struck by the tender, the vehicle overturned, and the plaintiff injured. The horses were not on the track at all.

In the course of his examination as a witness, the plaintiff, respecting the occurrence, testified: "When I saw that engine only 600 feet away, I didn't know which way it was going when it started. I didn't know anything about it. I looked up the track and saw the engine when I crossed the track several hundred feet below the engine. After crossing, I drove along substantially parallel with the railroad track. With very few exceptions, I could see the engine all the time, and I noticed it there all the time. My companion was sitting in the seat with me. I kept a lookout all the way up from the crossing, and I knew I was coming to the narrow place in the highway. I didn't know that the engine was going to start. It had been standing there all the while I had been in sight, and I thought I would get through. The distance the highway ran close to the track is about 60 or 70 feet. My team was trotting, and is perfectly gentle. I have driven them around railroad trains before; ordinarily they are not afraid of them. The place where the accident happened is 150 feet from where the engine was standing. The team whirled pretty near the end of the narrow space nearest the engine—150 feet from where the engine stood. The lower end of the narrow space would be about 50 feet from where the accident happened, so when I started in the narrow space the engine was about 200 feet away, and the team was trotting. I didn't see any one in the engine or

working about it. I didn't see the engineer or the fireman until immediately after the accident. When I started into the narrow space on the trot I didn't give them any signal, but as soon as I saw them start I hollered. I don't know whether the engineer and fireman knew whether I was traveling along there or not. They told me afterward that they didn't. I could have hollered in time, and I did as soon as I thought there was any danger. When I started into that narrow space I could have hollered and made them hear me, but I did not holler until the engine started. The engine then was about 175 feet from me when it started. It came down the track with the tender first. I saw it start, and it wasn't necessary to whistle or ring the bell to let me know that the engine was starting. I don't know what effect the blowing of the whistle would have had on them; it might have scared them all the more—I don't know. It wouldn't have helped me a particle to blow the whistle or ring the bell before they started if they had kept on coming down. If they had blown the whistle or rung the bell just before starting, I would have been out of there flying, because all I had to do was to let out the lines and the horses would go like the wind. My horses were not afraid when the engine started about 175 feet away. There was no whistle or ringing of the bell as it came down the track. It just made the ordinary noise of an engine as it rolls over the rails—nothing unusual. When I drove up in that narrow place I knew that the engine, after it had got through taking water, would start. I didn't know which way it would start. They could have heard me holler, the moment before they started, better than after starting."

The witness Mrs. Priestly, as appears from the transcript and respondent's brief, among other things testified: "When Mr. Fares started in the narrow place he drove rapidly, so as to get out of the way, for fear the engine might come. That was spoken of. He whipped up, and the horses were pretty good travelers. We were both looking at the engine, and could not see anybody around it. When we got about halfway up this narrow place the engine started. When we started into the narrow place we talked about the fact that the engine might start, so we concluded to drive rapidly to get out. The conclusion was that, as the engine was standing still, we would have time to get through. When the engine started, it didn't have to whistle to let us know it was starting, because we saw it start. They didn't ring the bell. They came rather quickly. When the engine started, the horses commenced to rear; that is, when the engine was away a few yards." The witness further testified: "When the engine started it did not make any other noise than an engine will going over the rails, but its movements scared the team as soon as it started."

Under this and other evidence of similar

import, the jury returned a verdict in favor of the plaintiff for the sum of \$5,150, and judgment was entered thereon accordingly. Thereupon the defendant prosecuted this appeal.

Sutherland, Van Cott & Allison, for appellant. Powers, Straup & Lippman, for respondent.

BARTCH, J. (after stating the facts). When the plaintiff rested his case, the defendant interposed a motion for a nonsuit, upon the ground, among others, that the railroad company was not shown to have been guilty of any negligence whatever in operating its engine on the occasion in question. The motion was overruled. Then, when both sides rested, the defense requested the court to instruct the jury to return a verdict in favor of the defendant, which request was refused, and thereafter a motion for a new trial denied.

The appellant, under proper exceptions, complains, in the first instance, of these several rulings of the court, and insists that the evidence shows, without conflict, that the defendant was entitled to a verdict and judgment as matter of law. The contention is that the railroad company is not liable to the plaintiff for the injury sustained by him, under the circumstances connected with the accident and disclosed in evidence, and this contention appears to be well founded. The defendant had a right, under the law, to construct and operate its railroad through the canyon, and in doing so it was compelled, owing to the physical conditions of the canyon, to run parallel with and in close proximity to the highway. To hold that the railroad company was guilty of negligence in constructing its railroad parallel with and adjoining the highway would practically be to hold that railroads could not be constructed and operated in canyons in this intermountain country, for ordinary observation demonstrates the utter impossibility of constructing railroads through these precipitous canyons without, in places, encroaching to some extent upon highways and rendering them less safe. This the respondent appears to admit, for while, in the complaint, he alleged negligence in the construction and operation of the railroad so close to the highway that a team could not pass with safety, he offered no proof in support of such allegations; yet one who alleges negligence has the burden to prove it. He must show, as to an act lawful in itself, the commission of it, at the time, place, or in the manner, was unlawful. We must therefore assume that the railroad was lawfully constructed at the place in question, notwithstanding its close proximity to the highway and the cliff of rocks north thereof. It is apparent that railways and highways must, of necessity, in some places, run side by side. In such cases the inconvenience to passing teams oc-

casioned by the construction and operation of the railroad is compensated for by the greater convenience to the general public in the more rapid and improved method of intercommunication and transportation. The railroad in the present instance having been lawfully constructed at the place where the accident occurred, the railroad company had a right to stop its engine at the water tank, and, after taking water, to again move it in pursuit of its business; and the moving of the engine, without making any unnecessary noise, or any more noise than an engine ordinarily makes in rolling over the rails, as is admitted in this case, was not an act of negligence, even though the appearance of the moving engine frightened the respondent's horses. A railroad company has the undoubted right to run its engines and trains on its railroad adjoining the highway, and is not responsible to travelers whose horses become frightened by the appearance of such engines or trains, if the same are operated prudently, and without unnecessary noise or willful disregard of a traveler's perilous position, after it has been discovered by the servants of the company.

Nor is a railroad company required to keep a lookout specially for travelers upon the highway, where the railroad and highway run parallel with and are in close proximity to each other. Under no circumstances is it required to exercise more than ordinary care towards persons traveling along a highway adjacent to the railroad. It is its duty, primarily, and in the highest degree, to keep a lookout upon its track to discover persons or vehicles that may be upon or crossing the track, so as to avoid collision with them. This duty is enjoined upon it not only to avoid injury to those who may be upon or crossing its track, but also for the safety of its passengers, whom it has contracted to carry safely. It is true that when those in charge once discover a traveler, on an adjacent highway, in a perilous position, they are bound to recognize his situation, and to refrain from doing any heedless or wanton act which will increase the danger of his surroundings, and, if they fail to do so, the company will be liable for resulting injury and damages; but no such liability attaches for the mere failure of servants, while in the exercise of proper care in running engines or trains, to observe a traveler upon an adjacent parallel highway, who may be in a perilous position because of the fright of his horses at the appearance of an engine or train. Nor is a railroad company, as alleged in the complaint, required to keep its engines and cars so under control that they can be stopped if any team is found at a point of danger on an adjoining highway; nor is it bound to exercise the same degree of care, as contended for by the respondent, at all points of known or reasonably apprehended danger, in keeping a lookout, and in the operation of its engines and trains alongside

the highway, as it is required to exercise at grade crossings. Such rules would render the operation of railroads in this mountainous country, where such places of danger are almost innumerable, well-nigh impracticable, and would release travelers upon the highway from their duty of themselves keeping a lookout for their own safety. In *Lamb v. Old Colony Railroad*, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449, a case in many respects like the one at bar, the plaintiff was driving his horse along a highway parallel to and adjoining the defendant's railroad, and the evidence was uncontradicted that the railroad and highway were adjoining each other for more than a mile. The plaintiff's horse was frightened by the smoke from the engine of a train passing on the railroad in a direction opposite to that in which the plaintiff was going, and the plaintiff was injured in consequence. The smoke was occasioned by the act of firing up the engine on the stretch of railroad adjoining the highway. There was no evidence that the defendant's servants knew that the plaintiff was on the highway, but there was evidence that they would have seen him if they had been on the lookout for travelers on that part of the highway. The court, holding that it was not the duty of those on the engine to be on the lookout for travelers on the highway who might be endangered by such act, in the course of its opinion said: "The defendant had a right to run its trains on its railroad adjoining the highway, and was not responsible to travelers on the highway for the consequence of noise, vibration, or smoke caused by the prudent running of its trains. \* \* \* Under such circumstances, the firing up near the highway, and the smoke occasioned by it, were ordinary incidents of running the train, as much so as the smoke when not firing, or the noise or vibration caused by the cars; and they were not of themselves evidence of negligence. \* \* \* The lawfulness of the act cannot depend upon whether a traveler happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or engineer. If it is their duty to see one traveler outside the location of the railroad, it is their duty to see how many travelers are there, and to observe the position, direction, and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances which may determine whether all travelers are, and will continue to be until the smoke is dissipated, in such positions that their horses will not be frightened by it. Being under no obligation to watch for travelers on the highway, the defendant could not have been guilty of negligence in not seeing and avoiding the plaintiff." So, in *Dewey v. Chicago, M. & St. P. R. Co.*, 99 Wis. 455, 75 N. W. 74, an engine of the defendant, in charge of its servants, pass-

ed over a street crossing, and, after going a short distance beyond it, was brought to a stop. The plaintiff was riding in a buggy drawn by a single horse, and, when he approached the crossing, the engine, in plain sight, started, and made a slight exhaust or puff, and steam and smoke escaped, but there was nothing unusual as to noise, steam, or smoke. There was a strong wind blowing, which carried the steam and smoke directly towards the horse, whereby it became frightened and uncontrollable, overturned the buggy, and injured the plaintiff. At the close of the evidence a nonsuit was granted. In affirming the judgment of nonsuit, the appellate court said: "They had a right to move the engine in pursuit of defendant's business in which they were engaged, and without responsibility on defendant's part for the consequences of any of the ordinary noises which the operation of the engine caused, or such incidents as the ordinary escape of smoke and steam. If such were not the case, railway companies would be greatly embarrassed in the performance of the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam, or any unusual noise, or anything not ordinarily attendant upon the usual movements of a locomotive. That, where injuries result from the frightening of horses by the sight of moving cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, there is no liability on the part of the railway company, is firmly established and recognized as the law." In *Ryan v. Pennsylvania R. Co.*, 132 Pa. 304, 19 Atl. 81, the plaintiffs were driving under the defendant's railroad, on a city street, when a train of cars overhead frightened their horse so that he became unmanageable. They were thrown out of their carriage, one of them severely injured, and their child killed. The jury, under a binding instruction, rendered a verdict for the defendant. In affirming the judgment, the Supreme Court said: "The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always have a tendency to frighten horses. In this case the fright was occasioned by the sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company, under all the authorities, has the right to operate its road in a lawful manner; and when it does so without negligence, and without malice, it is not responsible for injuries occasioned thereby." 2 Thomp. Neg. § 1908; *Bailey v. Hartford & Conn. V. R. R. Co.*, 56 Conn. 444,

16 Atl. 234; *Beatty v. The Central Iowa R. Co.*, 58 Iowa, 242, 12 N. W. 332; *Webb v. Railway Co.*, 202 Pa. 511, 52 Atl. 5; *Hahn v. S. P. R. R. Co.*, 51 Cal. 605; *Lake Shore & M. S. Ry. Co. v. Butts* (Ind. App.) 62 N. E. 647; *Hendricks v. Fremont E. & M. V. R. Co.* (Neb.) 93 N. W. 141; *Leavitt v. Terre Haute & I. R. Co.* (Ind. App.) 31 N. E. 860; *Abbot v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Cahoon v. Chicago & N. R. Co.*, 85 Wis. 570, 55 N. W. 900; *Howard v. Union Freight R. Co.*, 156 Mass. 159, 30 N. E. 479; *Omaha & R. V. Ry. Co. v. Brady* (Neb.) 57 N. W. 767; *Lake Erie & W. R. Co. v. Juday* (Ind. App.) 49 N. E. 843; *Ohio Val. R. Co. v. Howerton* (Ky.) 72 S. W. 760; *McCerran v. Alabama & V. Ry. Co.* (Miss.) 18 So. 420; *Chicago & E. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026; *Ohio Val. R. Co. v. Young* (Ky.) 39 S. W. 415.

It is, however, insisted by the respondent that it was imperative upon the defendant to blow its whistle, and ring its bell, before it moved its engine down along the highway, and that the plaintiff had a right to expect that some signal would be given. We do not think that the failure to sound the whistle or to ring the bell was negligence under the circumstances. On the contrary, we are inclined to the view that to have done so on that occasion would have rendered the defendant guilty of negligence, because, since the plaintiff was aware of the presence of the engine, it would have been an unnecessary thing to do, and in all probability would have frightened the horses more, and added to the peril of the occupants of the vehicle. As will be observed, the plaintiff himself, in his testimony, said: "I saw it start, and it wasn't necessary to whistle or ring the bell to let me know that the engine was starting." He also stated that he did not know what effect the blowing of the whistle would have had upon his horses; that "It might have scared them all the more;" and that the sounding of the whistle or ringing of the bell would not have helped him a particle if the engine had kept on coming down. If, under the then existing circumstances, the whistle had been sounded or the bell rung, would not the respondent now be contending that the servants of the defendant aggravated his perilous position unnecessarily and willfully by the additional noise? And could it be said that such contention would be altogether without force? It is true the blowing of the whistle and ringing of the bell are ordinary incidents to the operation of railroads, and when the whistle is sounded or the bell rung, without fault or negligence, no liability results therefrom; but it may be quite otherwise when the act is done unnecessarily, willfully, or wantonly, to the injury of those in close proximity, or who may be traveling upon a highway close by. In such event the act, lawful in itself, may become unlawful, and the guilty party amenable to damages. The fact that there was a grade crossing several

hundred feet below the place of the accident, upon approaching which a signal was ordinarily required to be given, is immaterial under the circumstances. The accident did not happen at the crossing. And, even if the failure to give a signal for the crossing amounted to negligence, that negligence did not cause injury to the plaintiff, and therefore he cannot avail himself of it. Nor, if the defendant had discovered the plaintiff in his perilous position, would the nearness of the engine to the crossing, under the circumstances, have justified the defendant in the doing of an act, though lawful, unnecessarily or heedlessly, which would have rendered such position yet more dangerous. "Courts," says Mr. Justice Brewer, in *Culp v. A. & N. Rld. Co.*, 17 Kan. 475, "must take knowledge of the fact that the blowing of a whistle is one of the ordinary signals used in the running of a train, and that in the management of locomotive engines it is at times necessary to open the valves and permit the escape of steam. But still these acts, which at times are legal and necessary, may be done without any necessity therefor, out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong. That a party has a right to do a given act at certain times and under certain circumstances, does not prove that the same act is right under all circumstances and at all times." 2 *Thomp. Neg.* §§ 1909-1911; *Wabash R. R. Co. v. Speer*, 156 Ill. 244, 40 N. E. 835; *Billman v. Indianapolis, C. & L. R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Petersburg R. R. Co. v. Hite*, 81 Va. 767; *Stanton v. Louisville & N. R. R. Co.* (Ala.) 8 So. 798; *Philadelphia, etc., R. R. Co. v. Stinger*, 78 Pa. 219; *Northern Pacific R. Co. v. Sullivan*, 53 Fed. 219, 3 C. C. A. 506.

After careful examination of the testimony in this case, and taking every fact of which there is any evidence as proven, we are unable to see wherein the defendant was guilty of negligence. If there was any negligence on the occasion in question, it was on the side of the plaintiff himself. He has shown nothing to excuse his heedless act in driving from a place of comparative safety into that narrow space with the engine in plain sight, ignorant of when it would start, or where it would go, whether toward or from him, and making no effort, until the engine started, to attract the attention of the defendant's servants, so as to disclose to them the perilous position into which he had placed himself and his companion. He fully realized the danger of his undertaking, but concluded to take the chances of getting to a place of safety before the engine would start. He failed in his calculations, and has but to attribute his misfortune to his own want of ordinary prudence and caution. Justice will not permit compensation in damages as a result of such heedlessness. In deciding such questions as this, we cannot be unmindful

of the fact that the rights of others are involved. We may concede the right of a man to risk his own life and the lives of his horses, but not the right to imperil the lives of others, who may be on the engine or train, by his lack of caution. The misfortune might have been much greater if, through his unwarranted assumption of risk, his horses had gotten upon the track and been struck by the engine. We are clearly of the opinion that, under the facts and circumstances in evidence, the court ought to have granted a nonsuit, or, at the close of the testimony, instructed the jury to return a verdict for the defendant, and that, having failed to do either, a new trial ought to have been ordered.

The judgment must be reversed, with costs, and the case remanded for further proceedings in accordance herewith. It is so ordered.

MCCARTY, J., concurs.

BASKIN, C. J. (dissenting). It appears from the evidence that the place on the public highway where the injury occurred was a dangerous one; that the engine, as the plaintiff traveled toward it, was standing still a short distance beyond and in full view of the dangerous point in the highway, and headed in the opposite direction from which the plaintiff was approaching. In view of these facts it was the duty of the employés of the company in charge of the engine, before starting it in the backward direction, to look and see that no one in vehicles was at the dangerous place. This they failed to do, and in my opinion it was negligence for which the railroad company is responsible.

I cannot, therefore, concur in the reversal of the judgment.

#### EARL et al. v. LEWIS et al.

(Supreme Court of Utah. June 25, 1904.)

#### ELECTION — CONTESTS — REGISTRATION — FAILURE OF REGISTER — CERTIFICATE OF NOMINATION — FAILURE TO FILE — EFFECT.

1. Under Rev. St. 1898, §§ 824, 828, requiring certificates of nomination to be filed with the town clerk not less than 15 days before the election, and declaring all certificates valid unless written objections are made, and section 836, requiring the clerk to print on the ballot the name of every candidate whose nomination has been certified, when a certificate of nomination is in legal form, the clerk, in the absence of objection, must place the candidate's name on the official ballot, though the certificate was not filed in the required time.

2. Under Rev. St. 1898, §§ 846-849, requiring the judges to furnish the voter the official ballot, which after being properly marked by the voter shall be deposited in the ballot box and counted for the candidate designated, the voter can only use the ballot furnished, and its validity cannot be denied because of irregularity in its preparation.

3. Where a person in charge of the certificates of nomination of candidates by a political party was prevented from filing them with the town clerk because of his absence and his office being closed, they may be regarded as filed on the day they were presented.

4. Under Rev. St. 1898, §§ 800, 821, prescribing the method of registration, and providing that no person shall be permitted to vote without having registered, the failure of the register to act does not deprive the legal voter, who has properly applied for registration, of the constitutional right to vote.

5. Where a register fails to act on a voter's application for registration, the voter is not required to resort to mandamus to compel him to act, nor to an action against him for damages.

6. Under Act Cong. May 31, 1870, c. 114, § 3, 16 Stat. 140, providing that a person offering to perform any act entitling him to vote, and otherwise qualified, shall be entitled to vote as if he had performed the act, where the requirements were not performed by persons who applied for registration they were not entitled to vote at the election.

Appeal from District Court, Carbon County; Jacob Johnson, Judge.

Action by H. H. Earl and others against B. E. Lewis and others, contesting the latter's election as president and trustees of the town of Scofield. From a judgment in favor of the contestants, the contestees appeal. Affirmed.

Weber & Braffet and W. H. Frye, for appellants. M. A. Breeden, Atty. Gen., and W. R. White, Deputy Atty. Gen., for appellees.

BASKIN, C. J. This is an election contest, instituted in pursuance of chapter 9, tit. 12, Rev. St. 1898.

It appears from the evidence, and also from the findings of fact, that on the 19th day of October, 1903, the said H. H. Earl was duly nominated by the Republican Party as a candidate for the office of president, and his co-contestants were duly nominated, by said party, as candidates for the offices of trustees, of the town of Scofield, to be voted for at the ensuing general town election for president and trustees of said town, to be held November 8, 1903. That each of the contestants was qualified to fill the office for which he was so respectively nominated. That after the nominations were made, and late in the same day, a certificate of said nomination, in due and legal form, was, on behalf of said party, taken to the office of the town clerk of Scofield, for the purpose, as required by sections 824 and 828 of the Revised Statutes of 1898, of filing the same with said clerk, but as the office of the clerk was locked and no one in charge thereof, admission to said office was not obtained, whereupon the person who had the certificate in charge inclosed the same in a sealed envelope, with postage prepaid, and deposited it in the United States post office at Scofield, directed to the town clerk, and it was received by him on the next day, October 20th. That neither the objection provided for in section 832, or any objection whatever, to the legality of the certificate, was made to or filed with the town clerk. "That the election was duly called, and three judges of election were appointed, and sworn according to law, to conduct said election on the day and at the place designated. That voting booths were erected, and stationery, of-

cial ballots, and ballot boxes were furnished by said town board, but it furnished no registration list of voters. That an effort was made to secure a registration list, or a copy of the registration list, but without success. That while this was in progress legal voters appeared, to the number of 10 or more, and demanded the right to vote. That said judges who had been appointed by the said town board declined to receive the votes of the electors who were there, assigning as a reason that they had no registration list. A list was produced called a 'registration list,' which the court finds to be a registration list of the precinct of Scofield. That the precinct of Scofield is larger than the town of Scofield. That the list produced was the precinct list, not the town list; that it contained all the electors of the town, as well as others not electors of the town. That, upon the judges of election refusing to receive votes of the electors who were then present and demanding the right to vote, the electors so present between the hours of 9 and 10 o'clock in the forenoon of that day proceeded to elect three other qualified judges to conduct the said election, who were of the same political parties as those judges who had refused to act, and they were sworn in due form of law and proceeded to hold an election, procuring a ballot box, and using the registration list, heretofore mentioned as a guide to determine who were the legal voters of the town. That they continued to hold an election until the time for closing, when they counted the ballots received, amounting to 93, and duly made return to the clerk of said town board, and filed the same with the said clerk. That the first judges appointed, who had refused to receive ballots, continued to occupy their places, but declined to receive votes until some time in the afternoon of the day of election, between 3 and 4 o'clock, when they made up their minds as to their mode of procedure, but that no votes were received by them until some time between 6 and 7 o'clock in the evening, and then only 5 votes besides their own were received by them from persons to whom they administered an oath. It does not appear what the form of the oath was, nor in what manner it was administered; but they were sworn to something, and then deposited their ballots. The polls were closed, and both sets of judges made and filed returns with said clerk. On the following Monday, November 9, 1903, the incumbent president and trustees of Scofield, as a canvassing board, canvassed the returns of both sets of judges, and found that the first judges appointed had received 8 ballots, all of which were for said canvassers, and that the other judges had received 76 ballots for H. H. Earl, 71 each for F. H. Merewether and Lewis Jacobson, 70 for A. Greenhalgh, and 63 for Louis Allant, they being the candidates nominated by said party. That thereupon the said canvassing

board declared themselves elected to the various offices, and ignored the other ballots, and directed certificates of election to be issued to themselves. That all the persons who voted at said election were legal voters, and were registered and voted at the last preceding town election of the town of Scofield. That the registration agent refused to act, and failed to revise and to publish or correct the last preceding registration list. That at least 70 to 76 legal electors desired to vote, but were not registered, and that 6 of them had applied for registration, but the registry agent refused to act."

Sections 824, 828 Rev. St. 1898, require certificates of the character of the one involved in this case to be filed with the clerk of the town not more than 30 nor less than 15 days before the election. Section 832 provides that: "All certificates of nominations which are in apparent conformity with the provisions of this chapter [which is chapter 1, tit. 18] shall be deemed valid unless objection thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all the candidates who may be affected thereby, addressed to them at their respective postoffice addresses if any, or places of residence as given in the certificate of nomination. The officer with whom the original certificate was filed shall pass upon the validity of such objection, and his decision shall be final; provided, that such officer shall decide such objection within at least forty-eight hours after the same is filed, and any objection sustained may be remedied or defect cured upon the original certificate, or by an amendment thereto, or by filing a new certificate within three days after such objection is sustained." Appellants' counsel contend that provisions of the statute relating to the time of filing the certificate are mandatory, and, as it was not filed within the time prescribed, it was an absolute nullity, and that the town clerk had no right to place the names of said nominees on the official ballot, and that the votes cast for them should not have been counted. Section 793 reads as follows: "The provisions of this title [18] shall be liberally construed, so as to carry out the intent of this title, and of political parties, nominees, and others in proceeding under this title."

The question here involved arose in *Blackmer v. Hildreth*, 181 Mass. 29, 63 N. E. 14. In that case section 145, c. 548, p. 588, of the Massachusetts Statutes of 1898, required nomination papers to be filed as early as the seventh day preceding the election, but the papers involved therein were filed two days late. Section 146 of said Statutes provided that such papers filed in apparent conformity with law should be held valid, unless seasonably objected to. No objection to the papers was made, and the names of the candidates set out in the papers were placed upon the official ballot. The petitioner con-



tended that the provisions of the election law involved were mandatory, and, as a necessary result the election of Dexter, who received a clear majority of the votes, was void. The court held that "the requirements as to the time of filing nomination papers and the certificates thereon, although binding on the officers whose duty it is to prepare and pass upon official ballots, do not invalidate ballots cast for a candidate nominated by papers filed too late and not properly certified." In the opinion it is said: "The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not, by technical obstructions, to make the right of voting insecure. The provisions above recited with reference to the preparation of the ballot are plainly limited and confined to that purpose. They are binding upon the officers for whose guidance and direction they are needed. If it be seasonably objected to a nomination paper that it was not filed within the time required by section 145, or that the provisions of sections 141 and 142 have not been complied with, it is the duty of the proper board to inquire into and settle the question, and to sustain the objection, if found to be true, and reject the paper. So far as respects their decision, these provisions are mandatory. When the decision is made, it is final, and a ballot made up in accordance therewith is not thereby made illegal. And in the same way the action of the town clerk—at least, in the absence of fraud and corruption—as to the papers to which no objection is made, must be regarded as final so far as respects the ballot which he prepares." And in support of the opinion, attention is specially directed to *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502, which in substance overrules the previous case of *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467, cited by appellants' counsel in the pending case.

In 16 Mont. 54, 40 Pac. 84, 28 L. R. A. 502, it is said: "The law is 'mandatory,' in the sense that it demands and requires the county clerks, in the preparation of the 'official ballot,' to strictly comply with all its provisions, but not in the sense that a voter's right to exercise its elective franchise will be lost because of some technical mistakes of the county clerk in printing the names of candidates upon the ballot. Such a construction of the law would not only render the election invalid on account of an honest mistake of a county clerk, but would open the door to the gravest fraud. It would place the power in the hands of a dishonest officer to disenfranchise the voters of his county, as well as cause the defeat of any particular candidate."

In *Allen v. Glynn*, 17 Colo. 338, 347, 29 Pac. 670, 673, 15 L. R. A. 743, 31 Am. St. Rep. 304, it is said: "It may be said that all such provisions of such laws are mandatory in the sense that they place a duty upon those who come within their terms. But it does not follow that an election should be invalidated because of every departure on the part of public officers from the terms of the act. *Bowers v. Smith* [Mo. Sup.] 17 S. W. 761."

In the case of *Schuler v. Hogan*, 168 Ill. 369, 48 N. E. 195, as in the case of *Blackmer v. Hildreth*, supra, no objection was made to the certificate of nomination. In the former case (page 377, 168 Ill., page 198, 48 N. E.), it is said: "Where a candidate for public office makes no objection to the certificate of nomination of his opponent before the election, when the statute provides for the time and mode of presenting such objections, he should be regarded as having waived all objections that may exist to the presence on the official ballot of any names of nominees not properly entitled to be there. *Bowers v. Smith*, 111 Mo. 45 [20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491]; *Allen v. Glynn*, 17 Colo. 338 [29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304]."

In the case at bar no objection was made by the contestees, who claim to have been legally elected, either to the certificate or the official ballot. That it was the mandatory duty of the town clerk, under the circumstances, to place the names of the nominees of said party upon the official ballot, is apparent from the following provisions of section 836, Rev. St. 1898: "It shall be the duty of the recorder of any city or clerk of any town, except as otherwise provided by law, to provide printed ballots for every election of public officers in which the voters or any of the voters, of such city or town participate; and to cause to be printed on the ballot the name of every candidate whose nomination has been certified to, or filed with, such city recorder or town clerk, in the manner provided by law." When objection is made and a certificate of nomination is set aside, under the provisions of section 832, the town clerk is relieved from the duty of placing the nominees named in the certificate upon the official ballot; but except in such instances there is no provision of law which exempts a town clerk, when nominations are certified to him in due form, from performing the duty, notwithstanding the certificate may not have been filed in the time prescribed. That the certificate of the contestants' nomination was in due and legal form, and was received by the town clerk one day less than the time provided by the statute, is not controverted; therefore, under the provisions of section 836, it became the duty of said clerk, in the absence of objections, to place the candidates nominated by the Republican Party upon the official ballot. Under section 846, each voter at the

polls is given, by one of the election judges, only one official ballot, and after it is marked by the voter as required by section 847, and the steps taken as required by section 849, it is deposited in the ballot box by the voter. Section 848 provides that the "ballots thus marked shall be counted for the candidates designated." The voter, under these provisions, can only use the ballot given him, and is not expected to know anything except what appears upon its face, and "cannot ascertain therefrom whether or not there has been any irregularity in its preparation." To deny the validity of such ballots, and withhold the offices from the candidates receiving a majority of the votes, would, in many instances, defeat the public will. To do so, the election law, instead, as intended, of being an efficient aid to the securing of a fair expression at the polls, would render it deceptive and well calculated to mislead and disenfranchise honest voters. Again, independently of the foregoing considerations, as it appears that the party in charge of the certificate on behalf of the party which made the nominations in question, attempted to file the certificate in time, to wit, October 19th, but was prevented from doing so by reason of the absence of the town clerk, and his office being closed, we are of the opinion that the certificate should be considered as filed on that day.

Counsel for contestees also contend that the provisions of the statute as to registration are mandatory, and that the failure to revise the list and register those entitled to register was fatal, and rendered the election void. It is clear that the provisions of the statute as to the register are mandatory in the sense that, if he refuses or neglects to perform his duties, he may be compelled by mandamus to do so; but it does not follow that his refusal or failure to act defeats the ensuing election, or deprives the qualified voter who has made proper application for registration from exercising his constitutional right to vote thereat. Section 2, art. 4, of the Constitution, is as follows: "Every citizen of the United States, of the age of twenty-one years and upwards, who shall have been a citizen for ninety days, and shall have resided in the state or territory one year, in the county four months, and in the precinct sixty days next preceding any election, shall be entitled to vote at such election except as herein otherwise provided." The Constitution is silent on the subject of registration. It is fundamental that a right of a citizen guaranteed by the Constitution cannot be abridged, impaired, or taken away, even by an act of the Legislature. Notwithstanding our Constitution has fixed the qualification of voters, the Legislature may rightfully enact a registration law which merely regulates the exercise of the elective franchise, and does not amount to a denial of the right itself, and does not abridge or impair the same. Section 821, Rev. St. 1898, provides that: "No person shall here-

after be permitted to vote at any general, special, municipal, or school election, without having been first registered within the time and in the manner and form required by the provisions of this chapter." Section 800 provides that: "It shall be the duty of the registry agents, when called upon to do so at their respective offices, and not elsewhere, at any time between the hours of eight o'clock a. m. and nine o'clock p. m. of the fourth Tuesday and of the fourth Wednesday and of the third Tuesday and of the first Tuesday, and in presidential years, of the first Wednesday, prior to any general election, to receive and register names of all persons applying for registration, who, on election day, will be legally qualified and entitled to vote in that election district, according to the provisions of law under which such election may be held." In passing section 821, it is evident that the Legislature did not anticipate a case so extreme and improbable as the refusal of a sworn register to act; on the contrary, the section was passed in contemplation that the register would perform his duty, and that legal voters, properly applying for registration, would not be denied the right. There is no provision of the registration act which warrants the conclusion that it was the intention that the legal voter who has properly applied for registration, but who has been deprived of the right by the failure of the register to act, should, by reason of such failure, be also deprived of his constitutional right to vote at the polls. We are therefore of the opinion that a failure of a register to act neither vitiates the registration law, nor deprives the legal voter, who has properly applied for registration in the manner required by section 800, of his constitutional right. In other words, when the legal voter has done all that the law requires at his hands, and his failure to be registered was the fault of the registration officer, "upon the well-settled principle of law that the offer to perform an act which depends for its performance upon the action of another person, who wrongfully refuses to act, is equivalent to its performance" (McCrary on Elections, § 137), his acts in attempting to register should be taken as equivalent to registration, and upon tendering his ballot at the polls, and showing that he possesses the qualifications prescribed by the Constitution, and also the cause of his failure to register, he should be permitted to vote. The claim that the remedy of the voter in such cases is either by mandamus to compel the register to act, or by an action against the register for damages, is not tenable, because to require the voter to resort to the remedy of mandamus would be to add onerous conditions not required by the Constitution, and a resort to an action for damages would not prevent registration officers from corruptly defeating the will of the majority of qualified voters by intentionally failing to act.

While the right of a person having the con-

stitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or neglects to properly apply for registration. It appears in the case at bar that the names of the persons who cast their ballots at the election were legal voters, and were registered and voted at the last preceding town election. Under the provisions of section 816, as there was no election for President of the United States in the year 1903, the previously registered voters were not required to again register in that year; only the voters who had not previously registered were required to do so. It does not appear that either of the six voters who applied for registration offered to vote at the polls, nor does it appear that either of the 76 legal voters who desired to vote applied for registration or offered to vote. By the third section of the act of Congress approved May 31, 1870, it is provided: "That whenever, by or under the authority of the Constitution or laws of any state, or the laws of any territory, any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act, and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act." Act May 31, 1870, c. 114, 16 Stat. 140. After quoting this provision Mr. McCrary, in his work on Elections, at page 104, says: "It is undoubtedly necessary that a person who, having been refused registration, seeks to have his vote counted under this statute, should prove that he actually and personally applied to the proper board or officer for registration, and offered to make such proof, or perform such acts, as the law required of him; that he was in fact legally qualified to vote and entitled to registration, and that registration was refused. In other words, it must appear that the voter did, or offered to do, all that the law required at his hands, and that his failure to be registered was the fault of the board or officer of registration. Nor is it enough that he demanded registration of the proper officer or board and was refused. It must also appear, before his vote can be counted as if cast, that he offered his vote at the proper time and place, or used proper diligence in endeavoring to do so."

As it does not appear in the case at bar that these requirements were performed by either of the 6 persons who applied for

registration, or by either of the 76 persons before mentioned, neither of them were entitled to vote at said election. And as it appears that the contestants received a majority of the legal votes cast at said election, the judgment of the lower court in favor of the contestants is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

PEOPLE ex rel. OVREN et al. v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Colorado. June 6, 1904.)

PROHIBITION—ADEQUATE REMEDY BY APPEAL.

1. A temporary injunction to prevent the holding of a stockholders' meeting was denied, the court retaining jurisdiction for the purpose of rendering complete relief in any controversy growing out of the meeting, and after the meeting, at the instance of plaintiffs, who claimed to have been elected directors, enjoined defendants, who also claimed to have been elected directors, from interfering with plaintiffs in the discharge of their official duties, and from prosecuting any action except the one in which the injunction issued. *Held*, that a writ of prohibition would not be issued to prevent further proceedings on the ground of want of jurisdiction because defendants had a complete remedy by appeal or error from the final judgment.

2. Owing to the unwarranted frequency of applications for the writ of prohibition, the court is disposed, except in extreme cases, where the right to relief clearly appears, and the usual remedy is not full, speedy, and adequate, to remit applicants to their ordinary remedies.

Application by the people, on relation of A. N. Ovren and others, against the district court of the Second Judicial District and others, for a writ of prohibition. Application denied.

Stuart D. Walling, for petitioners. Chas. J. Hughes, Jr., and Waldron & Thompson (Gerald Hughes, of counsel), for respondents.

CAMPBELL, J. This is an original application for a writ of prohibition to be directed to the district court of Arapahoe county to stay further proceedings in an action there pending. That action was instituted by the Famous Consolidated Gold Mining Company, its directors, and some of its stockholders, against the defendants, also stockholders, who were striving to wrest control of the company from plaintiffs. The only specific object of the action, as stated in the original complaint, was to restrain the holding of the annual meeting of the corporation, which had been called by defendant stockholders, under our statute so providing, upon the failure of the officers of the company to do so. The defendants filed their answer, and upon a hearing of the application for a temporary writ of injunction the same was denied. The court, however, made an order retaining jurisdiction of the action for the purpose of rendering full and complete relief and the adjustment of any and all controversies growing out of or connected with the

holding of the meeting which it had refused to enjoin. Such meeting was held at the time called, and the result was that two rival boards of directors claim to have been elected. After the adjournment of the meeting, plaintiffs filed a supplemental complaint, in which two new plaintiffs and two new defendants were made parties. Therein were averred the holding of the meeting, and the election of plaintiffs as directors, and that defendants wrongfully claim to be elected directors, and, unless restrained by the court, will proceed to take forcible possession of the books and property of the company, and oust plaintiffs from the office of which they are in possession and exercising the duties thereof. The prayer is for an injunction to restrain defendants from in any manner interfering with plaintiffs in the discharge of their official duties, and from commencing or prosecuting any suit in any court—save and except in the one in which the action is pending and in that very action—for the purpose of obtaining any decree other than might be rendered in that action, and requiring defendants to set up and litigate therein the validity of their claim to the offices in question. The court overruled both defendants' motion to strike the supplemental complaint from the files and their demurrer thereto, and issued an injunction substantially in the language of its prayer. Thereupon defendants in that action, as petitioners, brought this application to prohibit the district court from further proceeding upon the ground that it is wholly without jurisdiction in the premises.

The hearing was before two members only of the court. Counsel have discussed at considerable length the action of the district court under the supplemental complaint, the respondents asserting that under the facts and circumstances of the case that tribunal was strictly within its legitimate powers, and the petitioners as strenuously insisting that the jurisdiction which the court may have had under the original complaint to enjoin the corporate meeting did not include the power to determine title of a director who claims the office by a vote of the stockholders thereat. Whether such action was erroneous is a question which, if we should be called upon to decide in an appeal or writ of error from the final judgment, we probably would not find difficult of solution. But as to whether the district court had jurisdiction in that action to hear and decide the matters presented by the supplemental complaint is a different, and more important, question, upon the investigation of which we are not inclined at the present time, and in the pending proceeding, to enter. It should be left for the consideration of the court with all its members participating, and upon a review according to the usual practice.

We shall deny this application, if for no other reason, because by appeal or writ of error from the final judgment in that action,

in case of an unfavorable decision, the relief to which plaintiffs are entitled may be awarded. These applications invoking the original jurisdiction of this court are becoming altogether too frequent, and, excepting in extreme cases, where the right to the extraordinary relief clearly appears, and the usual remedy is not full, speedy, and adequate, we are disposed to remit the parties to their ordinary remedies, which in most cases prove efficacious, and which in this case we believe will be so.

The application is denied.

STEELE, J., not participating.

32 Colo. 506

FISK MIN. & MILL. CO. v. REED et al.

(Supreme Court of Colorado. Dec. 7. 1903.)

MINES AND MINING—DRAINAGE—CONTRACTS—CERTAINTY—MUTUALITY—PRINCIPAL AND AGENT—AUTHORITY OF AGENT—PRESUMPTION—DENIAL—PAST SERVICES—CONSIDERATION—ACTIONS—PLEADING—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

1. A contract by which defendant, in consideration of plaintiffs' pumping the water from mining properties operated by plaintiffs and defendant which were on the same level and had a common drainage, should pay its proportion of the expense of such pumping, was not defective for uncertainty, by reason of its failure to provide what aliquot part of such expense each party should bear.

2. Where a contract for the payment of defendant's share of the cost of pumping water from certain mines had been executed by plaintiffs, want of mutuality was no defense to an action thereon.

3. Where it was alleged that at the time of the making of a contract sued on, by which defendant agreed to pay its proportion of the cost of pumping water from certain mines of the respective parties, plaintiffs and defendant were engaged in operating such mines, and that they had a common drainage, and that, if plaintiffs had not been engaged in working their properties, defendant would have been compelled, in order to operate its property, to have pumped the water which plaintiffs pumped, and that the expense of drainage, all of which was borne by plaintiffs, was the sum of \$2,000 per month, an allegation that the fair proportion of such expense which defendant should pay was the sum of \$1,000 a month was not objectionable as a conclusion unsupported by facts pleaded.

4. A complaint in an action on a contract to recover defendant's just proportion of the cost of draining certain mines was not demurrable for failure to allege that such drainage was done at defendant's request.

5. Where defendant promised to pay its proportion of the cost of draining certain mining properties, a request that such drainage be continued would be implied.

6. Findings of the trial court on conflicting evidence will not be reversed on appeal where there is sufficient evidence to support them.

7. Where plaintiffs and defendant were both engaged in operating mines having a common drainage, and plaintiffs for a long period had been bearing all the expense of such drainage, and had been endeavoring to obtain a promise from defendant to pay its just proportion thereof, and both parties were equally benefited thereby, defendant's agreement to pay "what was proper and fair" should be construed as an agreement to pay one-half of such expense.

8. Where plaintiffs had been draining several mining properties, some of which belonged to defendant, for over two years, at the time defendant agreed to pay its just proportion of the expense thereof, the agreement covered the cost of past as well as future drainage.

9. Where plaintiffs continued to pump water from certain mines having a common drainage after defendant had agreed to pay its just proportion of the expense thereof, and defendant had the benefit of such subsequent drainage, such benefit constituted a sufficient consideration for defendant's agreement to pay for past as well as future drainage.

10. Where defendant agreed to pay its just proportion of the drainage of certain mines accomplished by plaintiffs, the drainage having been prosecuted for defendant's benefit, it was immaterial that defendant had no control over plaintiffs' pumping operations, and that plaintiffs had not agreed to continue the same for any particular length of time.

11. Where an agent of a corporation had charge of its mining operations at the mine, which could not have been worked without drainage, the corporation was precluded from denying that such agent was authorized to contract to pay its just proportion of the cost of draining such mine, in connection with others having a common drainage.

12. Where certain incompetent evidence could not have influenced the court adversely to defendant on any issue in the case, the admission thereof was harmless.

#### On Rehearing.

13. Where the agent of a corporation in charge of its mine had authority generally to contract for drainage thereof, he had the right, in the absence of notice to plaintiffs, with whom he contracted in the corporation's behalf for such drainage, to the contrary, to agree to pay for past drainage in consideration for a continuance thereof in the future.

14. An objection on the ground of an alleged variance between the pleading and proof cannot be made for the first time on appeal.

Appeal from District Court, Arapahoe County; Geo. W. Allen, Judge.

Action by Clinton Reed and others against the Fisk Mining & Milling Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Teller & Dorsey, for appellant. L. M. Goddard and Clinton Reed, for appellees.

GABBERT, J. The purpose of this action, commenced by appellees, as plaintiffs, against appellant, as defendant, was to recover from the latter its alleged proportionate share of the expenses incurred by plaintiffs in draining mines operated by the parties in severalty. From a judgment for plaintiffs for \$27,000, the defendant appeals.

The cause of action was stated in two counts. The first counted upon a contract between the parties, and the second upon the statute relating to the drainage of contiguous mining properties. According to the averments of the first count, it appears that for the period of 27 months subsequent to July 23, 1891, the parties were severally engaged in the operation of contiguous mines having a common drainage or water level; that, when the water was taken from neither, it would rise to a common level in each; that pumping the water from plaintiffs' mines

drained the property of defendant; that plaintiffs, during the period mentioned, pumped the water from their mines, thereby draining the mine of defendant; and that the expense thus incurred by them was \$2,000 per month. The complaint then charges, after alleging a demand upon the defendant about June 1, 1891, to pay its just and fair proportion of such expense: "And the said defendant then and there, in consideration of the premises, and of the benefits accruing to it by reason of said drainage, and in consideration that it would be continued to drain said mine as they were doing, undertook and promised the plaintiffs that it would pay to the plaintiffs its just and proper proportion of said cost of drainage as aforesaid." It is alleged that the just and fair proportion which the defendant should pay was the sum of \$1,000 per month. To this complaint a general demurrer was interposed, which was overruled.

We shall first consider the questions raised on the demurrer to the first count. It is asserted that this count fails to state a cause of action for four reasons: (1) That the contract declared upon is so uncertain that it cannot be enforced; (2) that it does not appear from its terms that it was mutual; (3) no facts are stated from which it can be determined what would be a just and fair proportion for the defendant to pay; and (4) it is not charged that the expense of pumping was incurred at the request of the defendant.

1. A contract is not void for uncertainty, even though it does not enter into all the details with respect to its subject-matter, if, according to its terms, it is sufficiently definite so that it can be ascertained with a reasonable degree of certainty what the parties intended to agree to. Thus tested, the terms of the agreement with respect to each can be readily ascertained. In brief, the contract was to the effect that, in consideration of the plaintiffs' pumping the water from all the properties, the defendant should pay them its proportion of the expense of such pumping. True, the parties did not agree in specific terms how many dollars each should contribute to the expense of drainage, nor what aliquot part of such expense each should bear, but they did agree how the sum which the defendant should pay should be determined; that is, that it "would pay to the plaintiffs its just and proper proportion of said cost of drainage." So that it only remains to determine from the contract, in connection with its subject-matter and the conditions under which the parties contracted, to ascertain for them, when a dispute has arisen, what would be a just and fair proportion of the expenses which the defendant should pay.

2. In order to enforce an unexecuted contract, mutuality is necessary, but this requisite does not apply to a contract which has been executed. As to an executory contract,

want of mutuality or reciprocal obligations of the contracting parties would be a good defense in an action to enforce specific performance, or to recover damages for its breach; but when executed, and the action is for the purpose of enforcing the obligation arising from its execution, the want of its mutuality originally is immaterial. *Frue v. Houghton*, 6 Colo. 318; *Wood v. Casserleigh*, 30 Colo. 287, 71 Pac. 360; *Marie v. Garrison*, 83 N. Y. 14; *Crawford v. Avery*, 35 Miss. 205. According to the complaint, the plaintiffs have performed for the defendant that which they agreed to do, and the latter must therefore pay the consideration agreed upon, irrespective of the question of whether or not either was originally bound by the terms of the contract, further than as conditions precedent which would entitle the one performing the acts agreed upon to a performance by the other of the obligation resulting from such performance.

3. It is argued by counsel for appellant that the averment in the complaint to the effect that the just and fair proportion of the amount which the defendant should pay is the sum of \$1,000 per month is but a conclusion of the pleader, and that no facts are stated upon which such conclusion can be predicated. It appears from the complaint that the mines of the respective parties were drained by plaintiffs; that during this period both the plaintiffs and defendant were engaged in operating their respective properties; that the mines had a common drainage, so that draining one drained the other; that, if plaintiffs had not been engaged in working their properties, the defendant would have been compelled, in order to operate its property, to have pumped the water which the plaintiffs pumped; that the expense of drainage, all of which was borne by the plaintiffs, was the sum of \$2,000 per month. These statements disclose what would be a just and fair proportion for the defendant to pay on account of such drainage. Both parties were equally benefited by having their mines drained, because they were thereby enabled to work their properties, and therefore the expense which the plaintiffs incurred on this account should be equally divided between the plaintiffs, on the one part, and the defendant, on the other.

4. There is no specific averment in the complaint that the pumping operations of plaintiffs were carried on at the request of the defendant, but the absence of this statement does not render the complaint obnoxious to the demurrer. The complaint avers that, about the time the defendant began to operate its mine, it promised and agreed with the plaintiffs that it would pay them its just and fair proportion of the expense of drainage, and that the plaintiffs, in consideration of such promise, did thereafter drain the mine of the defendant for a specific period. In such circumstances, the law implies a request, or, in other words, a promise to pay

for services to be performed implies a request for their performance. 1 *Parsons, Contracts*, \*474.

The issues made by the answer to the complaint were found in favor of the plaintiffs. From these findings it appears that the mines of the parties had a common drainage; that plaintiffs pumped the water from the property of the defendant from July 23, 1891, to October 23, 1893, and that the cost incurred by them in draining the several properties during this period was \$2,000 per month; that defendant agreed to pay them what was fair on account of such expense; and that the fair proportion of this cost which defendant should pay was \$1,000 per month. Counsel for appellant contend that the finding of the court that a contract was entered into between the parties is not justified, for various reasons, which, summarized, are to this effect: The testimony was insufficient to establish a contract; that the alleged promise on the part of defendant was so indefinite and uncertain as to be unenforceable; that such promise only related to subsequent pumping, or, if it was intended to embrace pumping previous to the time it was made, that there was no consideration for such promise, in so far as it embraced the latter; that defendant had no control over the pumping operations carried on by plaintiffs, and, in the absence of an agreement on their part to continue such operations for a specified time, the defendant was not bound by its promise; and that the promise attempted to be proved was not made by any one having authority to bind the defendant.

In order to determine these questions, a brief reference to the evidence bearing upon them is necessary. From the testimony of one of the plaintiffs, it appears that they commenced to operate their mines in the early part of 1891; that pumping the water from these mines drained the one subsequently operated by defendant, and that it commenced to operate this property below the water level in July, 1891; that about this time the witness informed the manager of the defendant company that plaintiffs, by operating their properties, were draining the water from the mine of defendant, and wanted the company to pay a part of the expense of drainage, and, in reply to the question as to what proportion, the witness stated: "Whatever is fair. You have a great deal better mine than we have, and you ought to pay as much as I do, certainly." The manager did not say whether any amount would be paid or not, but stated, in substance, that he had not heard from his company, although he had written them on the subject. The witness further stated that he subsequently talked with this manager several times on the subject of drainage, and, while he never promised positively that anything would be paid by his company on that account, he did say substantially that plaintiffs drained the mine of defendant, and that it was only fair

that they should be paid therefor. In September, 1893, this witness had several conversations with the then manager of the defendant with reference to the expense of pumping, when he informed the witness that, if plaintiffs were draining the mine of defendant, it would do what was fair toward paying the actual expense and cost of such drainage; that the company was considering what it ought to pay; and "that he could say that they would pay what was fair." The parties never agreed upon the amount which the defendant ought to pay, or what proportion of the expense incurred by plaintiffs in draining the mine should be paid by the defendant. The manager last above referred to denied that he ever promised to pay the plaintiffs anything, or that he ever consented to the proposition that the company ought to pay any sum whatever on account of the claim of plaintiffs that they were draining the mine, and denied that he had any authority to enter into an agreement with the plaintiffs with respect to drainage. There was other testimony bearing on the question of the contract claimed by plaintiffs to have been made with the defendant, but not of a character which would aid a discussion of the questions raised by counsel for appellant. After the conversation last above referred to, the plaintiffs continued to pump water as before until long after October 23, 1893, but, as this case was commenced about that time, the pumping subsequent to that date is not involved. The defendant worked its property continuously between July 23, 1891, and October 23, 1893. During this period the expense incurred by plaintiffs in pumping was \$2,000 per month. This fact is practically undisputed. The testimony clearly supports the findings of the court that the mines of the parties had a common drainage, and that plaintiffs, by draining their property, drained the mine of defendant.

In so far as any argument is based upon the assumption that the testimony is insufficient to establish the contract pleaded, because contradicted either directly or by circumstances called to our attention, it is sufficient to say that these were matters for the trial court to consider, and its finding on the issue of the making of the contract, being in favor of plaintiffs on conflicting testimony, will not be disturbed on appeal when there is sufficient evidence to support it. The testimony on the part of plaintiffs was certainly sufficient from which to infer that the defendant did promise to pay them something on account of the pumping operations, and therefore supports the finding of the court on the subject of the contract, unless, for one or more of the other reasons urged by counsel, the promise made by the defendant, as claimed by plaintiffs, cannot be upheld.

The contract declared upon, we have already indicated, was not subject to an attack on the ground of uncertainty, and it remains

to determine whether the witness for plaintiffs has stated a contract sufficiently definite and certain to be enforced. The language of the promise was to pay what was just and fair. It is urged that this is so vague, indefinite, and uncertain that it is impossible to ascertain how much was to be paid, or what proportion of the expense of pumping the defendant should discharge. In ascertaining what the parties really meant to agree to by virtue of the contract, the first point to consider is what they meant, understood, and intended by the words employed; and, as an aid to this end, the facts and circumstances surrounding the transaction at the time the contract was made may be taken into consideration. The promise of the defendant to pay what was fair does not of itself determine the amount which it should pay, or what proportion of the expense of drainage should be borne by it. When, however, the conditions under which the promise was made are taken into consideration, it can readily be ascertained what it should do by virtue of such promise, and that, in the circumstances of this case, must be taken to be what the parties meant by the expression "pay what was fair." Plaintiffs and defendant were both engaged in operating mines having a common drainage. The plaintiffs were bearing all the expense of such drainage. For a long time they had endeavored to obtain a promise from the defendant to pay its just proportion of this expense. Had plaintiffs not been operating their mines, and the defendant had operated its property, it would have been compelled to hoist the water which the plaintiffs pumped. The plaintiffs, when the defendant took no steps to take care of the water common to all the properties, were compelled, in order to work their mines, to pump the water resulting from the common drainage. The whole of this expense was thus thrown upon them, although by their operations the defendant was just as much benefited as they, by being enabled to work its property below the water level, and in fact did so. Both were therefore equally benefited, and the defendant should bear, as stated in the contract pleaded, "its just and proper proportion of the said cost of drainage," or, as testified by the witness, "what was just and fair." In such circumstances, the cost of such drainage should be divided in proportion to the benefits derived therefrom, which would be one-half each, and that, therefore, is the meaning which must be imputed to the words which they employed in their contract with respect to what the defendant should pay.

When the plaintiff who testified and the manager of the company, about September, 1893, were discussing the subject of drainage, it is plain from the statements of the former that they had in mind the question of compensation for the drainage of the mine of defendant, past as well as future. Plaintiffs had then been draining the several

properties for over two years, and during that period had at various times endeavored to effect some definite arrangement with the defendant to pay its part of the expense and cost of drainage by which the defendant was benefited, so that the statement attributed to the manager, to the effect that his company was considering what it would pay, that it would do what was fair, and he could say it would pay what was right, clearly included drainage prior as well as subsequent to that time. Plaintiffs continued their pumping operations after that date. Of this the defendant has had the benefit. The consideration which the defendant has thus accepted went to the entire undertaking upon its part, and rendered it liable to pay its proportion of the expense of pumping performed before as well as after its promise. The rendition of services in consideration of a promise to pay for them, as well as those performed prior to the promise, is a sufficient consideration to uphold a promise to pay for the latter. *Irwin v. Locke*, 20 Colo. 148, 36 Pac. 898; *Roberts v. Griswold*, 35 Vt. 496, 84 Am. Dec. 641.

The fact that the defendant had no control over the pumping operations of plaintiffs would not prevent it from entering into a binding arrangement, the purpose of which was to have such pumping operations carried on for its benefit. That this arrangement does not appear to have contemplated that the drainage should be performed by plaintiffs for any particular length of time in the future, or that by the agreement claimed on the part of plaintiffs there was no mutuality, does not, for the reasons we have already given, relieve the defendant from the obligations imposed upon it by virtue of such pumping. The plaintiffs continued to drain the mine of the defendant after the promise made by its manager, and it remains for the defendant to make good its promise by paying what it agreed in consideration of the services performed by the plaintiffs.

The agents of the defendant with whom plaintiffs discussed the question of drainage were in the active management and control of its property. Its mining operations were being carried on under their direction. The agent with whom the witness Reed talked in September, 1893, testified at the trial that he had no authority to enter into a contract relative to drainage. This, however, is immaterial. He does not pretend to have made any such statement to the witness at the time of the conversation referred to. In carrying on mining operations through a shaft, the water in a mine must be kept out; otherwise the property cannot be operated below the water level. The defendant was working its property below that level. It appears, then, that provision for the drainage of its property was one of the matters which the manager of the defendant must necessarily have had authority to arrange for, and it is therefore estopped from now claiming

that the agent had no such authority. Parties dealing with a corporation have the right to assume and act upon the presumption, in the absence of notice to the contrary, that the authority of its agent with respect to its affairs extends to those matters which, from the nature and scope of his employment, it would be necessary for him to exercise in order to carry on the business of his principal of which he is in charge. *Robt. E. Lee S. M. Co. v. O. & G. S. & R. Co.*, 16 Colo. 118, 26 Pac. 328.

Errors are assigned on the admission of alleged incompetent testimony which it is claimed was not material to the issue of the cost of drainage. The testimony as to what was the actual expense of carrying on the pumping operations was not disputed. From this it appears that the actual expense of such operations was not less than \$2,000 per month. The testimony admitted over the objection of defendant, which it is claimed was incompetent, could not in the slightest degree have affected the finding of the court as to what the expenses were per month which the plaintiffs incurred on account of drainage, so that, although the testimony objected to may have been incompetent or irrelevant, inasmuch as it affirmatively appears that its reception could not have influenced the court in its findings on the issue of the pumping expenses, or any other issue in the case, it was harmless error.

The judgment of the district court is affirmed. Affirmed.

#### On Petition for Rehearing.

(June 20, 1904.)

In support of a petition for rehearing, it is urged that the agent of the defendant who promised to pay for the pumping had authority only with respect to the current affairs of the company, and no authority as to matters which were past. For the past pumping, standing alone, this proposition might be correct, but, in view of the fact that this agent had authority generally to contract for the drainage of the company's mine, he would have the right, in the absence of any notice to the plaintiffs to the contrary, to arrange for those matters in the past which were part of the consideration for a continuance of the pumping operations in the future. In this connection it is urged that no facts were established which would estop the mining company from claiming that its agent did not have authority to arrange for the payment of the drainage of its mine. The expression that the company is now estopped from asserting that its agent did not have authority, as stated in the opinion, does not refer to what is ordinarily known as an "equitable estoppel." The rule seems to be, generally, that it would not be in accordance with justice or business interests to allow corporations to deny the authority of agents acting within the apparent scope of their au-



thority, or to repudiate contracts made by them, which from their relation to the company they apparently have authority to make. *Crowley v. Genesee Min. Co.*, 55 Cal. 273.

It is again urged that, because the plaintiffs entered into no arrangement to continue the pumping for a definite length of time in the future, there was no consideration for the promise to pay for the past drainage. In *Loomis v. Newhall*, 15 Pick. 159, it was held that an entire promise founded partly upon a past and executed consideration, and partly upon an executory consideration, is supported by the latter. Where there is a request to continue services of a character theretofore rendered, the continuance of such services is a sufficient consideration to support a promise to pay for those rendered prior to such request. 6 Enc. of Law (2d Ed.) 694; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16.

Counsel for the defendant, in arguing this question, liken the promise upon which plaintiffs rely to support their recovery for the value of past pumping to promises of forbearance, and contend that in such cases the promise is without consideration unless a definite period of forbearance is fixed. We do not think the doctrine announced in such cases is altogether applicable, because it refers generally to the rights of third parties who derive no direct benefit from the promise. The authorities, however, on this question, appear to be conflicting, but the later cases would indicate that, where no time is mentioned, a reasonable time will be implied, and this is held to be a sufficient consideration. *Anson on Contracts* (2d Am. Ed.) 98 (\*75); 1 *Parsons on Contracts* (8th Ed.) 458 (\*442); 9 *Cyc.* 344; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593. Applying this rule, no fact is called to our attention which would justify us in holding that the plaintiffs did not continue their pumping operations for a reasonable length of time after the promise to pay for the past as well as the future pumping was made, inasmuch as it appears from the testimony that such pumping operations were continued for at least 30 days after this promise. In fact, we think, from a further examination of the record, that the promise was probably made several months prior to the date suit was commenced. Aside from these reasons, it appears to us that there are other grounds sufficient to support the judgment, which, however, have not been discussed by counsel.

Negotiations were opened between the parties shortly after the defendant commenced the operation of its mine, and, while no definite promise appears to have been made until some time after, it might well be said that this promise was but a consummation of the arrangement which the parties originally contemplated should be made.

On the subject of variance, it is sufficient to say that the question was not raised below, and for that reason it will not be con-

sidered on appeal. *King v. De Coursey*, 8 Colo. 463, 9 Pac. 31; *Smith v. Roe*, 7 Colo. 95, 1 Pac. 909; *Oolo. Mortg. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42.

The petition for rehearing is denied.

32 Colo. 500

BAER BROS. LAND & CATTLE CO. v. WILSON et al.

(Supreme Court of Colorado. June 6, 1904.)

WATER RIGHTS—IRRIGATION—APPEAL—ALLOWANCE—ORDER—SERVICE AND PUBLICATION—PROOF—EXTENSION OF TIME—SUPREME COURT—JURISDICTION—AMENDMENT OF TRANSCRIPT.

1. Where material matter has been omitted from the transcript on appeal, permission may be obtained to withdraw the transcript for correction by the trial court, or an order may be made allowing a supplemental transcript to be filed to perfect the record.

2. *Mills' Ann. St.* § 2432, requires proof of the service and publication of the order allowing an appeal in proceedings to determine the priorities of rights to the use of water for irrigation to be made within 60 days after the order is granted, and, if not so filed, the Supreme Court shall, on motion of the appellee at any time after default in the filing of proof, and before such proof shall be filed, dismiss the appeal. *Held*, that such section was mandatory, and that the Supreme Court had no power to extend the time for the filing of such proof.

Appeal from District Court, Rio Blanco County; John T. Shumate, Judge.

Action between the Baer Bros. Land & Cattle Company and H. T. Wilson and others. From a judgment in favor of the latter, the former appeals. On motion to amend the transcript and to extend the time for filing proof of service and publication of order allowing appeal. First motion granted, second denied.

C. W. Darrow, for appellant.

CAMPBELL, J. The motion has a two-fold object: First, to amend the transcript; second, to extend the time for filing proof of service and publication of order allowing the appeal. As the second ground presents an important question of practice, our conclusion should be embodied in an opinion as a precedent in similar cases.

1. Leave under the first ground of motion is almost as a matter of course. The proper practice, however, is not for this court to order omitted parts of the record to be inserted in a transcript. Permission may be given to withdraw the transcript for correction by the trial court, or an order made allowing a supplemental transcript to be filed to perfect the record. Appellant may file a supplemental transcript containing the portions of the record which it alleges have by inadvertence been omitted, subject, of course, to the right of appellees to make their objections.

2. The judgment sought to be reviewed

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 2831.

seems to have been entered under the general irrigation statutes enacted for the purpose of settling the priorities of right to the use of water for irrigation. These statutes furnish a special procedure, which embraces specific provisions for perfecting an appeal. Section 2432, Mills' Ann. St., requires that proof of the service and publication of the order allowing the appeal shall be filed with the clerk of the Supreme Court within 60 days after the order is made, and, if not so filed, the Supreme Court shall, on motion of the appellee at any time after such default in filing of proof and before such proof shall be filed, dismiss the appeal.

We cannot grant the extension. The provision as to time is mandatory. *Needle Rock D. Co. v. Crawford-Clipper D. Co.* (Colo. Sup.) 75 Pac. 424. While the mere failure of appellant to file the proof within 60 days after the order of allowance is made does not ipso facto work a dismissal of the appeal, yet if appellees should interpose a motion to dismiss after such default, and before such proof is filed, this court would be obliged to grant it; and if we should allow the extension of time asked for it might cut off the absolute right of appellees to have the appeal dismissed for noncompliance by appellant with a mandatory provision of a statute.

The motion as to the first ground is allowed, and as to the second denied.

32 Colo. 522

#### ROOSE v. GOVE.

(Supreme Court of Colorado. March 7, 1904.)

EXECUTION—SALES—REDEMPTION BY CREDITOR  
—EFFECT—OBJECTIONS.

1. Where, pending advertisement of real estate for sale under an execution, the owner conveyed the same to plaintiff, who made no effort to redeem within the six months allowed by 2 Mills' Ann. St. § 2547, and after the expiration of such period a judgment creditor of plaintiff's grantor redeemed, as authorized by section 2548, and the party entitled to the redemption money accepted the same, whereupon the property was again offered for sale under an execution in favor of the redeeming creditor, and a sheriff's deed was issued to him for the cost of redemption, plaintiff was not entitled to object to the latter's purchase on the ground that the judgment under which he redeemed was invalid.

#### On Rehearing.

2. A redemption from an execution sale by a judgment creditor does not vacate the sale, but operates to transfer to such creditor the rights of the creditor from whom he redeems, providing the redeeming creditor is entitled to do so.

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by Mary Roose against F. E. Gove. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

T. M. Robinson, John R. Smith, and O. A. Johnson, for appellant. Young & Luthe, for appellee.

GABBERT, C. J. Appellant brought an action to quiet title to a tract of land. Appellee answered, setting up title by virtue of a sheriff's deed. To this the appellant replied, attacking the validity of such deed. The issues were found in favor of the defendant, and a decree rendered quieting the title in him. The plaintiff appeals.

Several important questions are argued, but the only one necessary to consider is whether or not plaintiff can be heard, on the propositions on which she relies, to question the deed under which the defendant derails title or the proceedings which led up to its issuance. One Charles E. Huggins was the owner of the property. Pending its advertisement under execution Huggins conveyed to the plaintiff. No redemption from the execution sale was made by either plaintiff or her grantor during the six months following the execution sale. After that period one Bergland, a judgment creditor of Huggins, redeemed from the sale in the manner designated by section 2548, 2 Mills' Ann. St., and the sheriff again offered the property for sale under the execution in favor of the redeeming creditor, as provided by this section. There being no bid in excess of the cost of redemption, a sheriff's deed was issued to Bergland in conformity with the provisions of section 2549, Id. The latter subsequently conveyed to the defendant. The money paid the sheriff to effect the redemption was accepted by the party entitled thereto. The validity of the original sale is not questioned, but plaintiff attacks the validity of the judgment under which Bergland redeemed and the regularity of the proceedings thereunder. She cannot raise these questions. The judgment debtor had no right to redeem after the expiration of six months from the date of sale. Section 2547, Id. Plaintiff, as his grantee, was subrogated to his rights, but they are no different from those of her grantor. *Finch v. Turner*, 21 Colo. 287, 40 Pac. 565. The only person affected by the redemption has recognized its validity. Plaintiff no longer had any such interest in the question of redemption as entitled her to raise any objection on that score. Hence, whether the judgment under which Bergland redeemed was valid, or the proceedings thereunder regular, does not concern the plaintiff; for she was not injured by the judgment or sale thereunder, which she now seeks to attack. As against her, in these circumstances, the sheriff's deed is valid, and vested the title to the premises in Bergland, who has conveyed to the defendant. When the grantee of a judgment debtor fails, within the time prescribed by law, to exercise the statutory right to redeem lands from an execution sale in all respects valid, he cannot question the validity of a redemption from such sale by a judgment creditor of the debtor, or the title acquired by virtue of a sale in pursuance of such redemption, when the party entitled to the redemption fund has accepted it. *Massey*

¶ 2. See *Execution*, vol. 21, Cent. Dig. § 394.

v. Westcott, 40 Ill. 160; Pozarth v. Largent, 128 Ill. 95, 21 N. E. 218; Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367.

The judgment of the district court is affirmed.

Affirmed.

STEELE, J., not sitting.

On Rehearing.

(June 20, 1904.)

PER CURIAM. Further consideration of the case has not changed our conclusion. In the Illinois cases cited, expressions are found which certainly support the view that plaintiff could not raise the question respecting the validity of the judgment under which Bergland redeemed. In addition we now cite Pearson v. Pearson, 131 Ill. 464, 23 N. E. 418, in which it was held (quoting the syllabus): "It matters not whether a party has the right to redeem from a sheriff's sale of land as a judgment creditor or not, if the purchaser at such sale accepts the redemption money. Such acceptance terminates all the rights of the purchaser to the land, and no one else can question the validity of the redemption." In Hare v. Hall, 41 Ark. 372, it was held that a judgment creditor, whose judgment was void, who redeemed land of the judgment debtor from sale under a prior judgment, with the consent of the purchaser, and received a sheriff's deed therefor, obtained good title to the land. There are cases from the Supreme Court of Illinois, referred to by counsel, which do not appear to be altogether harmonious with these cases, and which hold that a redemption made by a judgment creditor, in order to be available under his statutory right to redeem, must be under a valid judgment and valid execution, and that the acceptance of the redemption money by the purchaser under the judgment sale redeemed from does not change this rule. Such is the holding in Meyer v. Mintonye, 106 Ill. 414. The court, however, in that case, says that this doctrine has become a rule of property in that state, and it is now too late to question it.

An analysis of the statutes relative to execution sales will serve to further demonstrate that the conclusion originally announced is correct. The judgment debtor is given six months after date of sale within which to redeem. After that period judgment creditors are the only persons who may redeem; so it necessarily follows that the judgment debtor, not having any right of redemption, cannot question subsequent proceedings which do not affect his rights. True, he is not divested of the legal title until a sheriff's deed issues; but, after the period of redemption has expired, the only question open is, to whom shall such deed issue? The only person who can raise that question is the holder of the certificate of sale from which redemption was made, because no other's rights are

affected by its issuance. He may waive this right, but that is not a waiver of which the debtor can complain or take advantage. The redemption by a judgment creditor, the sale under his execution, and issuance of deed thereon deprives the judgment debtor of nothing which he otherwise would have had. Smith v. Mace, 137 Ill. 68, 26 N. E. 1092. Inferentially, Finch v. Turner, supra, sustains these views. It was there held that as to the judgment debtor the deed may issue at any time after the expiration of six months. While such deed would be premature as against judgment creditors, that is not a matter of which the judgment debtor can complain, because his right of redemption has expired, and upon the issuance of a sheriff's deed, based on the original sale, his rights in the property have terminated.

The effect of a redemption from an execution sale by a judgment creditor is not to vacate the sale and set it aside, as though the redemption had been made by the debtor, but it operates to transfer to the creditor redeeming the rights of the creditor from whom he redeems, provided, of course, that the creditor redeeming has the right to do so. 3 Freeman on Executions (3d Ed.) p. 1884, § 321. If, however, the holder of the certificate of sale accepts the redemption money, the rights of the creditor redeeming are the same as though his redemption was in all respects valid. In re Opening of Eleventh Ave., 81 N. Y. 436.

The judgment of the district court will stand affirmed.

Affirmed.

STEELE, J., not participating.

32 Colo. 493

STRATTON'S INDEPENDENCE, Limited,  
et al. v. MIDLAND TERMINAL  
RY. CO. (two cases).\*

(Supreme Court of Colorado. June 6, 1904.)

RAILROADS—RIGHT OF WAY—SWITCH TRACKS—  
LICENSES—REVOCATION—APPEAL—PARTIES  
—FREEHOLD—TRANSCRIPT—OMISSIONS—  
AMENDMENT.

1. The omission from the transcript in the Supreme Court of the appeal bond and indorsements, showing the date of filing and approval, may be supplied by a supplemental transcript, showing that such bond was in fact filed and approved within the time fixed by the trial court.

2. Where, under Mills' Ann. Code, § 400, providing that, where a decree has been rendered against two or more persons, either may remove the suit to the Supreme Court, and for such purpose may use the names of all the parties, if necessary, a mining company could have appealed from an entire judgment against it, granting complainant the right to relay a switch track, and permanently enjoining both the mining company and another railway company, which was made a party to the proceedings, from interfering therewith, or with complainant's reoccupation of such track, and in so doing might have used the name of the railroad

\*Rehearing denied June 27, 1904.

company so enjoined, even if the latter had not joined in the appeal, it was no objection that the appeal taken was on behalf of the mining company and the railway company jointly, and that no judgment affecting the rights of the defendant railway company had been rendered.

3. Where a railway company, joined as a defendant in a suit to restrain interference with complainant's switch track, was enjoined by the decree from entering into an arrangement with its codefendant granting it an easement over the latter's land for the use of a switch track, a freehold was involved, entitling such railway company to appeal from the decree to the Supreme Court.

4. Where, on the request of a mining company, complainant railroad company constructed a switch track over the mining company's land to its ore and coal bins, without any compensation being paid, or any agreement being made that the license to maintain the track should continue for any definite length of time, and it was never intended that the track should be extended beyond the limits of the mining company's property, and it was never extended beyond such limit, nor intended to be used, except in connection with the business of the mining company, the railroad's license to maintain the track was revocable at the option of the grantor.

Appeal from District Court, Teller County; William P. Seeds, Judge.

Consolidated actions by the Midland Terminal Railway Company against Stratton's Independence, Limited, and others. From a decree in favor of complainant, defendants appeal. Reversed.

At the written request of Stratton's Independence, Limited, a mining corporation, the Midland Terminal Railway Company constructed a track to the ore and coal bins of the former. This track was constructed over the property of the mining corporation, but does not extend beyond the ore and coal bins of that company. Subsequently the mining company changed the location of its ore bins, and an additional track was laid by the railroad company to these bins. This track is also wholly on the property of the mining company, and is the particular subject of controversy involved. It does not extend beyond these bins, and was never used, or, at least, was never intended to be used, for any purpose except to ship ore of the mining company. After this track was so laid, the mining company wished to make arrangements whereby the Colorado Springs & Cripple Creek District Railway Company, hereafter mentioned as the "Short Line," could have the use of such tracks, so that ore might be shipped over that line, as well as effect the Midland Terminal. Not being able to effect such arrangement with the latter company, the mining company took up the part of the track in controversy, and replaced it with one of its own, but connected it with the other track, built by the Midland Terminal, and also made connection with the Short Line, so that this track could be used by either company. Later the Midland Company undertook to tear up this track, but was prevented from so doing by the mining company. The Midland Company then commenced an

action against the mining company and the Short Line to restrain them from interfering with its relaying the track over the line in question, or its operation when relaid. The mining company also commenced an action to restrain the Midland Company from interfering with the track laid by the mining company. Preliminary injunctions were issued in each case. The causes were consolidated for trial, and on the issues made judgment was rendered in favor of the Midland Company, granting it the right to relay its track, and permanently enjoining interference therewith by either the mining company or the Short Line, or its reoccupation of the grade from which its track had been removed. The cause commenced by the mining company was dismissed. From this judgment the mining company and the Short Line prayed, and were allowed, an appeal to this court. After the cause was at issue here, and had been set for oral argument, the appellee moved to dismiss the appeal. This motion is based upon two grounds: (1) Because it appears from the transcript that appellants did not file the appeal bond required by order of the district court; and (2) because the appeal attempted to be taken is joint, and, so far as the Short Line is concerned, no judgment was rendered against it, nor is any question or right involved affecting its rights which vests this court with jurisdiction to review the judgment rendered against it. Appellants then filed a cross-motion for leave to file a supplemental transcript, in which motion they state that through error or mistake of the clerk of the district court he omitted from such transcript a copy of the appeal bond, together with the indorsements thereon, showing the date of filing and approval. In support of the motion they tendered a supplemental transcript, from which it appears that the appeal bond required by order of the district court was in fact filed and approved within the time fixed by such order.

Macbeth & May, Robt. G. Withers, Lunt, Brooks & Wilcox, Thomas, Bryant & Lee, and Helm & Dixon, for appellants. Karl O. Schuyler, H. M. Blackmer, and Henry T. Rogers, for appellee.

GABBERT, C. J. (after stating the facts). The omission from the transcript of record lodged in this court on appeal of the appeal bond and indorsements, showing the date of filing and approval, may be supplied by supplemental transcript, showing that such bond was in fact filed and approved within the time fixed by the trial court.

The action was commenced and maintained by plaintiff on the theory that the license granted by the mining company was irrevocable. To this action the Short Line was made a party. It appears from the pleadings, as well as the testimony, that the purpose of the mining company in taking up the track in question and laying down one of

its own was to connect the latter with the tracks of the Midland, as well as the Short Line Companies, so that each might have access to the ore bins of the mining company. It appears that the mining company intended, if it had not in fact so arranged with the Short Line, that the latter should have the use of this track. The purpose of plaintiff in making the Short Line a party was to secure a judgment which would prevent it from in any manner interfering with plaintiff's grade or track, which it claimed the exclusive right to use and control. The judgment entered expressly inhibits the Short Line Company from in any manner interfering with the reoccupation of the grade upon which the Midland Company claims the right to construct and maintain its track. So long as this judgment stands, the Short Line Company would certainly be prevented from using the track in question, even though it should be held that the mining company had the right to take up the track laid by the Midland Company and construct one of its own. The mining company has the right, if entitled to lay and control the track in controversy, to enter into an arrangement with the Short Line whereby the latter may have the use of such track. The effect of the judgment is to inhibit the mining company from entering into such an arrangement with the Short Line, even if the former should be decreed the right to lay and control its own track over the grade which the Midland Company claims. The mining company is the owner of the fee over which such track may be constructed, and it has the right to have the judgment against the Short Line reviewed, because that judgment affects its (the mining company's) interest in a freehold. In order, then, to have the questions at issue fully determined, and its rights fully protected and adjudicated, the mining company, by virtue of section 400 of Mills' Ann. Code, could have appealed from the entire judgment, and in so doing used the name of the Short Line, even if the latter had not joined in the appeal. The Short Line is also prevented from entering into an arrangement whereby it could enjoy the easement to which it is entitled by virtue of an arrangement made or hereafter to be entered into with the mining company, because it is also enjoined from in any manner interfering with the reoccupation of the grade claimed by the Midland Company. This right, of which the Short Line is deprived by the judgment, is an easement in real estate, and hence, as to it, a freehold is also involved. *Wyatt v. Irr. Co.*, 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280. The motion to dismiss the appeal is denied.

As has often been remarked in opinions, discussing the question of whether or not an executed parol license which imposes a servitude on an estate in lands is revocable at the will of the licensor, the authorities are conflicting and irreconcilable. It can, therefore,

serve no useful purpose to undertake a discussion of the various propositions under which the courts have reached opposite conclusions on that subject. The case at bar has peculiar features, by virtue of which our conclusion is controlled, which clearly distinguish it from any case on that question decided by this court or the Court of Appeals, particularly *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039, and *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902. The license granted to the Midland Company was limited in the sense that it could only be enjoyed in handling freight for the mining company. There was no compensation paid, or exacted, for such license; no promise to convey a right of way over which the track was constructed; no promise that such license should continue for any definite length of time. The written request to build granted no right to the railway company different from that which would have passed, had the request been verbal. The arrangement entered into was for the mutual accommodation of the mining and railway companies. It was never intended that the track in question should be extended beyond the limits of the property of the mining company, nor was it ever extended beyond such limits; neither was it used, or intended to be utilized, except in connection with the business of the mining company. The purpose of having the track extended to the bins of the mining company was to afford it better facilities for transporting its ore. By building the track the Midland Company secured the transportation of such ore, as well as supplies which the mining company shipped in for use in operating its mine. The Midland Company, therefore, has not been defrauded or misled, nor has it expended money on the faith of the license granted, except so far as by such expenditure it expected to, and has, been benefited by the business obtained from the mining company. The railway company was certainly under no obligation to maintain the track in question. It could have removed it at its pleasure, and the mining company would have had no recourse against it for any breach of contract. It is apparent, therefore, that there was no contract mutually binding and obligatory upon each of the parties; but the arrangement entered into was only for their mutual convenience, so long as the railroad company saw fit to operate its cars over the track, or the mining company to permit it to occupy its ground for the purpose of maintaining such track. In such circumstances we are of the opinion that the license granted the Midland Company by the mining company was revocable at the will of the latter. *Nat. Stock Yds. v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Minn. Mill Co. v. Minn. & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *Jackson & Sharp Co. v. P., W. & B. R. R. Co.*, 4 Del. Ch. 180; *L. S. & M. S. Ry. Co. v. Hoffert*, 40 Ill. App. 631.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Judgment reversed.

STEELE, J, not sitting.

32 Colo. 502

BROWNLEE v. WILLIAMS et al.

(Supreme Court of Colorado. June 6, 1904.)

ADVERSE POSSESSION — WHAT CONSTITUTES —  
ERECTION OF IMPROVEMENTS — MIS-  
TAKEN BOUNDARIES.

1. The making of improvements by the owner of land on adjoining land, under the mistaken belief that he is making them on his own land, does not constitute an adverse possession of the adjoining tract.

2. One who has a bond for a deed to land from the owner has the right to erect improvements thereon, and his act in so doing does not put the owner on inquiry to ascertain whether the one making the improvements is claiming to hold adversely.

3. One entering on land under bond for title does not hold adversely as to the owner of the land until by stipulation he agrees to quitclaim to such owner the premises described in the title bond.

Appeal from District Court, Morgan County; Christian A. Bennett, Judge.

Action by Edward B. Williams and others against George F. Brownlee. From a judgment for plaintiffs, defendant appeals. Affirmed.

Talbot, Denison & Wadley, for appellant. W. A. Hill and L. C. Stephenson, for appellees.

STEELE, J. In the year 1886 Solon D. Martin was seised in fee of the southwest quarter of section 7, township 4 north, range 58 west, and executed to George F. Brownlee a bond for a deed therefor. In the year 1888 Brownlee entered the southeast quarter of the same section as a homestead. From that time until July, 1896, he was in possession of both quarters, and used them together as a farm. On December 20, 1895, suit was brought by Martin against Brownlee for the purpose, among other things, of foreclosing his bond and of quieting his title to the southwest quarter of the section. That suit was disposed of by stipulation, and it was agreed by and between the parties that the defendant, Brownlee, should move the house theretofore moved from the southwest quarter back upon said premises, and that he should quitclaim the said southwest quarter to Martin; that Martin should deliver up certain notes given him by Brownlee, and that he should assume a certain note given for water rights. It was further agreed that the action should be dismissed, and that these things, when done, should settle and discharge all claims of either party against the other. The agreements were performed upon both sides, and the suit was dismissed.

Brownlee surrendered possession of the southwest quarter to Martin, excepting about 28½ acres, which he (Brownlee) had fenced with, and as a part of, the southeast quarter in 1895. Martin died in 1897, and the appellees succeeded to his title. On July 18, 1900, they brought suit in ejectment to recover the possession of the 28½ acres of land in dispute. The suit resulted in a judgment for the plaintiffs, and the defendant has appealed to this court.

Upon the trial there was some testimony given by the defendant tending to show an agreement between the defendant and Martin as to the division line. An issue was made as to whether there was such an agreement, and the jury found against the defendant, under proper instructions. It is at least doubtful whether the defendant's testimony, if uncontradicted, would have sustained a verdict in his favor upon this point. On cross-examination he said: "Q. You have stated in your direct examination that Mr. Martin saw this fence there. When did you make any agreement with Mr. Martin as to where this line should be? A. In about '89. Q. What was the consideration for the agreement? A. There wasn't any consideration. Q. Did he agree to any line? A. He did. Q. How? A. Why, by consenting to my putting the fence up. Q. You remember your testimony six months ago, do you? Did you state at that time of his agreeing to a line? A. He agreed to the line by not objecting to my cutting hay. Q. Mr. Brownlee, did you have a conversation with—in March or April, 1900—with Ed. Williams, when he went to see you on the place, in which you went down with him and his father where you live there on this southwest quarter of 7, and that you stated to them that as soon as the river went down, and you could get Ed. Baker down to survey the line, that wherever he would determine it that you would be willing to be governed accordingly, and that you did not want any part of the southwest quarter of 7? A. Why, providing they got a correct survey of it. Q. Then at that time you did not claim any agreed line, did you? A. Why, I claimed it up to that fence, where I maintained my house. I did; most certainly I did."

The assignments of error relied on to reverse the case are numerous, but they all relate to the giving and refusing of instructions relative to the defendant's claim of title to the 28½ acres by adverse possession and the payment of taxes. During the years from 1888 to 1896 Brownlee was in possession of the southwest quarter under the bond for deed from Martin, and in possession of the southeast quarter under his homestead entry. He was mistaken, and, no doubt, honestly mistaken, as to where the dividing line should be, and made some slight improvements on the southwest quarter which he at the time thought he was making on his homestead; but this could not be regarded as an adverse possession. Having a bond for a deed to the

southwest quarter, he had the right to put whatever improvements he pleased upon it, and Martin, of course, was not put upon inquiry by the making of such improvements. Brownlee, therefore, was not in a position to hold as a part of his homestead, and adversely to Martin, any part of the southwest quarter, until after the settlement of their differences by the stipulation of July 6, 1896. By that stipulation Brownlee agrees "that he will quitclaim by deed to said plaintiff the premises and property described in said title bond sued upon." We can find nothing in the record tending in the remotest degree to support the contention of the defendant that there was any real or supposed boundary dispute settled by this stipulation, or that any such dispute was in existence at that time. Brownlee was to reconvey to Martin the land described in the bond for deed, and he did so. The deed recites that: "Said Martin having, on the 19th day of August, 1886, made to Brownlee his bond for deed for said premises, and the same having been recorded in Weld county, Colorado, December 11, 1886, of which county Morgan county was then a part, in Book 66, on page 71, now the purpose of this deed is to perfect the title to said premises back in Martin, to have and to hold the same, together with all the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use and behoof of the said party of the second part, his heirs and assigns, forever." We think, therefore, that the period of Brownlee's adverse possession was too short to be submitted to the jury as a possible defense or source of title in this case, and that the errors complained of were without prejudice to any right existing in the defendant.

For the reasons given, the judgment is affirmed. Affirmed.

32 Colo. 486

PEOPLE ex rel. LANKFORD et al. v. LONG et al.

(Supreme Court of Colorado. June 6, 1904.)

OFFICERS—TITLE TO OFFICE—JOINT ACTIONS—PARTIES DEFENDANT—COUNTY COMMISSIONERS—INCREASE—STATUTES—CONSTRUCTION.

1. In an action to try title to office plaintiff alleged that in 1883 two persons other than the regularly elected county commissioners in a certain county having theretofore only three commissioners convened with the board, and since that time, by election, the number of commissioners de facto had been kept at five; that the two defendants were the successors of the two members illegally added, and defendants had no right to the office. *Held* that, on its appearing that one of the defendants was not in fact the successor of one of the alleged illegally appointed members, joint action could not be maintained.

2. Const. art. 14, § 6, prior to its amendment in 1902, fixed the number of county commis-

sioners at three, with permission to counties with population of more than 10,000 to increase the number to five; and Mills' Ann. St. § 786, provided for the election and terms of office of members in counties availing themselves of such permission. *Held*, that where a county increased the number of commissioners in 1883, and the people acquiesced therein, and ever afterwards elected five commissioners, and the county was entitled to that number, the regularity of the proceedings increasing the number would not be inquired into at the instance of private individuals seeking to try the right to office of some of the commissioners.

3. Const. art. 14, § 6, as amended November 4, 1902, provides that in each county having a population of less than 70,000 there shall be elected for a term of four years, each, three county commissioners; two of said commissioners to be elected at the general election in the year 1904, and at the general election every four years thereafter; and the other one of said commissioners to be elected at the general election in the year 1906, and at the general election every four years thereafter; and the term of office of the county commissioners in each county expiring in January, 1904, was extended to the second Tuesday in January, A. D. 1905, and the terms of office of the county commissioners expiring in January, 1906, were extended to the second Tuesday in January, A. D. 1907. *Held*, that this did not contemplate the immediate reduction of the board in counties where it was composed of five members by the removal of two of them, but that the number should be decreased by elimination by the method of election stated.

Error to District Court, Pueblo County; M. S. Bailey, Judge.

Proceedings by the people, on the relation of Garrett Lankford and others, against Chauncey J. Long and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

N. C. Miller, Atty. Gen., and Coulter & McDougall, for plaintiffs in error. E. E. Hubbell and Charles E. Gast, for defendants in error.

STEELE, J. The action was brought by Lankford and others to test the right of Chauncey J. Long and Alfred H. Smith to hold the offices of county commissioners in Pueblo county. The complaint sets forth two causes of action. In the first it is alleged that prior to the 13th of January, 1903, there were three regularly elected, qualified, and acting county commissioners of the county of Pueblo, whose terms of office did not expire in January, 1903, to wit, D. C. Taylor and John T. West, who had been elected in the year 1900 to serve for a period of three years from January, 1901, and J. P. Williams, who had been elected in 1901 to serve for a period of three years from January, 1902. The relators further allege, on information and belief, that at the time of the adoption of the Constitution, and for several years thereafter, the county of Pueblo was a county of less than 10,000 inhabitants, and that at the time of the adoption of the Constitution and until March 19, 1883, there were but three county commissioners in said county of Pueblo, constituting the board of county commissioners; that about March 19, 1883, two persons

other than the regularly elected county commissioners of said county convened with the regularly elected county commissioners as the board of county commissioners, and since that time, by election from time to time, the number of county commissioners de facto in said county of Pueblo has been kept at the number of five; that the citizens of said county did not at any time, by a petition of a majority of the legal voters thereof or otherwise, express a desire to increase the number of the members of the said board of county commissioners of Pueblo county from three to five, nor were any steps taken increasing the number of said board, but the lawful number of county commissioners in said county of Pueblo is, and at all the times herein mentioned was, three; and that the said respondents Chauncey J. Long and Alfred H. Smith are the present successors of the two commissioners who were illegally added to the board, and of no other; that said Long and Smith, notwithstanding the premises above set forth, without authority or warrant of law, on or about January 13, 1903, intruded into and usurped the office of county commissioner of said county of Pueblo, and assumed, and still assume, to be regularly elected, qualified, and acting county commissioners of said county. In the second cause of action it is stated that at the state election held on November 4, 1902, the people, by a majority vote, adopted as a part of the Constitution an amendment to section 6, art. 14, by which amendment the number of county commissioners in counties having a population of less than 70,000 was and is limited to three; that said amendment became effective when ratified by the people on the 4th day of November, 1902; that Pueblo county is a county having less than 70,000 population, and that the defendants Long and Smith, notwithstanding the premises set forth, without warrant or authority of law, on or about January 13, 1903, intruded into and usurped the office of county commissioners of said county, and assumed and still assume to be regularly elected, qualified, and acting county commissioners of said county. It is also alleged that upon the 13th of May, 1903, the relators made their complaint in writing and under oath to the district attorney within and for the Tenth judicial district, requesting the said district attorney to bring this action, but that the said district attorney neglected and refused, and still neglects and refuses, to prosecute the action. Wherefore the relators pray the judgment of the court ousting said Chauncey J. Long and Alfred H. Smith from the office of county commissioner of the county of Pueblo. A demurrer was interposed upon the following grounds: (1) That said complaint, and neither the first nor second causes of action therein stated, set forth sufficient facts to warrant the relief prayed for. (2) As to the first cause of action, the same appears to be barred by the statute of limitations and by

the acquiescence, laches, and consent of the relators, and the same presents for determination matters which at this time will not be inquired into judicially. (3) There is a misjoinder of parties defendant herein, in this: that the suit attempts to try the title of two parties to two separate and distinct offices, without any community of interest or title existing as between the said defendants. The demurrer was sustained, and, the relators having elected to stand by their complaint, the cause was dismissed. Thereupon the relators prayed an appeal to this court.

The portions of the amendment to the Constitution mentioned in the complaint are as follows:

"Sec. 6. In each county having a population of less than seventy thousand there shall be elected for a term of four years each three county commissioners who shall hold sessions for the transaction of county business as provided by law; any two of whom shall constitute a quorum for the transaction of business. Two of said commissioners shall be elected at the general election in the year nineteen hundred and four, and at the general election every four years thereafter; and the other one of said commissioners shall be elected at the general election in the year nineteen hundred and six, and at the general election every four years thereafter. \* \* \* The term of office of the county commissioners in each county that expires in January, 1904, is hereby extended to the second Tuesday in January, A. D. 1905, and the term of office of the county commissioners that expires in January, 1906, is hereby extended to the second Tuesday in January, A. D. 1907." Laws 1901, p. 112.

Original section 6 of article 14 of the Constitution is as follows: "In each county there shall be elected for the term of three years three county commissioners, who shall hold sessions for the transaction of county business as provided by law; any two of whom shall constitute a quorum for the transaction of business. One of said commissioners shall be elected on the first Tuesday in October, eighteen hundred and seventy-six, and every year thereafter one such officer shall be elected in each county, at the general election, for the term of three years; provided, that when the population of any county shall exceed ten thousand, the board of county commissioners may consist of five members, who shall be elected as provided by law, any three of whom shall constitute a quorum for the transaction of business."

Section 786, Mills' Ann. St., is as follows: "Whenever any county having a population exceeding ten thousand avails itself of the provisions of section 6 of article 14 of the Constitution, and increases its board of county commissioners to five, it shall, at the first ensuing general election, elect three commissioners, one of whose term of office shall be three years, one two years and one one year. At the next ensuing general election, and



every three years thereafter it shall elect two, whose term of office shall be three years. At the next general election and every three years thereafter it shall elect two, whose term of office shall be three years, and at the next general election, and every three years thereafter, it shall elect one whose term of office shall be three years."

In the year 1876, according to the requirements of the Constitution, a county commissioner was elected for the term of three years. Every year thereafter a county commissioner was elected for the full term of three years. When the membership of the board was increased to five, the two members added to the board (it appearing that they took their places in the month of March, 1883) held under the appointment until the general election of that year. At the election in 1883 three commissioners were elected; one for a term of three years, one for a term of two years, and one for a term of one year. The commissioners elected in the fall of 1883 then were one commissioner whose term expired under the Constitution in January, 1884, and the two commissioners whose term by appointment expired at the election in 1883. These two commissioners, when elected, therefore, were elected to fill terms expiring in January, 1885, and in January, 1886. At the expiration of these one and two year terms these terms were increased to three years; so that the commissioner elected in 1885 is the predecessor of the commissioner whose term expired in January, 1908, and the commissioner elected in 1886 is the predecessor of the commissioner whose term began in 1901. It follows, therefore, that the two commissioners who were elected in the year 1902 were not both the successors of the commissioners who were appointed in 1883, at which time the board of commissioners was increased from three to five members. Therefore, although we should assume that a joint action might be maintained against the respondents under the second cause of action, the joint action cannot be maintained under the first cause of action for the reasons stated. But we think we should not inquire into the regularity of the proceedings by which the membership of the board was increased. The members were added to the board in the year 1883. For more than 20 years the people have acquiesced. They have elected successors of these two members, and the affairs of the county have for this period been conducted by a board consisting of five members. Pueblo county has all this time been entitled to a board consisting of five members, and, even though it should appear that the proceeding in 1883 was not in all respects regular, it should not be disturbed at the instance of private individuals for the purpose of trying the title to the office of a commissioner elected in 1902.

The amendment to the Constitution, we think, does not contemplate the removal of

two members of the board of county commissioners in counties where the board is composed of five members. It makes no provision in express terms for reducing the membership of the board, but does provide for elections every two years. This will result in the gradual reduction of the board, as there can be no election for county commissioners except in the year 1904, and every four years thereafter, when two commissioners are to be elected, and in the year 1906, and every four years thereafter, when one commissioner is to be elected.

It is contended that upon the adoption of the amendment in the year 1902 persons elected at the same election were not entitled to qualify for the reason that the Constitution had reduced the membership of the board from five to three members. We think this is not the correct interpretation of the amendment. The amendment expressly provides that the term of office of county commissioner that expires in the year 1906 shall be extended to the year 1907, and it could refer to no other officers than those elected in the year 1902.

For the reasons given, the judgment of the district court is affirmed. Affirmed.

20 Colo.A. 130

MACDERMID v. WATKINS.

(Court of Appeals of Colorado. June 13, 1904.)

APPEAL—ABSTRACT—SUFFICIENCY.

1. Plaintiff in error must abide the consequences of any want of necessary fullness in the abstract, as on final hearing the court will consider no part of the record not embraced therein.

Error to District Court, El Paso County.

Action between K. Macdermid and Letitia Watkins. There was judgment for the latter, and the former brings error. On motion to strike out the abstract. Motion denied.

McKisson & Little and John W. Kriger, for plaintiff in error. Walter Scott and Geo. W. Musser, for defendant in error.

PER CURIAM. Defendant in error moves to strike out the abstract of the record, filed by the plaintiff in error, and dismiss the writ of error, on the ground that the abstract does not present the parts of the record to which reference is made in the assignment of errors. The abstract falls very far short of the requirements of our rule, but we cannot say that, in respect of the objections specified in the motion, it is an absolute failure. The plaintiff in error must abide the consequences of any want of necessary fullness in the abstract, because at the final hearing the court will not look outside of it, and no part of the record will be considered which it does not embrace.

The motion will be denied. Denied.

20 Colo.A. 93

## EVERETT v. HART.

(Court of Appeals of Colorado. June 13, 1904.)

## ASSIGNMENT IN WRITING—SECONDARY EVIDENCE—FOUNDATION—DECLARATIONS AGAINST INTEREST.

1. In an action by an assignee of a claim for labor, evidence that the assignment, after execution in writing, had been delivered by plaintiff to his attorney, and left by the latter in the justice's office among the papers in the case, where, after search, it could not be found, was sufficient foundation for secondary evidence of the contents of the instrument.

2. Statements by a person who had been conducting a mine and employing laborers therein, under a lease to himself and others, that after a certain date the lease would be his, and that he was negotiating to sell his lease, justified a finding that after the date mentioned he was sole owner of the lease, and individually liable for labor employed by him.

Appeal from Teller County Court.

Action by Ira Hart against E. Everett. From a judgment for plaintiff, defendant appeals. Affirmed.

Lunt, Brooks & Wilcox and David P. Wilder, for appellant. Henry Trowbridge, for appellee.

THOMSON, P. J. This action was commenced by the appellee, Hart, before a justice of the peace, to recover an alleged indebtedness of the appellant to him for labor, and an alleged indebtedness of the appellant to one J. M. Martin for labor, of which latter he claimed to be the owner by assignment from Martin. The case went by appeal to the county court, where a judgment was rendered in favor of the plaintiff for the amount of his consolidated claim. The defendant appeals to this court.

The argument of the appellant is confined to certain rulings of the court made at the trial. The assignment by Martin to the plaintiff was in writing. It was written by Henry Trowbridge, the plaintiff's attorney, signed by Martin, delivered to the plaintiff, and by him turned over to Trowbridge. Trowbridge left it in the justice's office with the papers in the case. He afterwards looked among those papers for it, but it was not there. He also made search among the papers in his office, but could not find it. Upon proof of the foregoing facts, the court allowed Martin and the plaintiff to testify to what the assignment contained. It is said that the loss of the paper was not sufficiently proved to authorize the admission of the testimony. If Trowbridge, who handled it last, left it with the papers in the justice's office, that was the place where it should have been found. He not only looked for it there, but among the papers in his own office. We think he made all the search that was necessary, and that the secondary evidence was properly received.

When the plaintiff rested, the defendant moved for a dismissal of the suit on the

ground of nonjoinder of parties defendant, and renewed the motion at the conclusion of the case. The defendant was operating a mine called the "Monument Mine," as manager for certain lessees of the property, of whom he appears to have been one; and the plaintiff and his assignor worked upon that mine. The defendant did not in terms employ them in behalf of the owners of the lease, and they supposed they were working for him. Some facts were shown which counsel say were sufficient to put them on inquiry, and if they had inquired they would have found that the defendant was acting only in a representative capacity. The argument is that the indebtedness was due from the lessees jointly, and that hence they were all necessary parties defendant. But the theory that this indebtedness grew out of labor performed under that lease has consistency only by ignoring a portion of the evidence. The lease, in connection with which the facts suggesting inquiry arose, expired on the 15th day of November, 1898. For all work done prior to that time the plaintiff and his assignor were fully paid. The last checks for their work under that lease bear date November 15, 1898. Subsequent work on the mine was done under a new arrangement, and it was on account of such subsequent work that this suit was brought. There was evidence sufficient to warrant the court in finding that after the 15th day of November the defendant was sole lessee of the mine, and operated it in his own behalf. P. S. Farris, one of the employees upon the mine, testified that in a conversation he had in October, 1898, with the defendant concerning the ownership of the lease, the defendant told witness that after the 15th day of November the lease would belong to him. Mr. Martin testified that some time about November 15th the defendant informed him that, "after this lease he had signed those checks for as manager expired, the lease would be E. Everett's in the future." The plaintiff testified that, after the indebtedness to him for his work subsequent to November 15th had been incurred, he had a number of conversations with the defendant relative to its payment; that the defendant said he did not have the money, and could not pay it, but that "he had a deal on with his lease to sell his lease, and when that was sold he would get the money and could pay a part at least." That the defendant was the sole owner of the lease and was solely liable for this indebtedness, is a legitimate deduction from the foregoing declarations, which were not disputed; and a finding of the court that such was the fact will not be disturbed by us, notwithstanding there was other evidence tending in an opposite direction. There is no controversy over the amount claimed, and the judgment will be affirmed.

Affirmed.

20 Colo.A. 106

**SCHOOL DIST. NO. 38, BOULDER COUNTY, v. WATERS.\***

(Court of Appeals of Colorado. March 14, 1904.)

**PROCEDURE—APPEAL FROM JUSTICES—JUDGMENT—FAILURE TO SERVE SUMMONS—WAIVER—JURISDICTION.**

1. Under Mills' Ann. St. § 2687, providing that upon the trial of appeals before the county court no exception shall be taken to the form of service of summons issued by the justice of the peace, nor to any of the proceedings before him, but that the court shall hear and determine the cause in a summary way, according to the justice of the case, a defendant appealing to the county court from a judgment of a justice of the peace waives an objection that he was not served with process.

2. Under Mills' Ann. St. § 2632, providing that suits shall be commenced before justices in the township in which the debtor or person sued resides, a defendant in an action before a justice, by appearing specially and objecting to the jurisdiction of the justice, on the ground that he was not served with summons, thereby waives an objection that the action was not commenced in the precinct in which he resides.

Appeal from Boulder County Court.

Action by Lillian Waters against School District No. 38, in the county of Boulder and state of Colorado. From a judgment of the county court, affirming a judgment of the justice of the peace in favor of plaintiff, defendant appeals. Affirmed.

Patton & Hawkins, for appellant. Esteb & Wolff, for appellee.

MAXWELL, J. Appellee sued appellant before a justice of the peace of Boulder county to recover upon an alleged breach of contract of employment as a school teacher. Appellant, specially appearing, moved to quash the summons and abate the suit, upon the grounds that defendant had not been served with summons by any officer authorized by law to serve the same, that by the return it did not appear that the defendant was summoned, that it did not appear from the record that the justice of the peace had authority to appoint a special constable, and that the defendant had not been served. The above motion was overruled by the justice. Defendant did not participate in the trial, which resulted in a judgment against it, from which an appeal was taken to the county court, where the defendant specially appeared and filed another motion to quash the summons upon substantially the same grounds as before, adding thereto two paragraphs which will be hereafter noticed. The county court overruled this motion. Upon a later day a trial was had, defendant not appearing, which resulted in a judgment against defendant for \$120, from which this appeal.

Mills' Ann. St. § 2687, is as follows: "Upon the trial of all appeals before the county court, no exception shall be taken to

the form of service of the summons issued by the justice of the peace, nor to any of the proceedings before him; but the court shall hear and determine the cause in a summary way, according to the justice of the case, without pleading in writing." The foregoing section was originally enacted in 1861 (Laws 1861, p. 232, § 46), where the word "or" is found, instead of "of," between "form" and "service," which makes the section read, "No exception shall be taken to the form or service of summons"—a much broader provision than that contained in 1 Mills' Ann. St. § 2687, above quoted. See, also, Rev. St. 1868, p. 407, § 46, and Gen. Laws 1877, p. 559, § 1527. The error first appears in Gen. St. 1883, p. 633, § 1987. The General Statutes and Mills' Annotated Statutes being compilations, the Laws of 1861 and the Revised Statutes of 1868 control.

All irregularities and defects in the service of the summons, the form thereof, or even the want of process, were waived by appellant in taking an appeal from the justice to the county court. *Deitz v. City of Central*, 1 Colo. 323, 330; *Wyatt v. Freeman*, 4 Colo. 14, 15; *Charles v. Amos*, 10 Colo. 272, 277, 15 Pac. 417; *C. C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542; *Paul v. Rooks*, 18 Colo. App. 44, 47, 63 Pac. 711.

Appellant contends that the record shows that this action was brought before a justice of precinct No. 16, whereas the defendant school district is situated in precinct No. 8, of Boulder county, and that this question was raised before the county court by the fourth and sixth paragraphs of its motion to dismiss, filed in the county court, to wit:

"(4) Because the justice of the peace who assumed to try the above-entitled action had no jurisdiction to try the same."

"(6) Because this court can acquire no more jurisdiction than the justice of the peace had in this action."

We will concede that the record shows that the action was commenced before a justice of a township in which the debtor or person sued did not reside, and that this question was raised before the county court by the above-quoted paragraphs of the motion. It is conceded by appellant that this question was not raised before the justice. There the only attack made was upon the service of summons and the constable's return. By appearing specially, it is true, and objecting to the jurisdiction of the justice upon grounds going to the regularity of the summons and service thereof, the defendant waived the personal privilege enacted for its convenience by section 2632, Mills' Ann. St., which provides: "Suit shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action occurred in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable."

That this personal privilege may be waived

\*Rehearing denied June 13, 1904.

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 662.

has been held by our Supreme Court in *R. R. Co. v. Roberts*, 6 Colo. 333, *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72, and *R. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542. "It may be stated as a general rule that the bringing of an action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject-matter, and that the statutes fixing the venue in certain actions confer a mere personal privilege, which may be waived by a failure to claim it in the proper manner and at the proper time." 22 Ency. P. & P. 815, and cases cited. The proper place and time to have raised this question was in the justice court. Failure to raise it there waived it. The authorities cited by appellant are in support of, rather than in conflict with, the rule announced.

After the rendition of the judgment in the county court, defendant appeared specially and excepted to the finding and judgment of the court, and prayed this appeal. Upon this exception numerous errors are assigned, all going to the sufficiency of the evidence to support the judgment. The evidence is sufficient to support the judgment. Perceiving no error in the record, the judgment will be affirmed.

Affirmed.

20 Colo.A. 104

#### TITUS v. BERNARD.

(Court of Appeals of Colorado. June 13, 1904.)

CLAIMS AGAINST DECEDENT—ACTION FOR SERVICES—EVIDENCE—DIRECTION OF VERDICT.

1. Where, in an action for services rendered decedent, there was evidence which, if credited, tended to prove that plaintiff, at decedent's request, performed valuable services for him in discovering ore on a mining claim, and that deceased promised to pay plaintiff therefor the sum of \$2,500, it was error to direct a verdict for defendant, though some of the testimony was unreliable and conflicting.

Appeal from District Court, Boulder County.

Action by Albert Titus against James J. Bernard, as administrator of the estate of M. D. Morrison, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed.

T. M. Robinson, for appellant. Sylvester S. Downer, for appellee.

GUNTER, J. Appellant filed a claim in the county court against the estate of Morrison, deceased, for \$2,500 for services rendered by appellant in discovering ore on a mining property. The claim was tried on appeal in the district court to a jury. At the conclusion of the evidence for appellant the jury, by direction, rendered a verdict for the estate. From the judgment on the verdict the case is here.

The only question in the case is, was the evidence sufficient to justify submitting the issues to a jury? If it was, the case should go back. The evidence of the claim consist-

ed largely of the admissions of deceased, testified to by the various witnesses. This evidence, if credited, tended to prove that appellant, at the request of deceased, performed valuable services for him in discovering ore on a mining claim, and that deceased promised to pay him therefor the sum of \$2,500. The testimony of Lindenmeyer and Johnson alone was sufficient proof of the claim to justify submitting the case to the jury. The unreliability of admissions, the credibility of Johnson on account of relationship to appellant, the conflicts, if any, between the witnesses, the facts that the circumstances suggested that more satisfactory evidence must exist if the claim was valid, were all for the jury. We think the evidence in the case justified submitting it to a jury, and that the court erred in directing a verdict for the estate.

Judgment reversed. Reversed.

20 Colo.A. 123

#### ARKINS v. ARKINS.

(Court of Appeals of Colorado. June 13, 1904.)

LIMITATION OF ACTIONS—DISCOVERY OF RIGHT—FRAUD BY AGENT—LACHES.

1. Plaintiff alleged that in 1883, her husband and son having died, defendant, who was her sister, arranged for the burial and paid the expense thereof, but made no report to plaintiff; that afterwards, on a settlement during the same year, the sum of \$600 was admitted by defendant to be due plaintiff, but defendant represented that the money disbursed by her for said funeral expenses amounted to \$600, and the account was received in payment of defendant's indebtedness; that in 1896 plaintiff, on inquiry, learned for the first time that said funeral expenses amounted to only \$149, and that defendant, at the time she made the statement that it was \$600, knew it was false. Held that, as the complaint alleged that defendant was the agent of plaintiff, the concealment was a fraud, and the complaint did not show on its face that it was barred by the six-years statute of limitations.

2. In view of the relationship, and the fact that there had been no change in the situation of the parties or subject-matter, plaintiff was not barred by laches.

3. If a complaint shows on its face that the cause of action accrued more than six years prior to the commencement of the suit, objection may be taken by special demurrer.

Error to District Court, Arapahoe County.

Action by Laura J. Arkins against Louise L. Arkins. Judgment for defendant, and plaintiff brings error. Reversed.

Harrie M. Humphreys and Charles A. Frueauff, for plaintiff in error. Patterson, Richardson & Hawkins, for defendant in error.

MAXWELL, J. The complaint herein was filed July 10, 1899. Defendant demurred. Plaintiff confessed the demurrer, and filed an amended complaint December 1, 1899, wherein it is alleged that on or about September 1, 1883, a settlement of a rent and board account existing between plaintiff and defendant was made whereby the sum of \$600

was admitted by defendant to be due plaintiff. "(4) That on or about the month of February, 1883, the husband of plaintiff, and their infant son died at the aforesaid family residence of plaintiff in the city of Denver, and were duly buried therefrom at one and the same time, the direction, care, and charge of their funeral and burial being under the management of one C. M. Miller, an undertaker of said city of Denver. (5) That defendant herein was at the time last mentioned, and is now, not only related to plaintiff as a sister by blood, but also by marriage, plaintiff and defendant having married brothers. (6) That, following a custom usual in their family, viz., that all arrangements for the funeral and burial of any one of their number should be attended to by the relatives of the deceased, other than those in his or her immediate family, said defendant arranged for and looked after the necessary matters pertaining to the funeral and burial of plaintiff's deceased husband and child, and paid the undertaker's expense thereof, but made no report thereof to plaintiff herein, save to assure her that all matters had been properly attended to. (7) That as soon as said sum of six hundred dollars (\$600) had been mutually settled and agreed upon by and between plaintiff and defendant as the amount of the debt due to plaintiff from defendant, the latter then and there stated and represented unto plaintiff that defendant, by her husband, John Arkins, now deceased, had theretofore, on or about, to wit, February 23, 1883, paid to said C. M. Miller all of the undertaker's funeral and burial costs and expenses of plaintiff's deceased husband and child, and that the sum of money so disbursed and paid by defendant for said purpose aggregated exactly the sum of six hundred dollars (\$600), and defendant asked and prayed of plaintiff that the payment by defendant of said six hundred dollars (\$600) of said funeral expenses should be received, held, and accepted by plaintiff as satisfaction and payment in full of the debt and amount of six hundred dollars (\$600) due to plaintiff from defendant for said rent and board. (8) That such prayer and request of defendant was granted by plaintiff, and the debt of six hundred dollars (\$600) of defendant to plaintiff for said rent and board was declared paid by plaintiff, in consideration of defendant having paid six hundred dollars (\$600) for the funeral expenses of plaintiff's deceased husband and child." The complaint further alleged that plaintiff accepted the statement of defendant as true; that December 2, 1896, plaintiff, upon inquiry, learned from the undertaker that the total costs and expenses of the funeral and burial above referred to amounted to \$149, and no more; that at the time defendant made the statement that the funeral expenses amounted to the sum of \$600 she knew that the same was false. Prayer for

judgment for the sum of \$451 and interest. The defendant interposed a demurrer to the amended complaint, upon the grounds that it appeared upon the face thereof that the cause of action therein stated accrued more than six years prior to the commencement of the action, and also upon the ground of laches. The court sustained the demurrer and dismissed the complaint.

If the complaint shows upon its face that the cause of action accrued more than six years prior to the commencement of the suit, advantage thereof may be taken by special demurrer. The complaint must disclose a subsisting cause of action, and if, on its face, it shows that the statute of limitations has run, it should allege matters which avoid the bar raised by a special demurrer. This rule is recognized in *Meyer v. Binkleman*, 5 Colo. 262. Do the allegations of the complaint, above quoted, avoid the bar of the statute?

It is alleged that the defendant was the agent of the plaintiff in the transaction herein involved. "Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other; and this brings back the question, when does such duty rest upon either party to any transaction? All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes. These three classes are, in general, clearly distinct and separate, although their boundaries may sometimes overlap, or a case may fall within two of them: (1) The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties; so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like." The defendant being agent of the plaintiff, a duty rested upon her to disclose to her principal the truth with reference to the transaction involved in the agency. Any concealment, misstatement, misrepresentation, or falsehood was fraudulent. "They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that concealed itself until such time as the party committing the fraud could

plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side." *Bailey v. Glover*, 21 Wall. 342, 349, 22 L. Ed. 636. "The leading object of the statute [limitations] was certainly to prevent fraudulent and unjust claims from being brought forward after such a lapse of time that evidence might no longer be within reach of the other party by which they could be repelled. It was not intended to deprive a party of redress when by the act of the defendant himself he has been deprived of the opportunity of availing himself of it. To give it such a construction would make it a means of encouraging, rather than preventing, frauds. It is a general principle that no one will be permitted in a court of justice to claim protection by means alone of his own fraud. If the plaintiff has had knowledge of it, the statute, of course, runs against him. But if he has been kept in ignorance of his rights by the fraudulent contrivance of the defendant, does not the fraud of the latter estop him from claiming that there has been a delay in the prosecuting of the suit, which his own actions have prevented from being brought at an earlier day?" *Munson v. Hallowell*, 26 Tex. 475, 484, 84 Am. Dec. 582. The defendant seeks to escape the principle above announced by invoking the aid of the well-settled principle that the presumption is that, if the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it, and cites *Pipe v. Smith*, 5 Colo. 146, 159, in support of her contention. The cases holding the above doctrine, including *Pipe v. Smith*, upon examination are found to be cases wherein the facts as disclosed by the record imposed upon the party some duty of investigation. In *Pipe v. Smith* the record discloses that the "least ordinary diligence" would have disclosed and discovered the fraud complained of. In the case under consideration, the relation of principal and agent, being admitted, warranted the plaintiff in placing implicit trust and confidence in the statements made to her by the defendant, and imposed upon her no duty of making inquiry to ascertain the truth or falsity thereof. The plaintiff had a perfect right to rely implicitly upon such statements. Our conclusion is that the statements made by the defendant to the plaintiff at the time of the settlement between them was a fraud upon the plaintiff, that the concealment was such a fraud upon the plaintiff as to bring this case within the principle announced by the Supreme Court of the United States and the Supreme Court of Texas in the cases above cited,

and that the facts pleaded are a bar to the statute.

It is contended by defendant that plaintiff has been guilty of such laches, within the statute of limitations, as to preclude her from maintaining this action. Laches does not, like limitation, grow out of the mere lapse of time, but is founded upon the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property or the parties. *First Natl. Bank v. Nelson*, 106 Ala. 535, 18 South. 154; *Du Bois v. Clark*, 12 Colo. App. 220, 231, 55 Pac. 750. The relationship of the parties is entitled to great weight when the question is one of laches in taking hostile steps, and the same prompt and energetic proceedings which would be expected in other cases ought not to be demanded of near relatives. *Wright v. Wright*, 37 Mich. 55. Keeping in view the relationship of the parties, and the fact that there has been no change in the situation of the parties or subject-matter of the action, the defense of laches cannot be sustained.

The demurrer to the amended complaint should have been overruled.

The judgment will be reversed. Reversed.

20 Colo.A. 96

BOSTON & C. SMELTING CO. v. ELDER.  
Treasurer.

(Court of Appeals of Colorado. June 13, 1904.)

TAXES—MUNICIPAL LEVIES—TIME OF MAKING  
—PRESUMPTIONS—MUNICIPAL CORPORATIONS  
—CONSOLIDATED MUNICIPALITIES—RELATION  
TO CONSTITUENT CORPORATIONS.

1. The amendment to the Constitution designated as article 20 (Sess. Laws 1901, p. 97, c. 46) consolidated into a single body the city of Denver and certain other municipal corporations. The amendment further provided that immediately on the canvass of the vote, showing its adoption, the Governor should issue his proclamation accordingly, and that thereupon the municipal corporations should merge into the city and county of Denver. The amendment was adopted by a vote of the people on November 4, 1902, and the Governor issued the proclamation of adoption on the 1st day of December, 1902. *Held*, that the merger did not become complete until December 1st, when the proclamation was issued, and on the 6th of November, 1902, a municipal corporation within the limits covered by the amendment was still an independent municipality, the officers of which were in possession of the same powers, and charged with the same duties, which pertained to them before the adoption of the amendment.

2. Under Mills' Ann. St. §§ 4468, 4469, 4471, 4473, empowering the city council to levy taxes on property within the corporate limits, making it the duty of the county assessor to designate in his return the property situate within such limits, requiring the county clerk to extend the city or town taxes upon the tax list in the same manner as other taxes are extended, and to include them in his general warrant to the county treasurer for collection, and making it the duty of the county treasurer to collect the city or town taxes as other taxes are collected, the city council must levy taxes before it becomes the duty of the county clerk to extend the taxes on the tax list.

3. Mills' Ann. St. §§ 3819, 3821, 3826, 3828, 3829, 3852, relative to the duties of the county assessor and county clerk in matters pertaining to taxation, require the county clerk to transmit the tax list to the treasurer by the 1st day of November, "or as soon thereafter as practicable." Sections 4468, 4469, 4471, and 4473 empower the city council to levy taxes on taxable property within the corporate limits, and require the county clerk to extend city taxes on the tax list, and include them in his warrant to the county treasurer, whose duty it is to collect them with other taxes; thus making it necessary for municipal taxes to be levied before the transmission of the warrant and tax list to the county treasurer. *Held* that, where a levy was made by a city council on the 6th of November, it would be presumed, in accordance with the presumption of performance of duty by public officers, that the tax list had not been delivered to the county treasurer, and that the levy was made in time.

4. Under the amendment to the Constitution designated as article 20 (Sess. Laws 1901, p. 97, c. 46), consolidating into a single body, called the "City and County of Denver," several municipalities, and providing that the city and county of Denver should succeed to all the property rights of the included municipalities, the city and county succeeded to the right to collect taxes created by a levy imposed by a constituent municipality, and to the taxes collected thereunder.

5. In a suit to restrain the sale of property for unpaid taxes, the fact that the complaint erroneously stated the date of the termination of the fiscal year for which a certain levy was made was immaterial, where the date of the levy was properly alleged.

6. The statute provides for only one tax levy for general purposes during the year. The amendment to the Constitution designated as article 20 (Sess. Laws 1901, p. 97, c. 46) consolidated into a single body politic, called the "City and County of Denver," several previously independent municipalities, provided that the consolidated municipality should succeed to all the property rights of the included municipalities, and continued in force, so far as applicable, the present charter and ordinances of the city of Denver. *Held*, that where constituent municipalities had, previous to the consolidation, levied taxes for municipal purposes for the year in which the consolidation became effective, such levy was final for that year, and the consolidated municipality had no authority to make a further levy on property included therein.

**Appeal from District Court, City and County of Denver.**

Action by the Boston & Colorado Smelting Company against C. S. Elder, treasurer of the city and county of Denver. From a judgment for defendant, plaintiff appeals. Reversed.

Macbeth & May, for appellant. Henry A. Lindsley and Charles R. Brock, for appellee.

THOMSON, P. J. The appellant brought this action against the appellee, as treasurer of the city and county of Denver, to restrain the sale by the latter of the former's property for unpaid taxes. A demurrer to the complaint for want of facts to constitute a cause of action was sustained. The plaintiff elected to stand on its complaint, and judgment was entered against it.

The complaint alleged the ownership by the plaintiff of certain real estate in the former town of Argo, Arapahoe county, which

had become a portion of the city and county of Denver; the levy of a tax for general municipal purposes on the 6th day of November, 1902, by the board of trustees of that town (it still being, as alleged, an independent municipality) of 1 mill upon the dollar of the assessed valuation of the property within its limits; the levy in December, 1892, by the city council of the city and county of Denver (a new municipality, embracing the territory formerly pertaining to the town of Argo), in disregard of the action of the town trustees, of a tax for city purposes of 16¼ mills on the dollar of the assessed valuation of property, including the property of the plaintiff; the payment by the plaintiff of all state and county taxes levied against its property, and also the full payment of the tax levied by the town of Argo for municipal purposes; its refusal to pay the excess demanded by the defendant on account of the levy by the city and county, being \$2,353.95; and the advertisement for sale by the defendant of the plaintiff's property to make the amount of such excess.

By an amendment to the Constitution which was adopted by a vote of the people on the 4th day of November, 1902, and designated as article 20, the city of Denver, and all municipal corporations included within its boundaries, and also the portion of Arapahoe county which it embraced, were consolidated into a single body politic, called the "City and County of Denver." Sess. Laws 1901, p. 97, c. 46. It was provided by the amendment that, immediately upon the canvass of the vote showing its adoption, it should be the duty of the Governor of the state to issue his proclamation accordingly, and that thereupon the city of Denver, and all municipal corporations and that part of Arapahoe county within the boundaries of the city, should merge into the city and county of Denver, and the terms of all officers of such corporations and county of Arapahoe should expire, except that certain officers of the city of Denver and certain officers of the county of Arapahoe should continue in office as officers of the new corporation until their successors should be duly elected and qualified. The amendment further provided that, until the adoption of a charter in the manner prescribed by it, the charter and ordinances of the city of Denver, as they should exist at the time of the taking effect of the amendment, should, as far as applicable, be the charter and ordinances of the city and county of Denver. The amendment also provided that the city and county of Denver should succeed to all the property, rights, benefits, and liabilities of the included municipalities and of the county of Arapahoe.

The proclamation of the Governor that the amendment had been adopted was issued on the 1st day of December, 1902. The town of Argo was one of the municipalities which by virtue of the amendment became merged in the city and county of Denver. But it did

not become so merged, nor did the terms of its officers terminate, until the 1st day of December, 1902—the day the proclamation was issued. On the 6th day of November, 1902, therefore, the town of Argo was still an independent municipality, and all its officers were still in possession of the same powers, and charged with the same duties, which pertained to them originally. The town of Argo was organized under the provisions of the general statute concerning towns and cities, and the powers and duties of its board of trustees in relation to the levy of taxes must be sought there. By the terms of that statute the city council or board of trustees of any city or town is empowered to levy taxes upon taxable property, real, personal, or mixed, within the limits of the corporation, which is subject by law to taxation for state or county purposes; it is the duty of the county assessor each year, in making his return, to designate the property situate within the limits of any city or town in his county; the county clerk is required, as soon as the assessment roll is ready in each year for the extension of the taxes, to extend the city or town taxes upon the tax list in a separate column, properly headed, in the same manner as other taxes are extended, carrying the city or town tax into the general total of all taxes for the year, and to include the city or town taxes in his general warrant to the county treasurer for collection; and it is made the duty of the county treasurer to collect the city or town taxes in the same manner and at the same time as other taxes upon the tax list are collected. Mills' Ann. St. §§ 4468, 4469, 4471, 4473. It thus appears that, except the levy, all the proceedings in relation to city and county taxes are conducted by the county officers. The limits of time within which the municipal levy shall be made are not designated in the foregoing provisions, but the levy must be made before it becomes the duty of the county clerk to extend the taxes on the tax list, because the extension must include the city and town taxes, and it cannot include them unless they have been levied. The question of time must therefore be settled by the general law in relation to county taxes. Looking into that, we find that it is the duty of the county assessor, on or before the 1st day of October of each year, to make out and deliver to the county clerk an assessment roll, containing in tabular form and alphabetical order the names of the persons and bodies in whose names property has been listed, with the several species of property and its valuation; that, upon the delivery of the roll to the county clerk, the assessor and clerk shall carefully compare the various items therein within each other, and with township, town, and city plats or maps, where they have been provided, and that all errors and omissions shall be corrected; that, immediately after the completion of the assessment roll, the clerk shall make out in duplicate an abstract of the roll,

showing the total number of acres of land and its valuation, the total valuation of town lots, and the totals and valuation of the various species of personal property, and transmit one copy to the Auditor of State; that, as soon as practicable after the taxes are levied, the clerk shall make out a tax list, and attach to it his warrant, under his hand and official seal, requiring the treasurer to collect the taxes therein levied according to law, and cause it to be delivered to the treasurer by the 1st day of November, or as soon thereafter as practicable, who shall thereupon proceed with the collection of the taxes therein levied. Mills' Ann. St. §§ 3819, 3821, 3826, 3828, 3829, 3852. It will be seen from the foregoing that, after the delivery by the assessor to the county clerk of the assessment roll, the latter has a variety of duties to perform before the tax list is ready for the treasurer, and that he is confined to no absolutely fixed limit of time in their performance. The time for the delivery of the tax list to the treasurer is approximately the 1st day of November. Making allowance, however, for his possible inability to have it ready by that day, the clerk is given such further time as may be necessary for the purpose. If not then delivered, it must be delivered as soon thereafter as practicable. If, in this case, the tax list had been delivered to the treasurer on the 1st day of November, the levy by the town trustees of Argo on the 6th day of the same month would have been too late. The tax could not have been extended by the county clerk upon the tax list, because that list would have been out of his hands and beyond his control. But the presumption is that public officers perform their duty, and, from the fact that the levy was made on the 6th, it must be presumed that the tax list had not then been delivered to the treasurer, and that the levy was made at the proper time. On the 6th day of November, the trustees of Argo possessed all the authority they ever had, and a test of the validity of their proceedings at that time is the same as if the Constitution had not been amended. The power to levy taxes for town purposes was expressly conferred upon them by law, and all their powers remained intact until the 1st day of December, 1902—the day of the proclamation. The amendment provided that the city and county of Denver should succeed to all the property, rights, benefits, and liabilities of the city of Denver, the included municipalities, and the county of Arapahoe. The several constituent bodies were left in possession of their organizations and powers, and might, until the final merger, exercise all their lawful functions; and whatever rights they already possessed, and whatever rights they might acquire in the intermediate time, passed to the new corporation. Among the rights to which the city and county of Denver succeeded was the right created by this levy. If taxes had been collected under it, the money belonged



to the city and county of Denver; if not, the levy inured to it, and it could make the collections.

The complaint, aside from naming the date of the levy, describes it as having been made for the fiscal year ending November 30, 1902, and the question whether the fiscal year so ended is made the subject of considerable argument pro and con. It seems to be supposed on both sides that the question of the validity of the levy is in some way affected by the date of the expiration of the fiscal year. The state and county fiscal year does terminate on the 30th day of November, but the fiscal year of cities and towns organized under the general law ends on the 31st day of March, unless by ordinance a different time is fixed. Mills' Ann. St. § 4447. But the date of the termination of the fiscal year is a matter of no importance. The validity and effect of the levy depend upon the time when it was made, and the authority of the board of trustees to make it at that time; and the complaint, having given the date, is not harmed by an erroneous statement respecting the fiscal year.

The point is also made that the amendment became effective immediately upon its ratification by the people, that the included municipalities thereupon ceased to exist as such, and that therefore at the time of this alleged levy there was no town of Argo, and no board of trustees of the town of Argo. We may concede the proposition that the amendment became part of the Constitution on the instant of its ratification, but the conclusion reached by counsel does not follow. A law is none the less effective as such because it provides for something to be done in the future. While the amendment may have become effective at once, it fixed a time when the consolidation for which it provided should take place, and it was because the amendment had become effective that its provisions relating to the future could be lawfully carried out. By virtue of those provisions the town of Argo remained a municipal organization, and its board of trustees its governing body, until the day the Governor's proclamation was issued.

The statute provides for only one levy for general purposes during the year, and whatever levies were made prior to the merger by the several municipalities which afterwards composed the city and county of Denver were final. See *Oliver v. Carsner*, 39 Tex. 396; *State v. Van Every*, 75 Mo. 530; 1 *Cooley on Taxation* (3d Ed.) 593. The city and county of Denver succeeded to the benefits of such levies by virtue of the amendment, but the amendment gave it no authority to make a further levy. Nor is such authority found in the charter of the city of Denver, which became, as far as applicable, the charter of the city and county of Denver. The provisions of that instrument relating to levy, as contained in sections 2 and 3 of article 6, are the same as those of

the general law governing towns and cities, which we have already examined and analyzed, and confer the same power, and no greater.

The complaint might well have been more specific respecting the extension of the tax list by the county clerk, and some other matters, and an order requiring it to be made so would probably be granted on proper motion; but, as it is, it is aided by presumptions which make it good as against a general demurrer.

The demurrer should have been overruled, and the judgment will be reversed. Reversed.

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TELLER v. SIEVERS et al.

(Court of Appeals of Colorado. June 13, 1904.)

EMINENT DOMAIN — CONDEMNATION — COSTS — DEPOSIT — PAYMENT IN ADVANCE — WAIVER — DISMISSAL.

1. Under 1 Mills' Ann. St. c. 45, §§ 1720, 1724, 1728, providing for a preliminary deposit by petitioner in condemnation proceedings, whereby he may immediately enter into possession, and directing that the party making a request for a jury shall advance sufficient to pay the expenses, and if, after compensation has been ascertained, an appeal is taken, the petitioner may pay into court the compensation ascertained, the court is not authorized, in a condemnation proceeding, to set aside an order granting a new trial for refusal of petitioner to deposit in court a sum to apply on costs accrued and to accrue.

2. Under *Sess. Laws* 1891, p. 814, § 23, providing that every officer shall collect fees for services performed by him in advance, an order requiring a deposit in court to cover accrued costs in a condemnation proceeding is unauthorized, as the officers waived the right to demand in advance.

3. Under 1 Mills' Ann. St. §§ 674, 675, relating to security for costs, an order for a deposit in court to cover accrued costs in a condemnation proceeding is unauthorized.

4. The court cannot arbitrarily dismiss a pending cause at issue of its own motion, without notice and without the consent of the parties.

Appeal from Garfield County Court.

Action by George Teller against Henry Sievers and others for the condemnation of certain realty. From a judgment dismissing the action for want of prosecution, and for costs against petitioner, he appeals. Reversed.

M. J. Bartley and J. W. Dollison, for appellant. O. W. Darrow, for appellees.

MAXWELL, J. This was a condemnation proceeding under the eminent domain act. December 13, 1895, appellant filed his petition in the court below. In May, 1897, a trial was had to a jury of six freeholders, resulting in a verdict in favor of respondents. This trial occupied five days, in the taking of testimony and a view of the premises by the jury. May 24, 1897, the court set aside the verdict of the jury and granted a new trial. April 30, 1900, the court ordered the "petitioner to deposit in court, not later than 10 o'clock a.

mr. of May 1, A. D. 1900, the sum of \$400, to apply on costs accrued and to accrue, and that, on his failure so to do, the trial order heretofore entered should be vacated and set aside." On the same day the petitioner filed his exceptions to the above ruling of the court, protested against the authority or jurisdiction of the court to make such order, and declined to comply therewith. September 4, 1900, the following order was entered in the cause: "Order dismissed on court's own motion for want of prosecution. Costs ordered taxed to petitioner. It is ordered by the court that respondents have judgment for costs against petitioner, and that execution issue therefor. To which order petitioner excepts." Appellant assigns for error the order requiring him to deposit \$400 to apply on accrued costs and costs to accrue, and the order dismissing the action for want of prosecution.

The abstract of record in this case is very meager. The petition filed in the court below is substantially set forth, followed by the briefest possible mention of numerous orders setting the cause for trial, and continuances, and the two orders above mentioned.

In support of the order of April 30th, it is contended by appellees that the court was authorized to make such order under the eminent domain act. An examination of that act (1 Mills' Ann. St. c. 45) fails to disclose such authority. Section 1720 provides for a preliminary deposit by the petitioner, who thereby, in pursuance of the statute, acquires the privilege of immediate entry and possession of the premises sought to be taken. Section 1724 relates to an examination by the jury of the premises sought to be taken, upon the request of either party, provided that the party making the request shall advance a sum sufficient, in the opinion of the court, to defray the necessary expenses of such examination. Section 1728 provides that if, after compensation has been ascertained, the petitioner or owner shall appeal or prosecute a writ of error, the petitioner may pay into the court, or to the clerk thereof, the amount of compensation so ascertained, for the use of the owner, and thereupon the petitioner may take possession of the premises. The foregoing are the only provisions of the statute relating to the payment of money into court. No authority is thereby vested in the court to make an order for the deposit in court of a sum of money to apply on costs "accrued and to accrue." In the face of the language of the order, it cannot be seriously contended that a deposit was required in pursuance of the provisions of either of the above-cited sections.

It is said that section 23 of the salary act of 1891 (Sess. Laws 1891, p. 314) provides that every officer shall collect every fee for services performed by him in advance, if the same can be ascertained, and that this sec-

tion affords authority for making the order complained of. In *People ex rel. v. Quinn*, 12 Colo. 473, 21 Pac. 488, in discussing a rule of court which required the party appealing from a judgment to pay all accrued costs, the Supreme Court said: "We know of no statute by which he may be required to pay the accrued costs in the case at the time of perfecting the appeal, and, in the absence of such statutory authority, the right of the clerk to impose such a condition cannot be maintained. The statutes make further provision for the protection of court and other officers by permitting them to collect their legal fees in advance, and, if this right is not insisted upon at the proper time, the officer must be understood to have waived it, and to have consented that such fees shall abide the result of the suit." In respect to the accrued costs in this case, it must be held that the officers waived the right to demand them in advance, and that the payment of them must abide the result of the suit.

It is said that the requirement that security for costs be given is a matter in the sound discretion of the court, which will not be reviewed except in cases of clear abuse; citing *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247, and *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78. In the cases cited the "security for costs" under consideration was that provided for by 1 Mills' Ann. St. §§ 674, 675, and is an instrument, the form of which is set forth in the statute. The deposit of money is not mentioned, and, while money may be the best form of security, we find no warrant in these sections of the statute for the order complained of.

It appears from the transcript that September 4, 1900, on the call of the docket for the September term, an order for the dismissal of the action was made on the court's own motion. It is manifest that this dismissal was not made under section 166 or 176, Mills' Ann. Code, nor was it made for failure upon the part of petitioner to comply with any standing rule of the court; and therefore this case is not controlled by *Cone v. Jackson*, 12 Colo. App. 461, 55 Pac. 940, or *Hoy v. McConaghy*, 14 Colo. App. 372, 60 Pac. 184. We know of no statute or rule of practice in this state which authorizes the court, of its own motion without notice by rule or otherwise, and without consent of the parties, to arbitrarily dismiss a pending cause of action at issue. As was stated in *Hoy v. McConaghy*, supra: "If this can be upheld, then courts would be invested with the most extraordinary power, which they could arbitrarily exercise with most disastrous consequences."

The judgment of dismissal will be reversed, and the cause remanded, with directions to the court below to vacate and set aside the order of May 30, 1900, requiring the petitioner to deposit \$400, to apply on costs accrued and to accrue. Reversed.

**HOLLINGER et al. v. BOATMAN'S BANK et al.**

(Supreme Court of Kansas. June 11, 1904.)

**HOMESTEAD—DESCENT—CONVEYANCE OF INTEREST—RIGHTS OF CREDITORS.**

1. The legal title to land occupied as a homestead descends upon the death of the owner intestate to his widow and children, and such title gives to such children a present and valuable interest in such land, which they cannot give away in fraud of their creditors.

2. A voluntary conveyance of such an interest by a child not occupying such homestead to the widow, who continues to occupy the homestead, which has the effect to defraud creditors of such child, will be set aside at the suit of such creditor in a proper proceeding for that purpose, and a lien declared in favor of such creditor upon such interest where the antecedent proceedings have created it.

(Syllabus by the Court.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by the Boatman's Bank and others against W. H. Hollinger and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

G. W. Hurd and T. E. Dewey, for plaintiffs in error. C. S. Crawford and R. H. Seeds, for defendants in error.

CUNNINGHAM, J. We have here another of the seemingly endless problems arising out of the permutations of human affairs relative to the homestead question. The plaintiff in error Anna M. Hollinger states the facts as follows, with which statement no fault is found: "In July, 1900, J. S. Hollinger died intestate. At the time of his death he owned a farm of 160 acres in Dickinson county, Kansas, and occupied the same with his family as a homestead. He left surviving him as his heirs at law his widow, Anna M. Hollinger, and seven children, of whom the plaintiff in error W. H. Hollinger is one. After the death of J. S. Hollinger, the widow, Anna M., continued to occupy the premises as a home with her two adult unmarried children, and she occupied the same continuously to the time of the trial of this case. Soon after the death of J. S. Hollinger, W. H. Hollinger, who was at the time in debt and insolvent, conveyed his interest in the homestead to his mother, Anna M. Hollinger. Such conveyance was in the nature of a gift, and without any other consideration than the natural affection existing between the mother and son. Some time thereafter the Boatman's Bank, the defendant in error, one of the creditors of W. H. Hollinger, obtained a judgment against him in the district court of Dickinson county, Kansas, upon which an execution was duly issued and levied upon an undivided  $\frac{1}{14}$  interest in the homestead as the property of said W. H. Hollinger. And thereafter the Boatman's Bank commenced this action in aid of execution for the purpose of setting aside the deed of conveyance from W. H. Hollinger to his mother, and to subject the

undivided  $\frac{1}{14}$  interest in the homestead to the payment of this judgment." Upon these facts the court rendered the following judgment: "It is therefore by the court now here considered, ordered, and adjudged that the deed of conveyance from the defendant W. H. Hollinger to the defendant Anna M. Hollinger, for the undivided one-fourteenth interest in and to the following described real estate, situate in Dickinson county, state of Kansas [land described], is void as against the judgment lien of said plaintiff, and said plaintiff has a first lien upon the said undivided one-fourteenth interest in said real estate in the sum of \$27,391, with interest thereon at the rate of 8 per cent. per annum from the 8th day of September, A. D. 1902."

It is claimed that this judgment is erroneous because the real estate mentioned is the homestead of Anna M. Hollinger, not that it was the homestead of the debtor, W. H. Hollinger. Upon the death of J. S. Hollinger, who at the time owned and occupied the land as his homestead, and who was the husband of Anna M. Hollinger and the father of W. H. Hollinger, the title thereto passed, under our statutes of descents and distributions, one-half to his widow and one-half in equal shares to each of his seven children. Dayton v. Donart, 22 Kan. 256. As to this devolution of title neither constitutional nor statutory homestead provision had anything to do. The title to land is not the concern of these provisions. The homestead right grows out of a condition, and is not an estate. By this descension of title the heirs of J. S. Hollinger took something of substance, and presumably of value. Of course, it went to them conditioned with all the incumbrances created by the ancestor or imposed by the law, but whatever went to W. H. Hollinger would be subject upon the termination of those conditions to the payment of his debts. He could not find protection for this property for himself under any of the homestead provisions either of Constitution or statute, because he was not occupying it as a home. He could not, by its conveyance without consideration, put his mother in any better position than he himself occupied, so far as his creditors are concerned. It must be noted that the questioned decree goes only to the extent of declaring void the deed of, and decreeing a lien upon W. H. Hollinger's interest in, the estate. It does not determine when or how that interest may be subjected to the satisfaction of the lien. Contention is made that, if J. S. Hollinger's interest may be sold to satisfy such a lien, the homestead right of the widow in the land would be destroyed. That question is not in this case, and we are not called upon to decide it. No sale has as yet been ordered or attempted. It may never be, at least so as to interfere with any homestead right of the widow, if any she have. It is sufficient now to say that the interest in the land in question which W. H. Hollinger took upon the death of his father and as his heir

was a valuable one, and something which he could not give away while indebted, with the effect to hinder, delay, or defraud his creditors.

The judgment of the district court will be affirmed. All the Justices concurring.

### CARTER et al. v. BECKER.

(Supreme Court of Kansas. June 11, 1904.)

#### TRIAL—INSTRUCTIONS—TRUST—EJECTMENT—EVIDENCE.

1. The district court has a large discretion in the matter of giving additional instructions after the jury has retired for deliberation. It may supplement the original charge whenever confident that no substantial right will be infringed and that the ends of justice will be best subserved by doing so, and only in case of abuse, resulting in injury, will an exercise of such discretion be reviewed.

2. If the heirs of an estate, three in number, one of whom is a married woman, make an amicable division of the real property they have inherited, and, for the purpose of consummating such arrangement, meet and exchange deeds, to the end that each one shall receive from the others a conveyance for a two-thirds interest in the land he is to own in severalty, and after the woman's death it be discovered that the deed of her coheirs to her share of the land is in the name of her husband, the law will presume, in the absence of evidence to the contrary, that the husband took the deed for the use and benefit of his wife, and not as a gift from her.

3. In an action of ejectment for the recovery of land so deeded, brought by the deceased wife's children against her husband's grantee, the burden is upon the plaintiffs to establish the fact that the deed was of the wife's separate property; but when that fact appears, whether the deed was taken in the name of her husband with the wife's consent or not, it devolves upon the defendant to establish that a gift was intended, and not a trust.

4. In such an action the question of an intention on the part of the wife to give to her husband a two-thirds interest in the land is one of fact for the jury, to be determined in the same manner as questions of fact in other cases.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by Rosa E. Carter and Bell Carter against Daniel Becker. Judgment for defendant, and plaintiffs bring error. Reversed.

David Overmyer, for plaintiffs in error.  
M. T. Campbell, for defendant in error.

BURCH, J. In his lifetime John Cunningham was the owner of a tract of land in Shawnee county. When he died he was a widower, and he left no will. His heirs at law were his married sons, John W. Cunningham and Christopher Cunningham, and his daughter, Martha, married to Mitchell West. These children entered into an amicable arrangement for a division of the land their father had left them, and, for the purpose of consummating such arrangement, they met, according to a previous appointment, at the office of an attorney at law in the city of Topeka, and exchanged deeds which he had prepared, to the end that each one should re-

ceive from the others a deed for a two-thirds interest in the land which he was to take in severalty. One of these deeds was made to Mitchell West instead of to Martha, his wife. This deed was placed of record, and the respective parties entered upon the separate possession and enjoyment of their respective portions of their patrimony. Mrs. West and her children occupied the land conveyed to her husband, with him, as their homestead, until the time of her death, which occurred in 1885. She died intestate, leaving two minor children, the plaintiffs in the district court. Two other children had died in infancy some years before. At the time of her decease Mrs. West was the undisputed owner of one-third of the land she occupied, since that interest was not affected by the deed of her brothers to her husband. Under the law of descents and distributions, as it then stood, Mitchell West inherited one-half of this one-third interest, as her surviving husband, and also inherited one-half of the other half of such one-third as the heir of his two deceased children. The plaintiffs inherited the remaining one-twelfth of the land. In February, 1895, Mitchell West and a second wife whom he had married made a warranty deed of the land to Daniel Becker, the defendant in the district court, and delivered its full possession to him. The plaintiffs, from birth until the time the land was sold, resided upon the premises with their father. At the date of the sale one of them had barely reached maturity, while the other was some three years younger. They subsequently married brothers, and in the year 1901 brought suit to recover possession of the land; not only claiming the one-twelfth interest which unquestionably belonged to them, but asserting as well that their mother was the owner of the entire interest described in the Cunningham deed to Mitchell West, that they inherited a portion of this interest from her, and that the defendant purchased with notice of their rights. Upon a trial the jury awarded the plaintiffs one-twelfth of the land, and judgment was rendered accordingly. Error is assigned with respect to the conduct of the proceedings in the district court.

After the jury had deliberated for some time upon the case, it asked for further instruction upon a proposition of law. The court responded with a full exposition of the doubtful matter, and it is now urged that the court had no authority to instruct at length at that stage of the proceeding. The instruction was not a virtual substitute for the charge already given, was not given in a manner calculated to mislead the jury, and did not leave it to infer that it should certainly find in a particular way for one of the parties. Hence it does not fall within the ban of the case of *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145. The court has a large discretion in the matter of giving additional instructions after the jury has retired for delib-

eration, and may supplement the original charge whenever confident that the ends of justice will be best subserved by doing so. A judicious exercise of the right tends to the sure and efficacious administration of the law. Even in a criminal case the court may, of its own motion, give the jury additional instructions to meet any difficulty which may present itself to their minds (*State v. Chandler*, 31 Kan. 201, 1 Pac. 787), and only in case of abuse resulting in injury to some substantial right will an exercise of such discretion be reviewed.

The evidence introduced to account for the appearance of Mitchell West's name in the deed was very unsubstantial and unsatisfactory. So much either of uncertainty or of improbability attached to every explanation offered, that it was evident the jury might be compelled to disregard them all, and view the case as one in which a husband is found in the unexplained possession of a deed apparently investing him with title to land allotted to his wife as her portion of her deceased father's estate. By using the knowledge which the jury possessed in common with mankind, it was possible for them to draw a rational conclusion from the evidence as a whole that Mrs. West did understand and assent to the form of the deed as it was actually prepared, signed, delivered, recorded, and preserved. But it was not possible for them to say whether Mrs. West intended to give the land to her husband, or whether it was understood that he should hold it for her, or for her infant daughters, or for some other purpose. Under these circumstances, it was of the utmost importance that the jury be instructed fully and accurately with reference to the interpretation the law itself would place upon the transaction in the absence of explanatory facts. The court said that *prima facie* the deed to Mitchell West was what it purported to be upon its face, and was made to the person intended; that, unexplained, the result of the transaction showed what it was; and that *prima facie* the grantee in the deed was the owner of the property, because all transactions are presumed to be rightful and honest and fair. This instruction ignored the conceded fact that the property dealt with was derived by Martha West by descent from her father, and that upon segregation it became her sole and separate estate, not subject to the disposal of her husband or liable for his debts. Married Woman's Property Act (section 4019, Gen. St. 1901). In such cases the law is now well settled that the husband is presumed to hold the land in trust for his wife's benefit in the absence of proof that she intended it as a gift to him. *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136; *Grabill v. Moyer et al.*, 45 Pa. 530; *Bergey's Appeal*, 60 Pa. 408, 100 Am. Dec. 578; *Adoue v. Spencer*, 62 N. J. Eq. 782, 49 Atl. 10, 56 L. R. A. 817, 90 Am. St. Rep. 484; *Jones v. Davenport*, 44 N. J. Eq. 33, 46, 13 Atl. 652; *Sykes v. City Sav-*

*ings Bank*, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562; *Wales v. Newbould*, 9 Mich. 45, 64; *Chadbourn v. Williams*, 45 Minn. 204, 47 N. W. 812; *McNally v. Weld*, 30 Minn. 209, 14 N. W. 895; *Denny et al., Executors, v. Denny*, 123 Ind. 240, 23 N. E. 519; *King, Adm'r, v. King*, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287; *Jackson v. Kraft*, 186 Ill. 623, 58 N. E. 298; *Patten v. Patten*, 75 Ill. 446; *Toms v. Flack*, 127 N. C. 420, 423, 37 S. E. 471; *Smyley v. Reese*, 53 Ala. 89, 101, 25 Am. Rep. 598; *Houston v. Clark*, 50 N. H. 479; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

By the adoption of the married woman's property act it was intended primarily that the law should be changed, rather than that the conduct of husbands and wives should be greatly altered. The law was designed to secure to the wife, without additional effort or precaution on her part, that which before, under the same circumstances, might have become her husband's, because of his marital rights, or because of her incapacities; and it would amount to a virtual defeat of one of the beneficent purposes of the statute if the wife were obliged to take securities from her husband whenever he received for any purpose a portion of her separate property. Therefore in a contest the law will not permit the husband, or those claiming under him, to rest with the production of the ordinary indicia of title—the possession of goods, of money, of promissory notes properly indorsed, of bonds payable to bearer, of shares of stock duly assigned, or of deeds of land—but will require proof of a gift or of a purchase for value.

The law was clearly perceived and forcefully stated by Mr. Justice Strong, of the Supreme Court of Pennsylvania, in a case relating to personal property: "When the act of Assembly declares, as it does, that all property, real, personal, and mixed, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property—when the leading purpose of the act is to protect the wife's estate by excluding the husband it is impossible for us to declare that the mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the act of 1848 [P. L. 536] would be useless to the wife." *Grabill v. Moyer*, *supra*. In the case of *Adoue v. Spencer*, already referred to, the rule is stated to be as follows: "The

burthen is on the wife to establish that her husband took and used her separate estate; but, when that fact is established, whether such taking was with or without her consent, the burthen then shifts, and those claiming that such taking and use was by gift of the wife must establish such gift to the husband." And the subject is summarized in that case in the following manner: "Since 1848, which was about the year of the beginning of the statutory creation of the wife's separate property rights, the trend of the decisions in all the states has been toward the rule here contended for. It can safely be said that, with scarcely an exception, the Supreme Court of the United States and the courts of last resort of all the states have held that as to the principal of the wife's separate estate, taken into the possession of a husband and used by him, he or his personal representative is bound to account to her, and that, to sustain a refusal to do so, or to relieve from equitable liability to do so, the burthen is on him to establish that he received such property as a gift from her. His mere possession of it will not imply such a gift, any more than it would from a like receipt from any other person. There appears no good reason, either in law or morals, why such should not be the rule."

It is true, the law still has regard for the unity of husband and wife, and, while it permits them, it does not compel separate estates in property, and there is nothing to prevent the wife from giving her property to her husband, or from using it for the benefit of the family. But if husband and wife be one, the husband may no longer arrogate to himself the right to be that one, and the wife should not be held to have given him her separate estate unless an intention to give appear. In determining the question of an intent to give, some courts insist that the transaction shall be scrutinized with great care, and that the husband must show by the clearest evidence that a gift was freely intended and deliberately made. *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197. This is a survival of the presumption of undue influence under the common-law doctrine that terror of her husband is a married woman's natural felicity, and that coercion and domination of a woman by a man are the certain signs of connubiality. In other jurisdictions but slight evidence is required to show a gift, and, upon proof of acquiescence by the wife in the use of her property by her husband for a considerable period of time, the law presumes a gift. This is a survival of the theory that everything the wife does not keep chained, the rapacious husband may appropriate. The question of an intention to give is one of fact. It may be established by direct or by circumstantial evidence. The relation of the parties should be duly considered. The freedom of the wife to supply the wants of the family or to aid the enterprises of her husband, the circumstances under which he ob-

tains, uses, manages, or disposes of her property, her acquiescence in his conduct, the control which she retains, the lapse of time, her failure to call him to account, and many other facts, all bear upon the question, but its determination in an action at law is for the jury. *Roberts v. Griffith*, 112 Ga. 146, 37 S. E. 179; *Martin v. Jennings*, 52 S. C. 371, 37 S. E. 807; *McLure v. Lancaster*, 24 S. C. 273, 58 Am. Rep. 259; *In re Schmidt's Estate*, 56 Minn. 256, 57 N. W. 453. In *Roberts v. Griffith* the syllabus reads: "Where, in the division of her father's estate, a married woman was entitled to certain lands, and her husband insisted that the deed thereto by the other heirs should be made to the husband and wife jointly, and the wife assented, and where the evidence shows that, after the deed was so made, both of them occupied the land, but that the husband never claimed ownership of any part of or interest in the land, whether the wife, by assenting to the naming of her husband as one of the grantees in the deed, intended to give him a half interest in the property, or merely assented to his demand as a caprice on his part, and without intending it as a gift, was a question for the jury, and not for the judge. It was therefore error to hold that the above facts constituted a gift, and to direct a verdict accordingly." A single statement made arguendo in the opinion in the case of *Hunt v. Spencer*, 20 Kan. 126, might be taken to warrant a presumption of gift under certain exceptional circumstances, but an examination of the decision as a whole plainly shows that it was based upon a preponderance of evidence contradictory of any purpose on the part of the wife ever to reclaim her funds. It is said: "Now, the facts as found in this case exclude the idea of any loan. They would tend strongly in the same direction if the parties were strangers, and not husband and wife. There was no account or statement of indebtedness; no agreement or understanding that it should be treated as a loan, or ever paid. If the parties did not consider it a loan, why should the law be now invoked to so regard it? It is evident that the wife permitted the husband to take and use this money, not with the idea of his having a separate estate and separate interests, and of making a loan to him, but regarding her interests and his as one, and in furtherance of that single interest, and to promote the common good of the family." Since weight of evidence, and not a presumption, controlled the decision, it is in harmony with the well-settled and modern doctrines of the law. In the case at bar the rights of creditors are not involved, and could scarcely arise, because the land was occupied as a homestead until it was sold to the defendant. Of course, the plaintiffs cannot recover without proving to the satisfaction of a jury that the defendant purchased in defiance of notice of their rights.

The district court instructed the jury correctly upon the law of descent as it existed

prior to 1891, and the case of *Dayton v. Donart*, 22 Kan. 256, declares that the title to a homestead descends in the same manner as does the title to other real estate, subject only to the right of occupancy by those entitled to the homestead privilege. Therefore the assignments of error upon those matters are not well taken.

However, for the error in the instruction relating to the presumption attending the West deed, the judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

**METROPOLITAN ST. RY. CO. v. RYAN.**  
(Supreme Court of Kansas. June 11, 1904.)

**STREET RAILROADS—INJURY TO PERSON ON TRACK—EVIDENCE.**

1. Where, upon the trial, plaintiff testified she alighted from an east-bound street car, and passed back of it and to the northward upon a parallel track four feet distant, on which cars traveled in an opposite direction, without looking for an approaching car, and sustained injury, and, to have looked eastward along the space between the parallel tracks after passing by the end of the standing car, an approaching car could have been seen a distance of two blocks, *held* error to overrule a demurrer to plaintiff's evidence.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Frances Ryan against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Miller, Buchan & Miller, for plaintiff in error. Wm. B. Sutton, for defendant in error.

ATKINSON, J. On December 13, 1901, plaintiff was a passenger on one of defendant's cars. Plaintiff took passage on a car at Argentine, Kan.; her destination being the New York Life building, corner of Ninth and Wall streets, Kansas City, Mo. At Ninth street she was transferred to an east-bound car. The Ninth street car line was a double-track cable system. East-bound cars traveled the south track, and west-bound cars traveled the north track. These tracks were parallel and about four feet apart along the center of the street. When the car stopped at the corner of Ninth and Wall streets, plaintiff alighted on the south side, near the rear or west end of the car. Before the car moved forward, plaintiff started northward to cross over the street to the New York Life building, passing close behind the west end of the standing car. While crossing over the north track she was struck by a west-bound car, thrown violently to the ground, her right arm broken, and she was also considerably bruised about the body. This action was brought to recover damages for the injuries sustained. In her petition plain-

tiff charged defendant with negligence in operating the west-bound car; charging, in substance, that said car was at the time being operated at a high and dangerous speed, and that no sufficient or timely warning of its approach was given. Defendant, in its answer, charged plaintiff with contributory negligence. Upon the trial it was shown from the testimony of plaintiff that she was familiar with the locality, the surroundings, the tracks, and the manner of operating cars thereon; that each morning for about two months she had made a like trip over the line from Argentine. Plaintiff also testified upon cross-examination that she knew that a west-bound car was likely to pass over the north track at any time; that, as she was passing the west end of the standing car, she looked eastward to see if a car was coming from the east; that she could then only see about 10 or 15 feet to the eastward along the north track; that this was the last time she looked for an approaching car until she was startled by parties crying out to warn her of danger. Plaintiff further testified that she first saw the car when it was about 10 or 15 feet from her; that, had she looked eastward along the north track when she stepped into the space between the two tracks, she could have seen a car approaching from the east for at least a distance of two blocks. A demurrer to plaintiff's evidence was overruled by the court. In this there was error.

This court has frequently said that one, in approaching a railway track, before crossing over it, in the exercise of ordinary care, must look and listen. In *Burns v. Street Ry. Co.*, 66 Kan. 188, 71 Pac. 244, it was held that the same rule applied to one crossing a street railway. In *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, it was said a railway track is itself a warning of danger. This is so because trains may be expected at any time. At the place where plaintiff sustained injury, street cars were passing and repassing at frequent intervals, and a car might be expected at any time. As heretofore stated, of this fact and of the locality and surroundings plaintiff was perfectly familiar. She was also matured in years, and in the full possession of all her senses. The care which a traveler upon the public highway should exercise to protect himself from danger is commensurate with the known and the apparent dangers. There is more danger in crossing a street upon which street cars are run, than where there are none operated. Where two street car tracks run parallel, there is added danger in crossing over the street. So, too, is it more dangerous to the traveler to cross from one track to another where the view of the track is obstructed by a passing or standing car, than it is where the view is clear and unobstructed. Plaintiff knew that the car from which she alighted would soon move on, and leave the view of the tracks unobstructed. She

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1397.

neither waited for the car to move forward, nor looked for an approaching car, before passing upon the north track, when, to have looked east in the space between the two tracks, she could have seen a car approaching a distance of two blocks. The accident occurred in the daytime at a place where the view of the track was not obstructed for a space of two or three blocks to the east, except as the car from which she had just alighted would obstruct the view; and, if she had waited until the car moved on, she would have had an uninterrupted view of the space. She did not do so, but, according to her own statement, passed hurriedly along and around the rear end of the car, crossing the space between the two tracks from which the approaching car could readily have been seen, and onto the track immediately in front of the approaching car. Having done this, without looking to see where she was going or whether a car was approaching, she was guilty of negligence contributing to her injury. There was nothing in the existing conditions which prevented her from seeing the danger if she had looked, or in escaping the injury had she taken this precaution. Under the numerous decisions of this court, the minimum of care to be exercised in crossing over a railroad track is to look and listen, where the surroundings permit this precaution. The only excuse offered by plaintiff for a failure to look eastward for an approaching car as she passed onto the space between the two tracks is that the street was somewhat icy and slippery, and that she was compelled to look where she was stepping. The fact that the footing was thus insecure might with consistency be urged as a reason why she should have exercised greater care in looking for an approaching car before stepping upon the track. The following cases are very similar to the case at bar, and in each plaintiff was held to be guilty of contributory negligence barring a recovery: *Indianapolis St. Ry. Co. v. Tenner* (Ind. App.) 67 N. E. 1044; *Doty v. Citizens' St. Ry. Co.* (Mich.) 88 N. W. 1050; *Buzby v. Philadelphia Traction Co.*, 126 Pa. 559, 17 Atl. 895, 12 Am. St. Rep. 919.

Defendant did not stand upon its demurrer to the evidence, but offered evidence in support of its defense. None of the evidence offered by defendant tended to strengthen plaintiff's case.

The judgment of the trial court will be reversed, and a new trial ordered. All the Justices concurring.

HASTIE et al. v. BURRAGE et al.  
(Supreme Court of Kansas. June 11, 1904.)  
PLEADING—AMENDMENT OF PETITION—EVIDENCE—BOOKS OF ACCOUNT—LIMITATIONS—PAYMENT.

1. A petition filed in the district court of a given county did not in its caption recite the name of the court and the county in which the

action was brought, as required by section 87 of the Code of Civil Procedure. A praecipe for summons, properly entitled, was filed, and a summons in due form, notifying the defendants where the action was pending, was issued and served. Held, that the court had jurisdiction of the action, and obtained jurisdiction of the parties by the service of the summons, and that no error was committed by permitting the petition to be amended by inserting in its caption the name of the court and county where the action was pending.

2. An entry, made upon the account books of an agent, of a payment made to him by one for the principal, is competent evidence of the fact and nature of such payment, as against the payor, when it has been shown that such entry was made at the time of the occurrence of the events, and was correct.

3. It is the payment of a portion of a debt which tolls the statute of limitations, and not the actual indorsement of such payment upon the instrument evidencing such debt.

(Syllabus by the Court.)

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by W. W. Burrage and others against John K. Hastie and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

James Lawrence and Levi Ferguson, for plaintiffs in error. Herrick & Herrick and Ivan D. Rogers, for defendants in error.

CUNNINGHAM, J. This was an action upon a note, and for the foreclosure of a mortgage given to secure the same. The petition nowhere in its caption or body recited "the name of the court and the county in which the action is brought," as provided in section 87 of the Code of Civil Procedure. It was, however, indorsed upon the outside "No. 9019 District Court of Sumner County, Kansas," and was filed in that court. Upon a praecipe, properly entitled, a summons was issued and duly served upon the defendants. Conceiving that this summons was issued without authority, and its service void and conferred no jurisdiction, because the petition lacked the proper entitling, the defendants entered their special appearance, and moved to quash the summons and set aside the service. Pending the consideration of this motion, the plaintiff asked and obtained leave to amend the petition by writing at the head of it and above the names of the parties a proper entitling as to the court and county in which the action was pending. The motion to quash and set aside service was overruled, the court retained jurisdiction of the parties and subject-matter, and proceeded farther in the case. Defendants at all stages of the case reserved this question, and now present it here as their first assignment of error.

They contend that the statute above quoted is mandatory, and that the omission from the caption in the petition of the name of the court and county in which the action was brought was fatal to jurisdiction, the stat-

¶ 3. See Limitation of Actions, vol. 33, Cent. Dig. § 638.



ute reading, as it does, that the petition must contain these statements, and their omission would be fatal as omitting entirely the venue of the action. An analogous question to this is presented in the case of *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446, where it was held that the omission of the word "petition" from the caption, the insertion of which is made by the statute equally mandatory, was not fatal, but might be cured by amendment. The defendants could, in no way have been misled or prejudiced by the omission of which they complain. The summons fully informed them where the action was pending. All statutes of jeofailles, such as the provision for amendments in our Code of Civil Procedure which permits amendment of the pleading, process, or proceeding at any stage in furtherance of justice, and requires the disregard of errors and defects not going to the substantial rights of parties, amply justify the action of the court. *Merrill v. Grinnell*, 10 How. Prac. 31; *Davison v. Powell*, 13 How. Prac. 287; *Hotchkiss v. Crocker*, 15 How. Prac. 336; Enc. P. & P. vol. 4, p. 592. Besides, it will be borne in mind that the name of the court and county was found upon the petition, not strictly in the caption, but upon the outside, where for all purposes it would be equally efficient as though in the caption itself. We think that the amendment allowed, if any amendment was necessary, was well within the power of the court to permit.

Upon the trial the only litigated question was whether the statute of limitation had run upon the note sued on so as to bar foreclosure. To toll the statute, a payment of \$90 within the statutory period was relied upon. A payment of this amount was admitted by the defendants. The plaintiff claimed that it was made as interest upon the note, or, at least, as a general payment upon the indebtedness. The defendants claimed that it was made not as interest or as a general payment, but for the purpose specifically to discharge the taxes upon the mortgaged land. This question was resolved by the jury in favor of the contention of the plaintiff, and we think, upon the evidence, if properly admitted, correctly so. It is contended, however, that improper evidence was admitted in proof of this issue. The payment was made to an agent of the owner of the note, who testified that it was upon the interest, and that he at the time of the demand made an entry to that effect upon books of the account, which he kept as between himself and his principal. These books were produced in court, and after having been identified, and the showing made that the entries were made at the time of the occurrence of the events therein shown, and were correct, were admitted in evidence, over the objection of the defendant, for the purpose of corroborating the agent's oral evidence as to the character of this payment. This action is claimed to have been erroneous.

In one sense of the word these books were books of account between the plaintiff and the defendant, and were no less so because the entry was made by the plaintiff's agent. While they were in a greater sense the books of account between the plaintiff and his agent, still they showed the condition of the account between the parties principal, but in either view we think their admission well within the authority of section 387 of the Code.

This payment of \$60 was not actually indorsed upon the note until after the expiration of the time in which the statute of limitations would have run thereon, and it is claimed that such indorsement is necessary in order to stay the statute, and that a mere payment was not sufficient. In support of this contention we are cited to the cases of *Hamilton v. Coffin*, 45 Kan. 556, 26 Pac. 42, and *Good v. Ehrlich*, 67 Kan. 94, 72 Pac. 545. These cases do not sustain the contention of the plaintiff in error. It is the payment of a part of the principal or interest which tolls the statute, and not the indorsement of such payment upon the account or evidence of debt. Section 24, Code Civ. Proc.

After the execution of a mortgage the mortgagor had conveyed the title of the mortgaged premises to his son, who did not assume the payment of the mortgage indebtedness. The payment relied upon to toll the statute was made by the original mortgagor, and it is claimed that such payment would not avail to toll the statute as against the son, the holder of the legal title, and the mortgage, therefore, could not be foreclosed as against him. This question has been settled against this contention by the case of *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991, and several cases following.

We have looked into the other assignments of error, and find them without merit.

The judgment of the district court will be affirmed. All the Justices concurring.

#### SCRUGGS v. SCRUGGS et al.

(Supreme Court of Kansas. June 11, 1904.)

#### ADMINISTRATION OF ESTATES—NOTICE OF DISTRIBUTION.

1. In order that an order of distribution of the estate of a decedent made by the probate court may be effective and binding upon persons claiming a right to share in such distribution as heirs or otherwise, it is not necessary that the administrator give any other notice than that of final settlement provided for in section 2957 of the General Statutes of 1901.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Phineas T. Scruggs against Rosamond A. Scruggs and others. Demurrer to

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1281.

the petition sustained, and plaintiff brings error. Affirmed.

Cook & Gossett and F. M. Roberts, for plaintiff in error. R. H. Field, for defendants in error.

MASON, J. Rosamond A. Scruggs was the wife of Phineas T. Scruggs. Her husband dying intestate, she was on December 30, 1891, appointed administratrix by the probate court of Wyandotte county, and thereafter gave a bond conditioned as provided by statute (section 2818, Gen. St. 1901). On January 5, 1895, she made a final settlement of the estate, after having given the notice required by section 2957 of the General Statutes of 1901. The court made an order of distribution, with which the administratrix fully complied. Thereafter the plaintiff in this litigation, claiming to be entitled to one-sixth of the estate as an heir, in virtue of being the illegitimate but acknowledged son of the intestate, sued Mrs. Scruggs and a surety upon the bond to recover \$20,000, alleging that the order of distribution was void as to him because no notice was ever given under the provisions of section 2974 of the General Statutes of 1901. A demurrer to his petition was sustained, and he brings this proceeding to review that ruling.

In *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86, it is held that the probate court has jurisdiction to decide who are entitled to share in the distribution of the estate of a deceased person, and that its determination cannot be collaterally assailed. There an heir sued the administratrix upon her bond, but was denied relief on the ground that he was concluded by the proceedings in the probate court. In the opinion it is said: "Although he, the plaintiff, had legal notice of the final settlement and distribution, he ignored the probate court, and without appearance or objection, allowed the final settlement to be made, the estate distributed, and the final decree entered discharging the administratrix, and releasing the sureties on the bond from further liability. \* \* \* The final settlement and closing up of an estate is a judicial determination, to which all interested are summoned, and by which all having a day in court are concluded. \* \* \* The plaintiff, with legal notice and actual knowledge that a settlement and distribution were about to be made, could not safely ignore the proceedings in the probate court. The matters of which he complains have been finally determined in that court, and he is bound by the adjudication." While the report of the case does not disclose the precise character of the notice referred to, it was in fact, as shown by the record, in no material respect different from that given by Mrs. Scruggs. That decision, therefore, if accepted as an authority, precludes a recovery by plaintiff.

But we are asked to examine into and determine, as a new question, the purpose and

effect of the statute now invoked, for the reason that it was not called to the attention of the court in that case. The statute under which notice was given (section 2957) reads: "If any executor or administrator wish to make final settlement, he shall publish for four weeks, in some newspaper in this state having general circulation in the county, a notice to all creditors and others interested in the estate that he intends to make final settlement at the next term of the court."

It is claimed by plaintiff in error that this notice relates merely to the adjustment and settlement of accounts between the estate and creditors, and has no relation to the matter of the distribution of the residue of the estate among the heirs or legatees, and that, before any valid order for such distribution can be made, a notice must be published in accordance with section 2974 of the General Statutes of 1901, reading: "Each person entitled to distribution, not applying therefor, shall be notified in writing of such application, ten days before such order shall be made; or if such person do not reside in this state, a notice of such application shall be published in some newspaper in this state, four consecutive weeks before such order shall be made." It is argued that this is the construction which has been given to the two sections in Missouri, from which state they were adopted, and that such interpretation should have controlling force. It is true that this court seems not to have been called upon heretofore to interpret the latter section, that both sections were adopted literally from the statutes of Missouri, and that the Supreme Court of that state has given the corresponding sections the construction contended for by plaintiff. State, to Use of Morrison's Adm'r, v. St. Gemme's Adm'r, 31 Mo. 230; *Lilly v. Menke*, 126 Mo. 190, 220, 28 S. W. 643, 994; *Baker v. Lumpee*, 91 Mo. App. 560. But the Missouri decisions were made after the enactment of the Kansas statute, and after a change in the Missouri statute which may have affected its interpretation. To discover the meaning of section 2974, it is important to consider it in connection with the preceding section, which reads: "If any personal property descend, and an equal division thereof cannot be made in kind, the probate court may order the sale of such personal property, describing the time, place, manner and terms of sale, and cause the money to be distributed according to the rights of those entitled to distribution." The natural conclusion from a comparison of the two sections is that they relate simply to the situation arising when personal property descends which cannot be divided in kind, that the words "such application" in the second section refer to an application for a sale of the property under such circumstances, and that the notice referred to is a notice of the application for such sale. That this was the understanding of the Kansas Legislature that adopted the sections is clear from the fact

that in the Revised Statutes of Missouri of 1845, which furnished the basis of the Kansas enactment, the subject of this second section was thus indicated in the heading of the article and in a marginal note: "Notice of application to sell for the purpose of distribution, how and when to be given." Section 5, art. 6, c. 3, Rev. St. Mo. 1845. And this heading and marginal note were adopted together with the section by the Kansas Legislature, which adjourned August 30, 1855. Section 5, art. 6, c. 1, Gen. St. Kan. 1855. It is to be remembered that, under the administration act of which this section was a part, only so much of the personal property of the decedent as was perishable was sold at once. If this did not result in sufficient money to pay the debts, enough more was sold for that purpose. The remainder was ordinarily distributed in kind among the heirs or legatees, no notice being required in connection with an order for the purpose. And the section under consideration, with the one preceding it and the one following it, were made necessary in order to provide for the contingency of the personal property being incapable of division. In December, 1855, the Missouri statute was amended by adding the words "or partition," so that the first clause of the section became, "Each person entitled to distribution or partition." A corresponding change was made in the section which followed it, and an entirely new section was inserted preceding it, relating to proceedings where a division of the personal property could be made in kind. Sections 5, 6, 7, art. 6, c. 2, Rev. St. Mo. 1855. As a result of these changes the section, which originally had no operation except where indivisible personal property descended, was made to apply also to cases where such property was divisible, and when occasion for its construction arose (the earliest case cited having been decided in 1860) it was interpreted as though it had been originally framed as then found. Thus what had been a requirement exacted only under special circumstances became in Missouri a general rule applicable in all cases. It is not necessary to consider what practical effect, if any, is to be given the section in our statute. In 1859 the Kansas Legislature enacted the existing chapter relating to executors and administrators, substantially adopting the Ohio law on the subject, retaining, however, a few sections of the old statute, including this one. Inasmuch as, under the present procedure, substantially all of the personal property of the estate is ordinarily sold within three months, it may be that the section has no longer any function to perform. But in any event it has not the force of the present Missouri statute.

We conclude that the Missouri decisions do not require any modification of the views expressed in *Proctor v. Dicklow*, and that the plaintiff was bound by the order of distribution made by the probate court. As this

conclusion is fatal to the plaintiff's recovery, it is unnecessary to discuss any of the other questions raised.

The judgment is affirmed. All the Justices concurring.

### JONES v. STANDIFERD et al.

(Supreme Court of Kansas. June 11, 1904.)

#### EJECTMENT—EVIDENCE—PURCHASER PENDENTE LITE—APPEARANCE—MORTGAGEE IN POSSESSION.

1. A section of land was incumbered by a mortgage to H. A suit was begun to foreclose a materialman's lien on the southwest quarter of the section, and personal service had on the owners, who had given the mortgage on the whole tract of land to H. They made default. Pending the suit the northwest quarter of the section was conveyed to J. J. by one of the defendants. Later H., the mortgagee, was made a party defendant at the instance of the plaintiff lienholder. He filed an answer and cross-petition praying for a foreclosure of his mortgage. After a decree had been entered foreclosing plaintiff's lien, and also the mortgage of H., J. J. placed her deed on record.

At the sale under the decree the land was bid in by H., the mortgagee. The original defendants in the suit to foreclose the lien, who were mortgagors of H., and one of whom was the grantor of J. J., filed a motion to set aside the sale on eight grounds, seven of which were nonjurisdictional. The sale was confirmed.

In an action in ejectment by J. J. against H. and his grantees to recover the northwest quarter of the section of land, *held*, that she cannot recover, for the following reasons:

First. She must be treated as a purchaser pendente lite. Her grantor was in court for all purposes connected with the action, and was bound to take notice of the cross-petition of H., on which he obtained foreclosure of his mortgage filed after service of summons.

Second. The motion to set aside the sheriff's sale constituted a general appearance in the foreclosure suit by her grantor.

Third. H., the purchaser at the sale, and his grantees, are entitled to all the rights of a mortgagee in possession.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Jennie Jones against T. H. Standiferd and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This was an action of ejectment brought by Jennie Jones, now plaintiff in error, against T. H. Standiferd, Hiram Holt, and Malinda L. Holt, to recover possession of the northwest quarter of section 22, township 18, range 13, in Lyon county. Defendants had judgment in the court below. The facts, stated in chronological order, are as follows: On March 1, 1886, Mary P. Jones, the mother of plaintiff below, and from whom she claims title, was the owner and in possession of section 22, township 18, range 13, in Lyon county, and the southeast quarter of section 2, township 18, range 13, in Osage county, Kan. On that day Mary P. Jones and her son T. B. Jones executed and delivered to Hiram Holt, one of the defend-

ants in error, a mortgage of \$10,000 on all of said real estate, for borrowed money. This mortgage was recorded in March, 1886. On August 9, 1886, the Wisconsin Planing Mill Company commenced an action in the district court of Lyon county, Kan., to foreclose a mechanic's lien upon the southwest quarter of said section 22, in Lyon county, and the southeast quarter of said section 2, in Osage county, in the sum of about \$700, for lumber used in erecting a dwelling house and barn on the land. As originally commenced, the only parties to the suit were the Wisconsin Planing Mill Company, as plaintiff, and Mary P. Jones and T. B. Jones, defendants. In that action, service of summons on T. B. Jones was obtained in Lyon county on August 18, 1886, and on Mary P. Jones, in Osage county, on September 6, 1886. The service on Mary P. Jones was by certified copy of the summons left at her residence. On October 10, 1886, and during the pendency of said action, Mary P. Jones made a quitclaim deed to her daughter Jennie Jones, the plaintiff in error, for the west one-half of said section 22, in Lyon county. The consideration named in the deed was \$1. This quitclaim deed was withheld from record until after final judgment had been rendered in the foreclosure action. It was filed for record, however, before the sheriff's sale of the property in that suit. This quitclaim deed is the sole claim of title on which Jennie Jones bases her right to maintain this ejectment action. In January, 1887, the court ordered Hiram Holt and other record holders of liens upon said real estate to be brought in and made parties to the foreclosure suit. The planing mill company amended its petition by making them codefendants with Mary P. and T. B. Jones. Hiram Holt and other lienholders answered, setting up their various liens. The aggregate of all the incumbrances was about \$14,000. Mary P. Jones and T. B. Jones did not plead in the suit, but made default. On June 23, 1887, judgment was rendered in said action in favor of the Wisconsin Planing Mill Company, foreclosing its mechanic's lien, and ordering sale of the property after 30 days, with appraisement, and in favor of Hiram Holt, foreclosing his mortgage, and ordering sale, if upon his application, after six months, without appraisement. Judgment was also rendered in favor of the other lienholders. On August 4, 1887, the Wisconsin Planing Mill Company caused order of sale to issue under its judgment, and, after due advertisement and appraisement, said section 22 was sold at sheriff's sale by the Lyon county sheriff, and bid in by F. C. Newman, agent of Hiram Holt, for \$5,500—more than two-thirds of the appraised value—on September 23, 1887. On said September 23, 1887, said Mary P. Jones and T. B. Jones filed a motion to set aside the sheriff's sale on jurisdictional and nonjurisdictional grounds. This motion was overruled and

the sheriff's sale confirmed and deed ordered on October 17, 1887. On December 19, 1887, the sheriff's deed was duly executed and delivered to F. C. Newman, and he thereafter conveyed the property to Hiram Holt. Hiram Holt went into peaceable possession of said property, holding under the sheriff's deed, and he and his grantees have so remained in possession ever since. This suit was commenced on September 5, 1901, nearly 14 years after the date of the sheriff's deed and the taking of possession thereunder. The defendant Standifer holds under Hiram Holt. The indebtedness represented by the mortgage from Mary P. Jones has never been paid by any one, except as it was paid by the foreclosure proceedings, and the amount of the purchase price of said real estate at the sheriff's sale credited thereon. The plaintiff never paid or tendered payment of any part of the said mortgage indebtedness before commencing this action. The action is not one to redeem from the mortgage, but is simply ejectment for the land, and for rents and profits. No proceedings in error were ever instituted by Mary P. Jones or any one else to review the proceedings in the foreclosure suit.

J. Harvey Frith and John G. Egan, for plaintiff in error. Graves & Hamer and Kellogg & Madden, for defendants in error.

SMITH, J. (after stating the facts). Plaintiff in error must fail in her attempt to get title and possession to the property involved, for three reasons:

1. She purchased land from Mary P. Jones which was incumbered by a \$10,000 mortgage to Hiram Holt, executed by her grantor. Its existence was a matter of record. When the Wisconsin Planing Mill Company began suit to foreclose its lien for material furnished to Mary P. Jones, it did not, it is true, seek to fix its claim as a charge on the land now in controversy, but on other lands covered by the Holt mortgage. Before Hiram Holt was made a party to the action brought by the planing mill company, Mary P. Jones had executed a deed to the land in question to plaintiff in error, but it was withheld from record until after Hiram Holt had come into the foreclosure action and set up his mortgage against Mary P. Jones and her codefendant on the same land, and obtained judgment thereon, and an order of sale of the mortgaged property. We must treat the case as if the legal title to the land now in question vested in Mary P. Jones at the time the decree foreclosing the Holt mortgage was entered, and regard Jennie Jones as a purchaser pendente lite. *Smith v. Worster*, 59 Kan. 640, 54 Pac. 676, 68 Am. St. Rep. 385; *Baker v. Land Company*, 62 Kan. 79, 61 Pac. 412; *Atchison County v. Lips*, 68 Kan. —, 76 Pac. 850. Mary P. Jones and her codefendant, T. B. Jones, were duly served with summons in

the suit brought by the Wisconsin Planing Mill Company to foreclose its lien. They were bound to take notice of the cross-petition of Hiram Holt, filed thereafter, in which he prayed for and obtained a decree for the foreclosure of his mortgage, and an order of sale for the property in controversy. In *Kimball et al. v. Connor, Starks et al.*, 3 Kan. 414, 431, it is said: "When the original summons is served, the defendants are in court for every purpose connected with the action, and the defendants served are bound to take notice of every step taken therein." In *Curry v. Janicke*, 48 Kan. 168, 29 Pac. 819, it is held that, when a party has been properly served with summons, he must take notice of an answer and cross-petition filed by a defendant who was made a party to the action after the answer day named in the summons. *Mary P. Jones and T. B. Jones*, being in court to answer in a suit brought to foreclose a materialman's lien on land which they had mortgaged to Hiram Holt, ought reasonably to expect that their mortgagee would come into the action and assert rights under his mortgage. Being in court, their failure to plead did not render whatever action was taken in the suit less obligatory upon them.

2. After sale under a decree in the foreclosure suit of the land which plaintiff in error now seeks to recover, her grantor, *Mary P. Jones*, and *T. B. Jones* filed a motion to vacate and set aside the sale on eight grounds. The first challenged the court's jurisdiction over the persons of defendants; four others attacked the appraisalment returned by the sheriff; the fifth alleged that there was a combination between bidders at the sale which suppressed competition; another that sufficient notice was not published; and another, that no money was paid by the purchaser. This attack on the sale, so far as it was based on nonjurisdictional grounds, was a general appearance in the case. *Burdette v. Corgan*, 28 Kan. 102; *Life Association v. Lemke*, 40 Kan. 142, 19 Pac. 337; *Investment Co. v. Cornell*, 60 Kan. 282, 56 Pac. 475; *Baker v. Land Company*, *supra*.

3. The whole of section 22, township 18, range 13, the northwest quarter of which is here involved, was sold under the decree of foreclosure to Hiram Holt for \$5,500, the sale confirmed, and a sheriff's deed executed. Holt and his grantees have been in peaceable possession since 1887. This is not a suit to redeem, but an action in ejectment. The following cases are decisive against the right of plaintiff in error to recover the land: *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 96 Am. St. Rep. 808; *Stouffer et al. v. Harlan et al.*, 68 Kan. —, 74 Pac. 610; *Equitable Mortg. Co. et al. v. Gray et al.*, 68 Kan. —, 74 Pac. 614.

The judgment of the court below will be affirmed. All the Justices concurring.

(69 Kan. 857)

CITY OF LEAVENWORTH et al. v. JONES.  
(Supreme Court of Kansas. June 11, 1904.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—PROCEEDINGS TO SET ASIDE—TIME FOR BRINGING—COMPUTATION—PROCESS—SERVICE—STATUTES—REPEAL.

1. The statute relative to special assessments limits the time within which an attack may be made on special assessments to 80 days from the time the assessment is ascertained. Code Civ. Proc. § 722, provides that the time within which an act is to be done shall be computed by excluding the first day and including the last, but that, if the last day be Sunday, it shall be excluded. *Held* that, where an ordinance determining the amount of an assessment for paving was published and went into effect September 1st, an action to set aside the assessment commenced October 2d, the 1st day of October having been Sunday, was too late; the day on which the cost of the improvement is ascertained and the ordinance passed being included in the computation, and section 722 having no application.

2. Laws 1881, c. 88 (Gen. St. 1901, §§ 876-889), provides a method for constructing sidewalks, collecting the expense thereof, etc., in cities of the first class, and provides that it shall not impair any authority of any city with reference to sidewalks, but that a city may proceed under the act, or under the power and authority they now have, or may have under any general law governing cities of the first class. *Held*, that a city may construct a sidewalk under Laws 1881, c. 87, § 12 (Gen. St. 1901, § 728), a general law as to the construction of sidewalks and assessments therefor in cities of the first class.

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Suit by Elizabeth R. Jones against the city of Leavenworth and others. From a judgment for plaintiff, defendants bring error. Reversed.

F. F. Fitzwilliam, for plaintiffs in error. J. C. Douglass, for defendant in error.

PER CURIAM. This was a suit to enjoin and set aside a special assessment made by the city of Leavenworth to pay for repaving Olive street. Two lots belonging to defendant in error were charged with a part of the cost. The action was also brought to restrain the collection of special assessments for the cost of a sidewalk laid along the street on one side of said lots.

The ordinance determining the amount of the assessment for paving was published and went into effect on September 1, 1899. This action was begun on the 2d day of October, 1899. The 1st day of October was Sunday. It is contended that the proceedings to set aside the assessment for paving were brought in time, for the reason that the last day, being Sunday, should be excluded in computing the 80 days allowed by the statute to begin the action, and that the first day, that is, the day on which the ordinance was published, should also be excluded. This court, in the late case of *Kansas City v. Gibson*, 66 Kan. 501, 504, 72 Pac. 222, 223, said: "The statute limits the time within which attacks may be made on special assess-

ments to a period of 30 days from the time the assessment is ascertained; and the neglect of the property owner to bring a proceeding either to set aside the assessment or to enjoin the making of the same within the statutory time is a bar to these remedies." It was expressly decided in the case quoted from that the day on which the cost of the improvement is ascertained and the ordinance passed is to be counted in computing the 30 days allowed to begin the action. This case is decisive of the present controversy, except that part of it relating to the sidewalk. Section 722 of the Code of Civil Procedure is not applicable to the case. *Hagerman et al. v. Ohio Building & Saving Association et al.*, 25 Ohio St. 186; *Croco v. Hille*, 66 Kan. 512, 72 Pac. 208. See *Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114.

The sidewalk was laid and the cost assessed pursuant to section 12, c. 37, Laws 1881 (Gen. St. 1901, § 728). It is urged that the city should have proceeded under chapter 38, Laws 1881 (Gen. St. 1901, §§ 876-889, inclusive), and that this act repealed section 12 of chapter 37 of the Laws of 1881. This claim is untenable. Chapter 38 of the Laws of 1881, in its last section, provides that nothing in the act shall impair any power or authority any city of the first class may have with reference to the building of sidewalks; but it may be discretionary with the mayor and council whether they desire to proceed under this act, or under the power and authority they now have, or may have under any general law governing cities of the first class.

The judgment of the court below will be reversed, with directions to proceed further in accordance with this opinion.

#### UNION PAC. R. CO. v. BOARD OF COM'RS OF WYANDOTTE COUNTY.

(Supreme Court of Kansas. June 11, 1904.)

TAXATION—RAILROADS—REAL ESTATE—ASSESSMENTS—RES JUDICATA.

1. Section 7551, Gen. St. 1901, provides for a state board of railroad assessors to assess the property of railroads and railroad corporations in the state. Said section specifically designates the real estate owned by railroads or railroad corporations to be assessed by such board as being that "used or necessary to be used for the convenient and daily operation of its railroads."

2. Where the board of railroad assessors assessed real estate belonging to a railroad corporation, and the county clerk refused to recognize such assessments upon the return thereof made by the Auditor of State, and the lands were subsequently assessed by the local assessors, in an action by the railroad corporation to enjoin the sale of premises by the county treasurer for the nonpayment of taxes levied against the premises, based on the assessment made by the local assessors, and the question to be determined in such action was whether the premises were assessable by the board of railroad assessors or by the local assessors, and upon the trial the agreed facts disclosed the same question had been determined in a former adjudication between the parties or their pred-

ecessors, and the facts and conditions were not shown to have changed, *hæc res adjudicata*.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by the Union Pacific Railroad Company against the board of county commissioners of Wyandotte county. Judgment for defendant, and plaintiff brings error. Reversed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error. James S. Gibson, for defendant in error.

ATKINSON, J. This is an action by the Union Pacific Railroad Company, a railroad corporation, to enjoin the county treasurer of Wyandotte county from selling four tracts of land owned by said railroad company in the county of Wyandotte for the taxes of 1901 and 1902. The board of county commissioners was also made a party defendant. A restraining order was issued at the time of filing the petition. Upon the final hearing a perpetual injunction was refused, and judgment rendered against plaintiff for costs. Plaintiff prosecutes error to this court.

The case was before the district court on an agreed statement of facts. Plaintiff has owned the tracts in controversy since April, 1898. These tracts are designated in the petition and shown upon the plat attached to the record as "railroad tracts" Nos. 4, 6, 7, and 8. They constitute portions of a large tract owned by the railroad company, upon which are its roundhouse, machine and repair shops, the switchyards, and storage grounds. Each tract is entirely surrounded by the tracks of plaintiff. In the years 1901 and 1902 defendant included the lands in controversy in the return of its property to the state board of railroad commissioners for assessment. The board by resolution declared said tracts to be "held by said company exclusively for railroad purposes, and therefore should be assessed by this board." The tracts were assessed by the board, and included as railroad property by it assessed in the return made to the county clerk of Wyandotte county by the Auditor of State. The county clerk refused to recognize the assessments of these premises made by the board, and refused to place such assessments upon the tax roll, but treated the tracts in controversy as lands that had not been assessed, and himself charged taxes against each tract largely in excess of the assessment returned by the board of railroad assessors. Plaintiff refused to pay the taxes levied upon the assessment against the tracts made by the county clerk. It contends that the tracts were properly assessed by the board of railroad assessors. Plaintiff has been and is ready and willing to pay the taxes based upon the assessments made by the board of railroad assessors. These taxes the county treasurer refused to accept.

The question we are called upon to determine is whether, under the agreed facts, these tracts were assessable by the board of railroad assessors or by the local assessors for the years 1901 and 1902.

Section 7551, Gen. St. 1901, provides for a state board of railroad assessors, and empowers such board to assess the property of railroads and railroad corporations in the state. Said section specifically designates the real estate owned by railroads or railroad corporations to be assessed by such board as being that "used or necessary to be used for the convenient and daily operation of its railroads." To determine whether or not the premises in controversy come within the provision of said section as being premises by it authorized to be assessed by the said board of railroad assessors, we must resort to the agreed facts in the record before us upon which the case was tried in the district court. Subdivision 21 of the agreed facts reads: "In the year 1893 S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert were appointed receivers of all the property of the Union Pacific Railway Company by the United States Circuit Court for the District of Kansas. Railroad tracts Nos. 4, 6, 7, and 8, above described, were included in the property which said receivers had in their possession and under their control by virtue of their appointment. In the year 1893 said four tracts of land were assessed by the state board of railroad assessors, together with other property belonging to the Union Pacific Railway Company. The county clerk and county commissioners of Wyandotte county, Kansas, refused to recognize said assessment, and made a local assessment of said tracts of land, and placed said local assessment upon the tax roll of Wyandotte county for the year 1893. On September 1, 1894, said receivers brought suit in the district court of Wyandotte county, Kansas, against the board of county commissioners of Wyandotte county and M. G. McLean, then county treasurer of Wyandotte county, to restrain the collection of the taxes levied under the local assessment. On January 7, 1896, the case was tried, and judgment was rendered in favor of the receivers declaring the local assessment null and void, and perpetually enjoining the defendants from collecting the taxes levied thereunder. No appeal was taken from that judgment. The journal entry in said case is recorded in Journal 14, page 191, which is referred to and made part hereof. The plaintiff herein is the legal successor in interest of the Union Pacific Railway Company and its receivers above mentioned." The journal entry above referred to in the agreed facts, and made a part thereof, contains the following recital: "It is therefore ordered, adjudged, and decreed by the court that all of said tracts of land fully described and set out in the findings herein, and ever since they have been so owned by said

plaintiffs, have been, and during the year 1893 were, railroad lands situated, lying, and being contiguous to the right of way of said plaintiffs, and necessary for the daily and convenient use of said railway in the operation of its road, and are, and during all of said time have been, assessable only by the board of railroad assessors."

It is contended by plaintiff the agreed facts disclose the question involved in this case was fully considered in the action brought by the receivers; that the judgment rendered in that action, constituting a part of the agreed facts in the case at bar, determined the status of the land; that it was by said judgment determined said premises were not subject to the jurisdiction of the local assessors; that the status of the land remains as fixed by the judgment in said former action. In other words, the position of plaintiff is that the question before us in the record upon the agreed facts was adjudicated in the former action by the receivers, and cannot again be adjudicated between the parties to this action upon the same facts.

The agreed facts in this case admit that "the plaintiff herein is the legal successor in interest of the Union Pacific Railway Company and its receivers above mentioned." The agreed facts disclose the same parties are defendants in this case that were defendants in the former injunction suit; the same premises are in controversy; the controversy arose out of the same question—that is, whether the said lands were assessable by the board of railroad assessors or by the local assessors; and the law applied to the facts in that case is now in force to be applied to the same state of facts in this case. The judgment in the case brought by the receivers found the premises to be "necessary for the daily and convenient use of said railway in the operation of its road." Premises so used come within the provision of said section 7551 of the statute. Premises owned by a railroad or a railroad corporation, and so used, are by said section authorized to be assessed by the board of railroad assessors, and not by the local assessors. There is not shown in this case to be a change of facts and conditions differing from the facts and conditions existing when the former injunction suit by the receivers was brought and determined. The rule of *res adjudicata* applies as well to facts settled and adjudicated as to causes of action. *C. K. & W. R. Co. v. Com'rs of Anderson Co.*, 47 Kan. 766, 29 Pac. 96; *St. J. & G. I. R. Co. v. Steele*, 63 Fed. 867, 11 C. C. A. 470. The matters in controversy in this case, as disclosed by the agreed facts, were adjudicated in the former injunction suit.

The judgment of the district court will be reversed, with direction to enter judgment for plaintiff on the agreed facts. All the Justices concurring.

**SPENCER v. TAYLOR et al.**

(Supreme Court of Kansas. June 11, 1904.)

**CONTRACT—VALIDITY—MUTUALITY.**

1. In an action by S. to recover damage from T. & R. for a failure to sell and furnish to S. Geuda Springs mineral waters to supply the trade of the city of Wichita, where the contract sued on obligated T. & R. to sell and furnish S. the waters to supply the trade at a designated price, and obligated S. to furnish the vessels in which to make shipments of the waters, to pay all express and freight charges, to pay the expense of advertising, "to use his best endeavors to push the sales of said mineral waters in Wichita," and to pay T. & R. the price fixed by the contract for all waters used by S. to supply the trade, *held*, such contract is not void for want of mutuality of obligation.

(Syllabus by the Court.)

Error from District Court, Sumner County; O. L. Swarts, Judge.

Action by W. W. Spencer against F. D. Taylor and J. W. Reeves. Judgment for defendants, and plaintiff brings error. Reversed.

Adams & Adams and James Lawrence, for plaintiff in error. Hackney & Hackney and Hackney & Lafferty, for defendants in error.

**ATKINSON, J.** This action was instituted by W. W. Spencer against F. D. Taylor and J. W. Reeves to recover damage alleged by plaintiff to have been by him sustained on account of a failure on the part of defendants to comply with the terms of a written contract. After a jury had been impaneled and counsel for plaintiff had read to the jury the petition of plaintiff and the contract sued on, and had made a statement of plaintiff's claim to the jury, upon motion of counsel for defendants, the court discharged the jury and rendered judgment against plaintiff for costs. Plaintiff brings error.

The following is the contract upon which suit was brought:

"This instrument, made and entered into by and between Taylor & Reeves of Cowley County, Kansas, first party, and W. W. Spencer, of Geuda Springs, Kansas, party of the second part, witnesseth: That said first party hereby covenants and agrees to sell and furnish the second party, f. o. b. cars at Geuda Springs, Kansas, sufficient mineral waters of the Geuda Mineral Springs to supply the trade of the city of Wichita, Kansas, of such springs as required, natural and uncarbonated, for the period of five years from the first day of August, 1900, at the price of three cents per gallon, and as soon as the quantity so sold exceeds an average of more than two hundred (200) gallons per day the price is to be two and one-half (2½) cents per gallon; and when the waters are carbonated the same are to be furnished, but the price to be made to correspond with the additional expenses for all costs incident to such carbonating, bottling, casing, etc. Said Spencer is to have the privilege of re-

newing this agreement at the termination of said term of five years for the period of another five years on fulfilling his part of this agreement. Said Spencer is to furnish the vessels necessary in which to ship such natural mineral waters, to pay all expressage or freight, and is to use his best endeavors to push the sales of said mineral waters in Wichita, Kansas, and is to have the exclusive sale of said waters in said city of Wichita during the existence of this agreement. Said Spencer is to pay for all advertising and all other expenses made by him in connection with the sale of such waters. Settlement to be made and money paid over on each and every of the first days of each month during this agreement.

"In witness whereof, we have hereunto subscribed our names this first day of August, A. D. 1900, at Geuda Springs, Kansas.

"Taylor & Reeves.

"W. W. Spencer."

The district court found that the petition of plaintiff, to which the contract was attached and formed a part, failed to state a cause of action. It was contended by counsel for defendants that the contract is void for want of mutuality. It is apparent from the record that, in sustaining the motion of defendants for judgment, the court found the petition of plaintiff, with contract attached, failed to state a cause of action on the ground that no mutuality of obligation was shown. The opening statement made to the jury by counsel for plaintiff will not here receive consideration, as it was confined substantially to the averments of the petition. In addition to the allegations with reference to the execution of the contract sued on, a recital of the material matters contained in said contract, and the damage sustained, the petition contained the following averments: "That at the time of making said contract, plaintiff was a resident of Geuda Springs, Kansas; that as soon as said contract was executed the said plaintiff, relying upon the same, and with the intention and for the purpose of carrying out the provisions and fulfilling his part of the said contract, moved to the city of Wichita, Kansas, and purchased horses, wagons, tanks, cases, bottles, and other necessary articles to carry on said business, at an aggregate cost to the plaintiff of the sum of five hundred dollars (\$500.00); that the plaintiff, in reliance upon said contract and for the purpose of increasing the sale of Geuda Springs mineral water in Wichita, did expend large sums of money in advertising said water, to wit, the aggregate sum of one thousand dollars (\$1,000.00); that said plaintiff, relying upon the said contract, has spent his entire time in the work of advertising and selling said mineral water in Wichita, Kansas, and has at all times used his best endeavors to push the sale of said mineral water in the city of Wichita, Kansas, from the date of said contract until about the 15th day of November, 1901, when the said de-



defendants wholly disregarded the terms and provisions of said contract, and failed and neglected to ship said water to the plaintiff, after the plaintiff had ordered the same to be shipped, and stated to plaintiff at that time that they would not carry out the terms of the contract, that they would not ship to him any Geuda Springs mineral water under said contract, and have since said 15th day of November, 1901, wholly failed and refused to ship to plaintiff any Geuda Springs mineral water under said contract, although frequently requested to so do by the said plaintiff." From the foregoing averments of the petition, it appears plaintiff, to carry out the provisions of the contract on his part, at once left the place of his residence and took up a residence in the city of Wichita, at an expense of \$500 he purchased necessary equipments to carry on the work provided by the contract, expended the sum of \$1,000 in advertising the merits of Geuda Springs mineral waters, and for a period of 15 months devoted his time and best endeavors to furthering the sale of said mineral waters in the city of Wichita. It is apparent the petition, by its averments, which includes, also, the contract as a part thereof, states a cause of action in favor of plaintiff and against defendants.

We will now direct our attention to the contract upon which suit was brought. Is the contract void for want of mutuality, as claimed by defendants? It is conceded by counsel that a promise is a good consideration for a promise; there being a mutuality of agreement and obligation. By counsel for defendant it is contended that the contract under consideration is wanting in mutuality. It is claimed the contract imposes no obligation on plaintiff; that he does not bind himself or agree to take of defendants any of the Geuda Springs mineral waters. It will be observed plaintiff by the terms of the contract obligated himself to furnish the vessels in which to make shipments of water from the springs, to pay all express and freight charges, to pay all advertising expenses, and "to use his best endeavors to push the sales of said mineral waters in Wichita." Defendants had the mineral waters to sell. It is to be presumed that they would derive a profit on its sale at the price stipulated in the contract. It is also to be presumed that defendants would derive a benefit from plaintiff's advertising the merits of the waters in the city of Wichita. The case of *Railway Co. v. Bagley*, 60 Kan. 424, 58 Pac. 759, is cited by defendants in support of their claim that the contract in controversy in the case at bar is void for want of mutuality of obligation. An examination of the *Bagley* Case will disclose that case to have been determined on the ground that there was no advantage in the contract accruing to the railway company, aside from the haul of the grains actually shipped over its lines. There was no agreement on the

part of *Bagley* to ship over its lines at the rates fixed by the contract; nor did *Bagley* by the terms of his contract with the railway company obligate himself to do anything. The following cases come nearer meeting our views and the facts of the case at bar than any cases to which our attention has been directed: *Hickey v. O'Brien* (Mich.) 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; *Woodward v. Smith* (Wis.) 85 N. W. 424; *Dailey Co. v. Clark Can Co.* (Mich.) 87 N. W. 761. The cases cited by defendants are bottomed upon a different state of facts than are found in the contract here sued upon. The contract in the case at bar fairly implies that plaintiff, in addition to furnishing the necessary vessels, paying express and freight charges, and the expense of advertising, would also devote his time, talent, and labor to introducing and selling in the city of Wichita the waters from these springs. Does not the advertising, and the efforts which plaintiff has obligated himself to make to create a market in the city of Wichita, if these waters possess merit, reasonably imply a market in said city, a demand to be filled, and a taking of the waters by plaintiff to supply this demand? It cannot be said such a contract is wanting in mutuality, or that it imposes no obligation on plaintiff.

The validity of the contract was also challenged in the court below on the ground that no revenue stamp had been affixed to the instrument, and the claim made that a compliance with Act Cong. June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], was necessary to its validity. The judgment of the district court appears from the record not to have been influenced by this claim. While counsel for defendants again urge the claim in this court, the question appears not to be fairly in the record for review; nor has counsel cited authorities in support of their position. We do not feel called on, under the circumstances, to pass upon or discuss the question. If the claim be renewed on a second trial of the case, authorities decisive of the question will be found collected in 24 A. & E. Encycl. of L. (2d Ed.) 935.

For error of the district court in holding said contract void for want of mutuality of obligation, the case will be reversed, and remanded for a new trial. All the Justices concurring.

#### STEWART v. HARRIS.

(Supreme Court of Kansas. June 11, 1904.)

CORPORATIONS—DIRECTORS—TRUSTEES—SALE—GOOD FAITH.

1. The managing officers of a corporation are not only trustees of the corporate entity and the corporate property, but they are also to some extent and in many respects trustees for the corporate shareholders.

2. When two parties occupy to each other a confidential or fiduciary relation, and a sale is made by the party reposing confidence to the

party in whom confidence is reposed, equity raises a presumption against the validity of the transaction; and to sustain the sale the buyer must show affirmatively that the transaction was conducted in good faith, without pressure of influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller.

3. A director or managing officer of a corporation having a knowledge of the condition of the affairs of such corporation, because of the trust relation and the superior opportunities afforded for acquiring information, before he can rightfully purchase the stock of one not actively engaged in the management of its affairs, must inform such stockholder of the true condition of the affairs of the corporation.

(Syllabus by the Court.)

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by A. B. Harris against John T. Stewart. Judgment for plaintiff, and defendant brings error. Affirmed.

Kos Harris and Ed. T. Hackney, for plaintiff in error. W. W. Schwinn and C. E. Elliott, for defendant in error.

ATKINSON, J. On January 5, 1901, A. B. Harris sold to John T. Stewart, for \$2,000, 12 shares of the capital stock of the Wellington National Bank. Harris subsequently brought this action against Stewart to recover the difference between the amount he received for the stock and its actual value at the time he sold it to Stewart. Judgment for plaintiff on the verdict and findings of a jury. Defendant prosecutes error.

Defendant, at the time he purchased the stock of plaintiff, was president of the bank and the holder of a majority of the stock. He had been president of the bank continuously since 1893. As such president he was actively engaged in the management of the affairs of the bank. Plaintiff was a man over 80 years of age, and retired from active business. He had never engaged in the business of banking, or a like business. He had never attended a meeting of the stockholders of the bank. The petition in substance charged that through his agent, T. F. Randolph, defendant purchased the stock of plaintiff; that defendant at the time was president of the bank, engaged in the active management of its affairs; that he withheld from plaintiff a knowledge of the affairs of the bank; that by fraud, and by concealing from plaintiff the real condition of the affairs of the bank, defendant obtained the stock at much less than its actual value. A recovery was asked for the difference between the amount received and the actual value of the stock at the time of the sale. Defendant's answer, in substance, denied he withheld from plaintiff the information requested, denied he had procured the shares of stock from plaintiff by fraud or concealment, denied under oath the agency of Randolph, and averred that plaintiff had, or could have obtained upon inquiry, full knowledge of the condition and

affairs of the bank at the time he sold the shares of stock. Defendant was charged with undertaking and carrying out a scheme to so manipulate and manage the condition and affairs of the bank as to enable him to acquire the stock of the bank at a price grossly inadequate to its real value.

The capital stock of the bank was \$50,000, represented by 500 shares of the par value of \$100 each. When defendant took charge of the bank its affairs were in a deplorable condition. The bank had been improvidently managed. The financial condition of the community and the country at large was wretched. Under the change of management many thousand dollars of the notes held by the bank were charged off its books as worthless. Much of the real estate owned by the bank was charged off the books of the bank. Time brought about a general improvement of financial conditions, and prosperous agricultural seasons in the community. One by one the old officers and employes of the bank were dropped out. Defendant was a director and president, and became supreme in the management of the affairs of the bank. By good financiering on the part of the new management the bank prospered. As conditions improved there were payments made of many of the notes that had been charged off the books of the bank as worthless. The lands owned by the bank became valuable. The bank, in the meantime, had become the owner of 98 shares of its capital stock, which had been pledged to the bank to secure an indebtedness. Its affairs became very prosperous. These conditions were well known to defendant, and were but slightly known to plaintiff. The payments made on notes which had been charged off the books of the bank, instead of being carried in the profit and loss account, where the condition of the bank would be more readily shown from an examination of its books, were carried in the cashier's account. Funds carried in the cashier's account did not appear as assets of the bank. Lands owned by the bank, not charged off the books, were carried on the books at a nominal valuation only. Lands owned by the bank, but charged off the books, did not appear as assets of the bank. The charged off property of the bank, and the funds of the bank carried in the cashier's account, did not appear in the published reports of the condition of the bank. A 4 per cent. dividend only had been paid to stockholders from June, 1897, and no dividends were paid to the holders of stock during the two years plaintiff was the owner of the stock by him sold to defendant. Plaintiff, before selling the stock, went to defendant and inquired about the condition of the bank, and asked if dividends would be paid. Defendant informed him the bank would pay no dividends. He told him the bank was in good condition, but that the policy was to strengthen it. He related to

¶ 3. See Corporations, vol. 12, Cent. Dig. § 1403.

plaintiff the bad condition the affairs of the bank were in at the time he took charge of it. He also told him of the large amount of paper the bank had then charged off. Defendant gave to plaintiff no further knowledge or information of the affairs of the bank than to say to plaintiff that the bank was in a good condition. Defendant at two different times himself made a proposition to purchase the stock of plaintiff, on one occasion offering plaintiff \$1,000 for his stock, and, about two weeks before he purchased the stock through Randolph, offered plaintiff \$1,400 for it. Plaintiff received from defendant, through his agent, Randolph, \$168 per share for his 12 shares of bank stock. At that time it was worth \$350 per share. Gradually defendant bought up stock of the bank. Not long after defendant purchased the stock of plaintiff, he acquired the 98 shares of the capital stock held by the bank. This he obtained for a sum much less than its real value. He was then the owner of 45 of the 500 shares of the capital stock. Within a short time thereafter a dividend of 120 per cent. was declared. Other dividends soon followed.

Upon the trial, among others the court gave to the jury the following instruction: "You are instructed that the president or other managing officer of a corporation doing business as a bank stands in the relation of a trustee to all the stockholders who are not themselves engaged in the active management of the bank; and before any managing officer of a bank, who is acquainted with its condition and affairs, can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officers must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses; and a purchase, from a stockholder who is not acquainted with the condition and affairs of the bank, of his stock in such bank, by one of the managing officers, without first having informed such stockholders of the true condition of the bank, and of the amount and value of its assets, is a fraud on the part of such managing officer, and renders him liable to pay the stockholders the full value of the stock, without reference to the price agreed on at the time of the sale, provided the stockholder does not himself know the value of the stock." Of the giving of said instruction plaintiff in error complains, and assigns error. Does the instruction given correctly state the relation of the president or other managing officer of a corporation to the stockholders of such corporation not actively engaged in the management of its affairs? Does it correctly declare the law as to the duty of such president, or other managing officer, relative to his obligation

to the stockholders not engaged in the active management of the corporation, before he can rightfully purchase of them their stock?

The exact questions before us have never been passed upon by this court. Our attention is directed to *Mulvane v. O'Brien*, 58 Kan. 463, 49 Pac. 607, as a parallel case. In that case *Mulvane* was a director and the president of the corporation. *O'Brien* was a director and the secretary of the corporation. Defendant did not himself purchase the stock of plaintiff, but sold it to another and accounted to plaintiff for the par value only, and not for the amount he had actually received for it. The action was to recover from defendant the difference between the amount accounted for and the amount defendant actually received for the stock. The case was determined, not on the duties of defendant toward plaintiff, because of any fiduciary relation existing between them as a stockholder and the president and managing officer of a corporation, but because of a contract of agency at the time existing between the parties, whereby defendant undertook to sell for plaintiff his stock in the corporation. Again, had the right to a recovery been based on a claim of fiduciary relation existing between defendant and plaintiff, the former as the president and managing agent of the corporation, and the latter as a stockholder therein, the facts would materially differ from the facts in the case under review. In that case defendant and plaintiff were president and secretary, respectively, of the corporation, and jointly managed the affairs of the corporation. Each was actively engaged in the management, and had an equal opportunity to know of the condition and affairs of the corporation. The same cannot be said of plaintiff and defendant in the case at bar.

The managing officers of a corporation are not only trustees in relation to the corporate entity and the corporate property, but they are also to some extent and in many respects trustees of the corporate shareholders. That they are trustees for the corporation and the corporate property all the authorities are agreed. It would be difficult to lay down a general rule comprehensive of the extent and all the instances in which their trusteeship exists as to the stockholders of the corporation. *Pomeroy*, in his work on *Equity Jurisprudence* (section 1090), after an analysis of the relations, recognized and announced the doctrine that in their fiduciary relation the directors and managing officers of a corporation occupy as to the corporate entity and corporate property the position of quasi trustees. Of the relation of such officers to the stockholders of the corporation he says: "On the other hand, the directors and managing officers occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected there-

with are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders. From it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up: Directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust. They are quasi or sub modo trustees for the corporation with respect to the corporate property, and they are quasi or sub modo trustees for the stockholders with respect to their shares of the stock." The Supreme Court of the United States, in *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492, declared that "the managers and officers of a company, where capital is contributed in shares, are in a very legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form." In *Sargent v. Railroad Co.*, 48 Kan. 672, 29 Pac. 1063, an action brought by Sargent to recover on an order assigned to him for 1,000 shares of the stock of the railroad corporation, the question of the good faith of the transaction was before the court for determination. Chief Justice Horton, in the opinion, speaking for the court, said: "The relation between the directors of a corporation and its stockholders is that of trustee and cestui que trust. The directors are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. No director of a railroad company or any other corporation can use his official position to secure a personal advantage to himself."

The general rule applicable to a purchase and sale between parties who sustain to each other a confidential or fiduciary relation appears to be that, to sustain the sale, the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure of influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. The rule is applied with more or less strictness to all the well-known cases of fiduciary relation, as that of attorney and client, trustee and cestui que trust, principal and agent, guardian and ward. *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; 8 A. & E. Encycl. of L. 644. In *Oliver v. Oliver*, 115 Ga. 362, 45 S. E. 232, the right of plaintiff to a recovery was conceded, where defendant, the president and director of a corporation, purchased of plaintiff his holdings of stock in the corporation at \$110, worth at the time \$185, per share. The action was brought to recover of defendant the difference between the amount by plaintiff received for the stock,

and the value of the stock at the time of the sale. It was charged that defendant in the purchase of the stock withheld from plaintiff information, known to defendant and unknown to plaintiff, relative to its value, which, owing to the fiduciary relation existing between the parties, it was the duty of defendant to have disclosed to plaintiff. It is a well-considered case. Many features of it are applicable to the case under review. We quote from the opinion the following: "It is a matter of common knowledge that the market value of shares rises and falls, not only because of an increase or decrease in tangible property, but by reason of real or contemplated action on the part of managing officers, upon declaring or passing dividends, upon the making of fortunate or unfortunate contracts, the loss or gain of property in dispute, and on profitable or disadvantageous sales or leases; and to say that a director, who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof and buy from or sell to one whom he is directly representing, without making a full disclosure, and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence, and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak, and permit him to take advantage of his own wrong—a thing abhorrent to a court of conscience. It is conceded that the position which the director occupies prevents him from making personal gains at the expense of the company, or of the whole body of stockholders. But the rule that he is not trustee for the individual shareholders inevitably leads to the conclusion that, while a director is bound to serve stockholders en masse, he may antagonize them one by one; that he is an officer of the company, but may be the foe of each private in the ranks. When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible, in principle, to draw the line, and say that, while trustee for some purposes, he is not for others immediately connected therewith?"

The case of *Board of Co. Com'rs v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245, is the leading case cited and relied on by plaintiff in error as authority for the claim that the instruction under consideration, given by the court, does not correctly state the law. It was in that case held there was no relation of trust between the president and director of a corporation and a stockholder of such corporation; that in the absence of actual fraud a purchase of stock by the former from the latter was valid, though in his official position the president knew at the time he purchased the stock it was worth more than

its nominal market value, but did not disclose to the stockholder the facts within his knowledge as to its real value. The opinion in the case was by a divided court in 1873. It is bottomed upon the view, announced by the court, that, while the officers and managing agents of a corporation are trustees for the corporation and its corporate property, they sustain no trust relation to the stockholders of the corporation, and owe to them none of the duties of a trust relation. Other cases are cited taking the same view, and apparently following the Indiana case, the pioneer case to announce the doctrine. The rule laid down by the Indiana case has met with much criticism. The position taken by that court leaves the stockholder's interest in the corporation and all matters affecting its value wholly in the charge and keeping of the managing officers of the corporation, and leaves the stockholders of the corporation their legitimate prey. We cannot give the sanction of our approval to the views expressed by the Indiana court in that case. The fact that the directors and managing officers of a corporation are quasi trustees of the stockholders does not prohibit them from dealing with such stockholders. The only restriction is that in such dealing their conduct must be fair, open, and above reproach. Because of the trust relation and the better opportunities afforded for acquiring information, before any director or managing officer of a corporation having a knowledge of the condition of the affairs of such corporation can rightfully purchase the stock of one not actively engaged in the management of its affairs, such director or managing officer must inform such stockholder of the true condition of the affairs of the corporation.

Defendant suggests that plaintiff should have himself exercised more diligence in investigating the affairs of the bank; that the books of the bank were open to him. By this we are asked to say that in this case a means of knowledge is equivalent to knowledge; that a clue to the facts, which if diligently followed up would lead to a disclosure, is equivalent to a discovery. Plaintiff could not be required to make an investigation of the books of the bank to determine its financial condition, simply because it was in his power to do so. The diligence required by one to protect his interests is only such as a person of ordinary prudence would exercise under like circumstances. In a case like the one under review, the trust relation existing between the parties, the superior opportunities of defendant to know of the condition of the affairs of the bank, and his actual knowledge of its affairs, required no such diligence of inquiry on the part of plaintiff as is contended for by defendant. Plaintiff had the right to rely upon the belief that defendant would disclose to him the true condition of the affairs of the bank, and that he would not be called

upon to investigate the condition of its affairs before he could with safety sell to defendant his holdings of stock. It is not the intent of the law to place a restraint on the affairs of business, when conducted fairly, honestly, and openly, nor to deprive one party to a contract of the advantage which superior judgment, greater skill, or better information may give; but it cannot give its approval to a course of dealing that will permit those occupying a trust relation to be unmindful of the trust, betray the confidence reposed, and profit by such betrayal.

The jury, in addition to returning a general verdict for plaintiff, also returned numerous special findings. The record discloses there was some competent testimony to support all the special findings returned by the jury, including the finding that Randolph, in purchasing the shares of stock from plaintiff, was the agent of defendant. The findings returned by the jury are in harmony with and uphold the general verdict. The record in this case is voluminous. Much testimony was introduced upon the trial. The brief of plaintiff in error contains 67 assignments of error. Most of these assignments are based on the rulings of the trial court in the admission of testimony. Some of them are admitted by counsel to be unimportant, or cured or corrected by subsequent proceedings. Many of them are based on the claim that the testimony introduced was not within the issues. In a case of this character, where fraud is charged, great latitude is allowed to the scope of the inquiry; the limit resting largely in the discretion of the trial court. The record discloses no abuse of this discretion; nor did the court abuse its discretion in limiting the number of witnesses used on impeachment. The instructions given fairly state the law of the case. There was no error in refusing the instructions requested and not given.

We have read the entire record and examined the assignments of error. Finding no substantial error in the record, the case will be affirmed. All the Justices concurring.

(69 Kan. 510)

#### ORCHARD v. PEAKE.

(Supreme Court of Kansas. June 11, 1904.)

#### SUMMONS—RETURN OF SERVICE—DEPUTY SHERIFF—APPOINTMENT.

1. A return that personal service of a summons upon a defendant has been made is not open to contradiction, or to be disproved by extrinsic evidence, after the rendition of judgment.

2. A return of service, made and signed by a sheriff, where a service was actually made by his deputy, is irregular, but not invalid.

3. The statutory requirement that the appointment of a deputy sheriff shall be filed in the office of the county clerk is directory in its character, and the mere failure to so file the appointment actually made will not invalidate the appointment, nor the official acts of the deputy.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by George Peake, receiver for the Siegel-Sanders Live Stock Commission Company, against Henry Orchard. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Redmond, for plaintiff in error.  
Gregg & Gregg, for defendant in error.

JOHNSTON, C. J. George Peake, as receiver of the Siegel-Sanders Live Stock Commission Company, recovered a judgment on default against Henry Orchard for \$590. Within a short time, and at an adjourned term, Orchard filed a motion asking for the vacation of the judgment, alleging as grounds that no summons had been served upon him, that he had no notice of the pendency of the action, and knew nothing of it until after the rendition of the judgment. There was added to the application the statement that he had a good defense to the action, and he requested that he be allowed to file an answer setting it up. Considerable testimony was offered on the hearing of the motion as to the service of the summons and as to Orchard's knowledge of the pendency of the action, on which the court denied the motion and refused to vacate the judgment. If there was any doubt as to the jurisdiction of the court over the person of Orchard, it was removed when he appeared and set forth the defenses he had to the action. The averment of matters relating to the merits of the case, and which were nonjurisdictional in character, waived any defects there might have been in the service of the summons.

The principal controversy, however, on the motion, was as to the service of the summons, and whether Orchard had originally been given legal notice of the institution of the action. A summons was issued, and on it the sheriff made a return showing a personal service of the same upon Orchard. The return was conclusive of the question of service and of jurisdiction. It being a matter as to the truth and falsity of which the sheriff had personal knowledge, his return is not open to contradiction, or to be disproved by extrinsic evidence after the rendition of the judgment. *Goddard v. Harbour*, 56 Kan. 744, 44 Pac. 1053, 54 Am. St. Rep. 608; *Thomas v. Owen*, 58 Kan. 313, 49 Pac. 73; *Warren v. Wilner*, 61 Kan. 719, 60 Pac. 745. The oral testimony that was received strongly supported the official return.

The sheriff caused service to be made through a deputy, and himself wrote the return; but even a return signed by the sheriff, when the service is actually made by a deputy, although not the approved method, is sufficient. *Goddard v. Harbour*, supra. While the return in this case was not written by the deputy who made the service, it plainly indicated that it had been served by him.

The validity of the appointment of the dep-

uty was challenged, mainly because the appointment and oath of office of the deputy were not filed in the office of the county clerk, as provided by section 1745 of the General Statutes of 1901. The requirement of the section is directory in its character, and does not affect the qualification of the officer. The mere fact that the papers were not on file did not invalidate the appointment or the service made by the officer. Aside from this consideration, it was abundantly shown that the deputy had been regularly appointed, and had taken an oath of office, and had been acting as deputy under the appointment for a considerable time. He at least had the qualities of a de facto officer, and his official acts could not be safely ignored. *State v. Quint*, 65 Kan. 144, 69 Pac. 171.

From the evidence in the record we cannot say that the court abused its discretion in denying the application of plaintiff in error. Judgment affirmed. All the Justices concurring.

#### GIBSON v. KUEFFER.

(Supreme Court of Kansas. June 11, 1904.)

#### TAX DEED—DESCRIPTION OF PROPERTY—VALIDITY—SETTING ASIDE.

1. In a tax deed reciting the sale of several disconnected tracts, the use in the granting clause of the words, "and each and every separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all of the land sold.

2. A tax deed, which covers several disconnected tracts of land and fails to state the amount for which each separate tract was conveyed, is invalid upon its face, and may be set aside on that ground, even after the lapse of five years from the time it was recorded.

(Syllabus by the Court.)

Error from District Court, Ness County; Chas. E. Lobdell, Judge.

Action by Gottfried Kueffer against James S. Gibson. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Russell, for plaintiff in error. N. H. Stidger, for defendant in error.

MASON, J. The only question here presented is whether a certain tax deed was sufficient in form to resist an attack upon it, made after it had been of record for more than five years, for defects shown upon its face. The trial court upheld the deed by sustaining a demurrer to an answer which set out its contents in full and called attention to the matters claimed to invalidate it. The deed included two disconnected tracts. Its granting clause described the property conveyed as "the real property last hereinbefore described, and each and every separate tract and parcel thereof." Plaintiff in error contends that by reason of this language there was no conveyance of the tract

first described in the deed, which is the land here involved; and *Spicer v. Howe*, 38 Kan. 465, 16 Pac. 825, is relied upon as supporting the contention. There the deed, after describing several tracts and reciting the various transactions relating to each, wound up by granting "the real property last hereinbefore described," and was therefore held to convey only one tract—that last designated. But the deed here involved resembles the one held good as a conveyance of several parcels in *Curtwright v. Korman*, 45 Kan. 515, 26 Pac. 48, in that its recitals throughout refer to the tracts collectively as "said property." Moreover, whatever doubt there might be as to the land indicated by the expression "the real property last hereinbefore described," which is adopted literally from the form prescribed by statute (section 7676, Gen. St. 1901), is removed by the addition of the words, "and each and every separate tract and parcel thereof," which were manifestly employed for that very purpose.

The other objection made to the deed is that, while it states the amount for which each separate tract was sold, the subsequent taxes for three years, which were paid by the holder of the certificates, and which formed a part of the consideration for the deed, are merely given in gross, so that it cannot be told from the face of the deed how much was paid for such taxes upon either tract separately. The statute provides (section 7677, Gen. St. 1901): "In any case where any purchaser at any tax sale shall purchase more than one parcel or tract of land or lots, he may require the county clerk to include all such lands or lots in one deed, stating the amount of tax, interest and penalty for which each separate tract is sold and conveyed, the sum of which separate amounts shall be the gross or aggregate consideration of the deed." That this statute requires a separate statement of the subsequent taxes paid upon each tract, as well as of the amount for which each tract was originally sold, appears from the requirement that the deed shall show the amount for which each is conveyed, as well as the amount for which it is sold. While the land is in the first instance sold for one year's tax, it is conveyed for this amount plus any subsequent payments indorsed on the certificate. That this is the meaning intended appears also from the concluding provision that the sum of the amounts stated separately shall be the aggregate consideration of the deed. The deed, having omitted a recital which the statute explicitly requires, is invalid upon its face. 27 A. & E. Encyc. of L. (2d Ed.) 968. As was said in *Hopkins v. Scott*, 86 Mo. 140: "It may be said that, to hold the deed in question to be void on its face, because of its failure to state substantially a fact required to be thus stated, would be technical. The answer to this is that the Legislature has re-

quired a certain fact to be substantially stated, which in this case has not been done, and we are not authorized to eliminate from the statute a recital which the Legislature has declared the deed must substantially contain; nor are we authorized to say that this or that recital, required to be stated substantially in a tax deed, is unnecessary and immaterial, but must, on the contrary, presume that the Legislature deemed all the recitals which it required to be set out material." The history of the statute under consideration tends to show that the requirement in question was deemed important by the Legislature. Up to 1876 the tax law permitted pieces of land sold separately to be included in one tax deed, without imposing any condition as to the separate statement of the amounts paid for each. Section 115, c. 107, Gen. St. 1868. This provision was repealed at the time of the revision of the laws relating to assessment and taxation in 1876. Section 158, c. 34, p. 98, Laws 1876. In 1889 it was re-enacted as an independent act (chapter 248, p. 378, Laws 1889), but with the addition of the requirement for the separate statement of the consideration for which each piece was sold and conveyed. It thus appears that it was the deliberate legislative judgment that the inclusion of separate tracts in one tax deed ought not to be allowed at all, unless with the restriction that the consideration for each must be separately stated.

But it is further argued that this defect is cured by the operation of the five-year statute of limitations. Section 7680, Gen. St. 1901. The case, however, is within the reason and the letter of the doctrine thus stated in *Shoat v. Walker*, 6 Kan. 74: "A tax deed, to be sufficient, when recorded, to set the statute of limitations in operation, must of itself be prima facie evidence of title. It is not necessary that the deed be absolutely good under all circumstances. It is not necessary that it be sufficient to withstand all evidence that may be brought against it to show that it is bad. But it must appear to be good upon its face. It must be a deed that would be good if not attacked by evidence allunde. When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No statute of limitations can then be brought in to aid its validity. The party accepting it, and claiming under it, has full notice of its illegality, and must abide the consequences of such illegality. He has no reason to complain." This language is quoted with approval in *Hall v. Dodge*, 18 Kan. 277, and in *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327. See, also, *Black on Tax Titles*, § 497, and cases cited.

The judgment is reversed, with directions to overrule the demurrer to the answer. All the Justices concurring.

**CLARK v. BOARD OF COM'RS OF MITCHELL COUNTY et al.**

(Supreme Court of Kansas. June 11, 1904.)

**APPEAL—CASE-MADE—EXTENSION OF TIME—CONSTITUTIONAL LAW—EMINENT DOMAIN.**

1. When the court or judge orders an extension of time for serving a case-made under the proviso to section 1, c. 380, p. 583, Laws 1903, the requirements of the law are satisfied if the order of extension be filed with the clerk of the court. The filing of such order constitutes notice of extension.

2. Chapter 112, p. 179, of the Laws of 1874, entitled "An act to provide for opening private roads or highways" (sections 6053-6055, Gen. St. 1901), is unconstitutional, for the reason that it authorizes the taking of private property for private use.

(Syllabus by the Court.)

Error from District Court, Mitchell County; R. M. Pickler, Judge.

Action by Susie Clark against the board of county commissioners of Mitchell county and others. Judgment for defendants, and plaintiff brings error. Reversed.

Frank A. Lutz, for plaintiff in error. J. E. Tice, for defendants in error.

SMITH, J. 1. A motion to dismiss the petition in error has been made on the ground that the provisions of section 1, c. 380, p. 583, of the Laws of 1903, respecting the extension of time for making a case have not been complied with. Judgment was entered on April 20, 1903. On that day the time was extended, and plaintiff in error allowed until August 1st, following, to make and serve a case made on defendants in error. The latter were allowed until August 10th to submit amendments, the case to be settled on five days' written notice by either party. Service of the case was had on defendants in error June 29, 1903. The case was settled and signed on July 17th, both parties appearing by their attorneys. No amendments were suggested. The point is made against the validity of the case-made that the record does not show that the notice of extension was filed with the clerk of the district court. Section 1, c. 380, p. 583, of the Laws of 1903, requires that the case-made or a copy of it shall within 10 days after the entry of judgment be served on all the adverse parties or delivered to the clerk of the court. The section contains the following proviso: "That the court or judge before whom the case was tried may, on motion, order an extension of time for serving such case-made, which notice of extension shall be filed with the clerk of such court." We are of the opinion that the word "notice," used above, should be read "order," and that the Legislature intended the order of extension to be filed with the clerk of the court. If, however, the words of the statute are to be taken literally, then we think the order of extension made by the court or judge, and filed with the clerk, satisfies the requirement directing that "notice of extension" be given.

2. The case on its merits involves the constitutionality of chapter 112, p. 179, Laws 1874 (sections 6053-6055, Gen. St. 1901), which is entitled "An act to provide for opening private roads or highways." It reads:

"Section 1. That when any landowner who has no road or highway desires the benefit of a road or highway, such person may petition the county commissioners of the county in which such person resides to open a private lane or road to a public highway, when it shall be the duty of said commissioners to appoint three disinterested viewers to view and open a lane or road by the nearest and most practicable route to an established highway: Provided, that said lane or road shall follow or run parallel with some section or subdivision line; said road not to exceed two rods in width.

"Sec. 2. Said viewers shall assess all damages, when damages are claimed, and the road shall be declared open when the damages, if any, are paid.

"Sec. 3. That no portion of the expense of viewing and locating roads under this act shall be chargeable to the county or state, but shall be paid by the person for whose benefit the road is located."

Under the express terms of this law, a landowner may petition the county commissioners to "open a private lane or road to a public highway." The title of the act restricts its operation to private highways, and, in view of chapter 108, p. 164, Laws 1874, now incorporated into chapter 89, Gen. St. 1901, providing for the opening of public roads, passed at the same session of the Legislature, it is obvious that the later law was intended for purposes which could not be accomplished under the prior act. Section 29, c. 108, p. 174, Laws 1874 (section 6044, Gen. St. 1901) reads as follows:

"Sec. 29. That whenever the premises of any person in this state shall be so completely surrounded by adjoining lands, the property of other persons, as to be without access to any public highway, then such person may petition the board of county commissioners of the county in which such premises lie for a road through some portion of the adjoining lands, and the board shall on the presentation of such petition proceed in accordance with the provisions of the foregoing sections to lay out such road, make returns of plats, and allow damages, if any should be held or allowed, provided said road shall not exceed twenty-five feet in width, and be laid out upon the section or half-section lines when practicable."

Under the above section of the general road law ample relief is afforded to a landowner whose premises are so completely surrounded by adjoining lands as to be without access to any public highway. If his petition for a road be granted, and the highway established, under the general law, it is public in character. No necessity existed for the enactment of chapter 112, p. 179, Laws 1874, ex-



cept for the purpose indicated by its title, which is to provide for opening private highways, as distinguished from public roads. The Legislature emphasized the difference between private and public roads by the passage of the two acts. Under section 10, c. 108, p. 169, Laws 1874 (section 6025, Gen. St. 1901), the county commissioners, on the coming in of the viewer's report, are prohibited from opening the road, unless, when opened, it will be of public utility. Again, by section 18 (section 6083, Gen. St. 1901), all male persons between 21 and 45 years of age, who have resided 30 days in the state, and who are capable of performing labor on public highways, are made liable to perform two days' work each year on the public roads, furnish a substitute, or pay \$1.50 per day to the road overseer, to be expended in repairs on the public roads. By section 20 (section 6035, Gen. St. 1901) a failure to perform the two days' work or pay the amount stated is declared to be a misdemeanor, punishable by fine. Under the rules of construction applicable to penal laws, no person would be amenable to fine for refusal to do work in improving or repairing a road laid out under "An act to provide for opening private roads or highways," when the penalty for his default is found in a law applicable to public highways only.

We are asked to proclaim by judicial fiat that roads designated by the lawmakers as "private highways" are public in character. To so declare would be an aggressive and unwarranted invasion into the domain of legislation, from which courts are excluded. We are confined in jurisdiction and power to the field of interpretation of legislative acts. A law plain in its meaning, with a purpose clear and well-defined, without ambiguities, ought to rest secure from judicial distortion, leaving the responsibility for its failure to fulfill an expected object with its legislative creators. A reference to section 3, c. 112, p. 179, Laws 1874, now under consideration, leaves no doubt of the personal and private nature of a road established under its authority. It is provided that no portion of the expense of viewing and locating the road shall be chargeable to the county or state, "but shall be paid by the person for whose benefit the road is located." This, in connection with the first section, which speaks of "a private lane or road," leaves no latitude for construing the words used otherwise than according to their plain and obvious sense. The case of *Lockerman v. Comrs of Chase Co.*, 27 Kan. 659, cited as authority by plaintiff in error, is somewhat confusing and difficult to understand. The learned justice who wrote the opinion had before him the Compiled Laws of 1879, where the two chapters, 108 and 112 of the Session Laws of 1874, are run together, making chapter 89 of the Compiled Laws of 1879. There is, however, in the opinion, a citation and seeming approval of *Bankhead v. Brown*, 25 Iowa, 540, which is an authority of much weight on the question involved. The law passed on in the

Iowa case was entitled "An act for the establishment of private roads in Iowa," enacted in 1886. It is found in a note at page 542, of the report, and does not differ materially from chapter 112, p. 179, Laws 1874, above set out. In holding the law unconstitutional, as an attempt to appropriate private property for private use, Chief Justice Dillon said: "If the road now in question had been established as a public road under the general road law (as we confess we do not see why it might not have been), there would, in our minds, be no doubt as to its validity, although it does not exceed a half mile in length, and traverses the lands of but a single owner. For the right to take land for a public road—that is, a road demanded by the public convenience, as an outlet to a neighborhood, or, it may be, as I think, for a single farmer without other means of communication—cannot depend upon the length of the road, or the number of persons through whose property it may pass. With respect to the act of 1886, we are of opinion that roads thereunder established are essentially private; that is, are the private property of the applicant therefor, because: First. The statute denominates them 'private roads,' and is entitled 'An act to provide for establishing private roads.' If the roads established thereunder were not intended to be private, and different from ordinary and public roads, there was no necessity for the act. Second. Such road may be established upon the petition of the applicant alone, and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe. Third. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private. Fourth. We see no reason, when such a road is established, why the person at whose instance this was done might not lock the gates opening into it, or fence it up, or otherwise debar the public of any right thereto." To the same effect, see *Blackman v. Halves*, 72 Ind. 515; *Wild v. Delg et al.*, 43 Ind. 455, 13 Am. Rep. 399; *Sadler v. Langham and Moore v. Wright & Rice*, 34 Ala. 311; *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; *Richards v. Wolf*, 82 Iowa, 358, 47 N. W. 1044, 31 Am. St. Rep. 501; *Dickey v. Tennison*, 27 Mo. 873; *Elliott on Roads and Streets* (2d Ed.) § 192; *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Varner v. Martin*, 21 W. Va. 534; *Healy Lumber Co. v. Morris* (Wash.) 74 Pac. 681, 68 L. R. A. 820. The case of *Masters v. McHolland*, 12 Kan. 17, relied on by counsel for defendants in error, does not support his contention. There the road was laid out under the provisions of chapter 89, Gen. St. 1868—a general road law relating to public highways. The court said: "Neither the findings nor the testimony show that this was other than a public road. Its condemnation was sought in the ordinary proceedings for condemning public roads. It was pronounced

by both viewers and county board of public utility. The expense of opening is borne by the public. All damages assessed would have to be paid by the public. It affords one citizen at least a means of communication with the balance of community, and the balance of community a means of communicating with him." A quotation is then made from *Bankhead v. Brown*, supra, to the effect that the taking of land from one owner, necessary to establish a public highway to enable another to have an outlet to market, schools, etc., is not in a just sense the taking of private property for private use, but for the general good.

We should have no difficulty in sustaining the court below if the road in question had been laid out and established under the general road law and the road was found to be of public utility. The legality of the acts of the viewers and county commissioners rests on a law which is in conflict with the fundamental rule that private property can be appropriated for public use only. We are aware that the courts have expressed divergent views on the proposition involved. See *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577, 585, and note. In the last case cited it is conceded that the Legislature is without power to establish private roads, in the sense that they are the property of particular individuals. The court then proceeds to declare that such roads are public, perverting the language of the lawmakers to a meaning directly opposite that expressed in their enactment. We are content in the present case to rely on the sign to denote truly the thing signified, and not distort by strained interpretation plain and palpable legislative expression, or by far-fetched reasoning give to well-understood language a significance different from that conveyed by the words employed.

The judgment of the court below will be reversed, with directions to proceed further in accordance with this opinion. All the Justices concurring.

#### MISSOURI PAC. RY. CO. v. STATE.

(Supreme Court of Kansas. June 11, 1904.)

#### RAILROAD COMMISSIONERS—POWERS—STATUTE—CONSTRUCTION.

1. The law creating a Board of Railroad Commissioners for this state, and providing for the enforcement of orders made by that tribunal, expressly preserves all other remedies existing by virtue of statute or of common law for the redress of grievances of which the board may take cognizance.

2. The rule that the judicial construction given a statute in the state of its origin follows it into the state of its adoption is not absolutely controlling in all cases, and cannot prevail against an express provision inserted in the statute at the time of its adoption indicating a different legislative intention.

(Syllabus by the Court.)

Error from District Court, Coffey County; Dennis Madden, Judge.

Application by the state, on the relation of a county attorney of Coffey county, for writ of mandamus against the Missouri Pacific Railway Company. From a judgment granting the writ, defendant brings error. Affirmed.

Waggener, Doster & Orr, for plaintiff in error. O. C. Coleman, Atty. Gen., and Henry E. Ganse, for the State.

BURCH, J. The state, upon the relation of the county attorney of Coffey county, brought an action of mandamus to compel the Missouri Pacific Railway Company to restore to its former condition of usefulness a highway crossing which had been impaired by a reconstruction of the company's railroad. After a trial a peremptory writ was awarded in accordance with the prayer of the petition.

The railway company contends here, as it did in the district court, that the Board of Railroad Commissioners has exclusive jurisdiction of the controversy. That the Board of Commissioners has jurisdiction in the premises, the state does not deny, but it regards the remedy afforded by the law creating that body as cumulative to those existing by virtue of the common law. This position is assumed on account of the statute itself. Section 5998, Gen. St. 1901, makes it the duty of every railroad company to obey all reasonable orders of the Board of Railroad Commissioners made under authority of law, and provides for the enforcement of such orders, but concludes as follows: "The remedies provided by this section shall not be deemed to exclude or limit any other remedies provided in this act or existing in virtue of any other statutes or common law, but shall be additional thereto." The language quoted does not mean simply that other statutory and common-law remedies may be utilized to compel obedience to orders of the board, but its purpose was to save all other remedies for the redress of grievances, even though such grievances be cognizable by the board.

The railroad company argues that the portions of the Railroad Commission law applicable to the facts of this case were adopted from the statutes of Nebraska, and that prior to their adoption the Nebraska law had been construed by the highest court of that state to require the action of the Railroad Commission before any adversary proceeding could be commenced against the offending company, and that, since the Railroad Commission law provided a plain and adequate remedy, such remedy must be employed. Section 2, c. 85, p. 288, Laws Neb. 1885; *State v. R. V. R. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424. Since the decision of the case of *Bemis v. Becker*, 1 Kan. 226, it has been the law of this state that the judicial construction given a statute in the state of its origin follows it into the state of its adoption. Therefore the company claims the Ne-

¶ 2. See Statutes, vol. 44, Cent. Dig. § 307.

braska case to be controlling. Conceding the origin of the law to be as stated, the Nebraska statute contains no provision of the character of the one quoted above from the statute of this state. The rule of interpretation announced in *Bemis v. Becker* is of general application only. It is not absolutely controlling in all cases, and cannot prevail against an express provision inserted in the statute at the time of its adoption indicating a different legislative intention. If it were necessary to support so plain a proposition by authorities, they might be found in the decisions of the Supreme Court of Nebraska. *Nebraska Loan & Building Association v. Marshall*, 51 Neb. 534, 71 N. W. 63; *Goble v. Simeral* (Neb., Jan., 1903) 93 N. W. 235.

It is conceded that, aside from the Railroad Commission law, an ordinary action of mandamus will lie to compel a railway company to restore to their former condition highway crossings it may have disturbed. Therefore the district court was not without jurisdiction, and its judgment is affirmed. All the Justices concurring.

#### STATE v. CLARK.

(Supreme Court of Kansas. June 11, 1904.)

#### HOMICIDE—INSTRUCTIONS—INCONSISTENT DEFENSES.

1. In a prosecution for murder the defendant is entitled to have submitted to the jury the question whether the homicide was of a lower degree than that charged in the information, unless the testimony shows beyond question that the greater offense only was committed. Slight evidence that the crime may have been of a lower grade than the one charged requires the court to instruct the jury on the law of the inferior offenses included in the charge of murder, and the unsupported testimony of defendant is sufficient on which to base instructions respecting the lesser degrees.

2. The fact that testimony introduced on behalf of defendant on trial for murder gave support to the theory that he acted in self-defense is not inconsistent with the claim that, if guilty, his crime was manslaughter, and not murder.

3. The court will not be justified in refusing to instruct the jury on the lower degrees of crime included in a charge of murder, when the testimony requires it, for the reason that counsel for the accused, on request from the court, failed or neglected to formulate a theory on which such instructions might be given. Section 5681, Gen. St. 1901, requires the court in a criminal case to state to the jury all matters of law which are necessary for their information in giving a verdict.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Hugh Alexander, Judge.

Sam Clark was convicted of murder in the second degree, and appeals. Reversed.

The appellant and his brother Tom Clark were jointly charged by information with the crime of murder in the first degree, for the killing of one Owen Masten on or about April 17, 1903. Appellant demanded a separate trial, and was convicted of murder in the second degree, and sentenced to impris-

onment in the penitentiary for the term of 21 years. The testimony on behalf of the state, given briefly, was as follows: On the morning of April 17, 1903, James Tunks, who operated a threshing machine, commenced work for Ben Clark, the father of appellant. Clark and Owen Masten, who was afterwards killed, each had some kaffir corn which they wanted threshed, and it was agreed that their corn should be threshed first, and then some oats in the stack, which stood on the land. The threshing machine and engine which propelled it arrived on the ground between 7 and 8 o'clock in the morning. Masten came soon after with a load of kaffir corn. The machine stood between stacks of oats—two on the east, and two on its west side. The engine was 45 feet south of the separator, and connected with it by a belt which conveyed the power. Before the homicide the appellant and Masten were working on the west side of the separator, assisting in pitching grain. Tom Clark was working on the other side. When the threshing was nearly finished, James Tunks, who had the charge and management of the threshing, saw the two Clarks and Masten south of the machine, about six or eight feet apart, engaged in conversation. There was nothing unusual in their conduct or appearance. The Clarks were leaning on their pitchforks, but he could not tell whether Masten had a fork. The witness then went under the machine (the feeder) to gather up loose grain. His back was turned toward Masten and the Clarks. He heard a dull thud, and, turning, saw Masten on the ground, and the two Clarks over him. They were striking him over the head with pitchforks. He thought there were from four to six strokes. He approached them immediately. Masten was down, with blood on his face. He told them not to strike again. Tom Clark replied, with an oath: "Stay out of this. This is our fight." There were no other blows given after the witness came up. Sam Clark said to Barton Tunks, who approached them: "If you want anything out of this, you can damn soon have it." Sam said to Tom: "You didn't strike hard, but I did." The other witnesses for the state did not hear any quarrel between Masten and the Clarks, but all came forward when Masten was down, and saw no blows struck thereafter. Mr. Nelson testified for the prosecution that, when he went to Masten's assistance, Tom Clark said, "Nelson, you have no business to interfere." The witness said, "My God! you ain't going to kill the man, are you?" Tom answered, "He is about done up anyway." A Mr. Durham testified that he talked with appellant shortly afterward. The latter said that Masten drew off his glove, and he thought he was going to strike him, and that he (Clark) struck him with his fist, and then with his fork. He said, "It was our intention to fix him on the start, for he could whip the whole of us." Masten

was carried home in an unconscious condition, and died the day following from concussion of the brain. On the part of the defendant the testimony tended to show that Masten and appellant had been on friendly terms before the homicide; that on the morning Masten was killed he worked with Sam Clark on the east side of the machine. Appellant gave the following version of the tragedy: "We were friendly. He said, 'Come over to my place for dinner on Sunday.' I said, 'I will.' We got done quicker than those on the other side of the stacks. Masten told me when we were nearly done to go over on the other side. I did, and took a four-tined fork and went to pitching with Tom and Nelson. When Masten got through on the east side, he came over to the west side. He crawled under the belt. We then all pitched from the same stack. I started to the engine. When I got back, Tom and Masten were talking. They had forks in their hands. Tom said, 'Ony, I don't want any trouble with you over \$6 and a stack of oats. You are a bigger man and a better man than Sam. I don't want any trouble.' Masten said, 'You have thrown this up to me about beating you out of a stack of oats a good many times.' He swore and said, 'You will have trouble if you keep on.' They seemed angry. It was a quarrel. I stepped a little to the southeast of them and said, 'See here, fellows, settle this without any trouble.' Masten said, 'If you want a hand in this, you can have it,' and swore, and said he could whip both of us. I said, 'I don't want a hand in it. Tom is my brother, and you are a friend of mine, and I would rather pay the \$6 than have any trouble.' Masten turned toward me and said, 'I will settle you both right here.' He said he could whip both of us, and do it quick. He was a strong man, over 6 feet, weight 200 pounds, 30 or 35 years old. When he said, 'I will settle you both,' he stepped back and grabbed his pitchfork. He stepped up toward me and said, 'If you want a hand in this, you can have it.' He started to pull off his gloves. He was angry. I thought he was going to jump on me. I said, 'Ony, I don't want a hand in this.' He had stuck the pitchfork in the ground right by him before I interfered. I thought he was going to strike me. When he turned round to strike me, I throwed up my fork in his face. It struck him. I did it to protect myself. He turned and started to raise his fork. Tom struck him on the head. He staggered forward, turned round, and Tom hit him again and knocked him to the ground. I was afraid Tom was going to strike him again. I said, 'Don't hit him; don't hit him.' Tom struck him again, and I knocked off his blow with my fork. It knocked his fork back. Tom raised his fork again. I said, 'Are you still going to strike this man, when he is down?' I knocked his fork aside. Then Tom backed off, and James Tunks came up, and my father

and Nelson." At the close of the testimony the following appears from the record: "The court thereupon asks counsel for defendant what instructions they desire given to the jury. And Mr. Rector replies that the defendant wishes the court to give instructions to the jury as to these offenses only: Murder in the first and second degrees; manslaughter in the second, third, and fourth degrees; and assault and battery. But no written requests for instructions were presented, and the defendant objected to the court giving any instructions as to manslaughter in the first degree. The court asked defendant's counsel to formulate a theory upon which instructions as to manslaughter in second, third, and fourth degrees should be given, but the counsel of defendant wholly failed to formulate any theory, and did not attempt to do so."

J. W. Rector, for appellant. C. C. Coleman, Atty. Gen., and A. J. Freeborn, for the State.

SMITH, J. (after stating the facts). If the testimony tended to show that the appellant, without justification or excuse, as defined in sections 9 and 10 of the crime act, killed, or assisted, aided, or abetted in killing, Masten, without malice, expressed or implied, then the grade of his offense was reduced from murder to one of the degrees of manslaughter. Manslaughter is distinguished from murder by the absence of malice as a constituent element. If, under the influence of some violent emotion, a sudden intent was formed, which on adequate provocation overwhelmed the reason of the appellant, then the killing was not murder, but manslaughter only. It is important to refer to our statutory provisions respecting manslaughter to determine whether the court was legally justified in refusing to instruct the jury on the different degrees of manslaughter, except the first degree. As to the latter, counsel for defendant expressly requested the court not to instruct the jury on the elements of that crime. We shall therefore give no consideration to the assigned error, founded on a ruling now alleged to be erroneous, which was invited by counsel for appellant.

The killing of a human being under circumstances which do not constitute excusable or justifiable homicide, without a design to effect death, in the heat of passion, but in a cruel or unusual manner, is declared by our statute to be manslaughter in the second degree. Gen. St. 1901, § 2001. So, also, it is manslaughter in the same degree to unnecessarily kill another either while resisting an attempt by such other person to commit any felony, or do any other unlawful act, after such attempt shall have failed. Id. § 2002. By section 2003, Gen. St. 1901, it is made manslaughter in the third degree to kill another in the heat of passion, without design to effect death, by a dangerous weap-

on, in any case except where the homicide is excusable or justifiable. Again, "The involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion, in any cases other than justifiable homicide," is manslaughter in the fourth degree. Gen. St. 1901, § 2011.

In the present case the effect of the instructions given was a ruling by the court that the circumstances of the homicide confined the offense to a willful, deliberate, and premeditated killing, which is murder in the first degree, or to a murder done purposely and maliciously, but without deliberation and premeditation, which is murder in the second degree. In this we are well convinced that the court erred. The circumstances of the homicide indicate a total absence of bad feeling or hostility on the part of appellant toward Masten before the fatal blows were struck. The two worked side by side pitching grain to the threshing, and no one testified that they did not sustain friendly relations up to the very moment that the affray began. The witnesses for the state testified to the fact and manner of Masten's death, but, respecting the reasons for it, they did not enlighten the jury, except to repeat one or two somewhat damaging admissions of the accused, which he, however, denied making. In *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805, the accused was charged with murder in the first degree. It was held that a trial court is only justified in refusing to instruct the jury on the lower degrees of such crime when the testimony shows beyond question that defendant is guilty of the higher offense. In *State v. Buffington*, 66 Kan. 706, 709, 72 Pac. 213, 214, the court said: "The defendant in a criminal prosecution has a right to have the court instruct the jury in the law applicable to his contention, if it be supported by substantial evidence, however weak, unsatisfactory, or inconclusive it may appear to the court. To refuse so to instruct the jury would be to invade its province in the trial of a case. The question is not whether, in the mind of the court, the evidence, as a whole, excludes the idea that the defendant is guilty of an inferior degree of the offense charged, but whether there is any substantial evidence tending to prove an inferior degree of the offense. If there is, then the question of such degree should be submitted to the jury. The unsupported testimony of the defendant alone, if tending to establish such inferior degree, is sufficient to require the court so to instruct." In *State v. Patterson*, 52 Kan. 335, 34 Pac. 784, it was held that, where there is even slight evidence that the offense committed may have been of a lower degree than the one charged, it is proper to charge the law of such inferior offenses.

Adverting to defendant's testimony, it appears that there was a controversy between Masten and Tom Clark over a small amount

of money which the latter claimed Masten owed him for a stack of oats. When appellant approached them they were quarreling over this indebtedness. Sam Clark said, "See here, fellows, settle this without any trouble." Masten then said to him, "If you want a hand in this, you can have it," and swore he could whip both of them. Appellant said, "I don't want a hand in it. Tom is my brother, you are a friend of mine, and I would rather pay the six dollars than have any trouble." Masten then turned around to defendant and said, "I will settle you both right here." He said he could whip both of them, and do it quick. When he said, "I will settle you both," he stepped back and grabbed his pitchfork. He started to pull off his glove. He was angry. Appellant thought he was going to jump on him. He turned round to strike, and defendant threw his fork in his face. It struck him. He turned and started to raise his fork, when Tom Clark struck him on the head. He turned round the second time, when he gave him another blow which knocked him to the ground. Appellant, being afraid that his brother would strike him again, said, "Don't hit him; don't hit him." The fact that defendant's testimony gave support to the theory that he acted in self-defense was not inconsistent with the claim that, if guilty, his crime was manslaughter, and not murder. The accused had the right to present both aspects of the case to the jury, and rely on an act of self-defense, and also on one resulting from a sudden passion without malice. *Stevenson v. United States*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980. The first paragraph of the syllabus of the case last cited reads:

"On the trial of a person indicted for murder, although the evidence may appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, yet, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court."

Under section 2001, Gen. St. 1901, referred to above, the jury might have concluded that defendant killed or assisted in the killing of Masten, without a design to effect death, in the heat of passion, in a cruel or unusual manner, by means of blows inflicted with a pitchfork, through anger aroused by the threats and hostile demonstrations of the deceased. They might have found, also, under section 2002 of the statute supra, that defendant unnecessarily killed Masten while resisting an attempt of the latter to strike him with a pitchfork after the attempt to strike had failed. The witness James Tunks testified that he saw the defendant striking Masten over the head after the time when defendant said that Masten attempted to

strike him. The jury, also, after considering all the attending circumstances, might have inferred that appellant was guilty of manslaughter in the fourth degree. The trial court took the view that there was no adequate or reasonable cause for the appellant to be thrown into such passion as to dethrone his reason for the time being, sufficient in law to reduce the crime from murder to manslaughter. This court has repeatedly held, in homicide cases, where self-defense was pleaded as a justification for the killing, that a reasonable apprehension by the accused of imminent danger to his life or limb was a sufficient excuse, and of the reasonableness of this apprehension the jury are to be the judges. *State v. Bohan*, 19 Kan. 28; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302. The same rule is applicable to the case at bar, and whether there was sufficient cause to believe that heated passion, and not malice, impelled the homicide, was for the jury to decide. The case of *State v. McCarty*, 54 Kan. 52, 36 Pac. 338, is cited by counsel for the state in support of their contention that where the jury, under proper instructions, have found a defendant guilty of a superior offense, erroneous instructions or a total failure to instruct with reference to an offense of an inferior degree cannot be complained of. The McCarty Case does approve such doctrine, by quoting *State v. Dickson*, 6 Kan. 209, with the observation that the latter case ought not to be extended to unreasonable limits. It will be seen, however, from a reading of the opinion in *State v. McCarty*, that the court held that there was no proof justifying the giving of an instruction under section 2002, Gen. St. 1901, supra. On the other degrees of manslaughter, the court gave directions to the jury satisfactory to the defendant.

Defendant asked the court to give instructions on all the degrees of manslaughter except the first. The court requested counsel to formulate a theory on which instructions respecting manslaughter in the second, third, and fourth degrees should be given, which he failed to do. The court was justified in refusing to instruct on manslaughter in the first degree, but, as to the other degrees, the failure of counsel to formulate a theory on which the court might instruct was not a sufficient reason for the court to refuse or neglect to do so. The testimony itself, without the aid of counsel, presented to the court a sufficient theory on which to base instructions respecting the several degrees of manslaughter to which we have referred. Section 5681, Gen. St. 1901, requires the court, in a criminal case, to state to the jury all matters of law which are necessary for their information in giving a verdict. This must be done without request from the defendant. *Craft v. State of Kansas*, 3 Kan. 450.

The judgment of the court below will be reversed, and a new trial granted. All the Justices concurring.

## STATE v. TYREE.

(Supreme Court of Kansas. June 11, 1904.)

### CRIMINAL LAW — SENTENCE — EX POST FACTO LAW — RESENTENCE.

1. T. was convicted of a felony committed before the passage of chapter 375, p. 571, Laws 1903, commonly called the "indeterminate sentence law," but was sentenced under that law to the penitentiary. The law providing for the punishment for the offense when it was committed made provisions for a scale of credits to be given for good behavior. The act of 1903 contains no such provisions. *Held*, that the latter act, as to T., is *ex post facto*.

2. One who procures a voidable sentence to be set aside on appeal may thereafter be properly sentenced, notwithstanding he may have served part of the voidable sentence.

(Syllabus by the Court.)

Appeal from District Court, Barber County; P. B. Gillett, Judge.

John Tyree was convicted of felony, and appeals. Affirmed.

Samuel Griffin and Seward I. Field, for appellant. C. C. Coleman, Atty. Gen., and J. N. Tincher, for the State.

GREENE, J. The appellant was convicted of a felony, and sentenced to the penitentiary under the indeterminate sentence law of 1903. The crime of which he was convicted was committed before the enactment of the law, but his trial, conviction, and sentence were had thereafter. Appellant appeals to this court, asking that the sentence be set aside, and he be discharged and set at liberty, because, as to him, the law under which he was sentenced is *ex post facto*. The penalty prescribed when the offense was committed was confinement in the penitentiary at hard labor for not less than 5 nor more than 21 years. Section 1, c. 375, p. 571, Laws 1903, under which the appellant was sentenced, reads: "Every person convicted of a felony or other crime punishable by imprisonment in the penitentiary \* \* \* shall be sentenced to the penitentiary, \* \* \* but the court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law for the crime for which the person was convicted and sentenced, the release of such person to be determined as hereinafter provided. \* \* \*" Following this provisions are found authorizing the prison board to establish rules and regulations under which prisoners may be paroled after the expiration of the minimum term fixed by law for the offense committed, and providing that after the prisoner has been on parole six months the warden shall, if he is satisfied that the prisoner will remain a good citizen and his liberty will not be incompatible to good society, certify such fact to the prison board, which board shall take such steps and perform such acts (all of which are set out in the provisions of the act) as to secure a final

discharge of the prisoner from further liability under the sentence.

The term "ex post facto" applies only to penal or criminal statutes. Every retrospective penal or criminal statute is not necessarily ex post facto. If the law under which the appellant was sentenced mitigates the punishment prescribed in the statute in existence when the offense was committed, it would not be ex post facto, although retrospective. *Commonwealth v. Wyman*, 12 Cush. 237; *Commonwealth v. Gardner*, 11 Gray, 438; *Dolan v. Thomas*, 12 Allen, 421; *In re Petty*, 22 Kan. 477; *Turner v. State*, 40 Ala. 21. A retrospective criminal or penal law that does not deprive the party of some constitutional right to which he was entitled under the law at the time the offense was committed, or does not alter his situation to his disadvantage, is not ex post facto. Section 10, art. 1, of the Constitution of the United States, provides: "No state shall \* \* \* pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." The first time this question was presented to the Supreme Court of the United States was in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648. On page 390, 3 Dall., page 650, 1 L. Ed., Mr. Justice Chase defined ex post facto laws to be: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than when committed. (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."

The appellant has not specifically pointed out any provision of the law under which he was sentenced that increased the penalty, or deprived him of any constitutional rights or privileges to which he was entitled under the law as it stood when the offense was committed, or that in any way altered his situation to his disadvantage. A comparison of the act under which he was sentenced with the law in existence when the offense was committed will demonstrate that the law under which he was sentenced deprived him of substantial rights and increased his punishment. Section 7050 of the General Statutes of 1901, which was in force when the offense was committed, reads: "The warden shall cause to be kept a record of each and every infraction of the rules of discipline by the convicts, with the names of the convict or convicts offending, and the date and character of each offense, which record shall be placed before the directors at each regular meeting of the board; and every convict whose name does not appear upon such record of reports for violation of the prison

rules shall be entitled to a deduction from his sentence of three days per month, for the first year or fraction of a year, for each month he shall obey the rules of the penitentiary; and all such convicts who shall have become entitled to a deduction of three days per month shall, for a like faithful observance of all the prison rules during the second year, be entitled to a deduction of six days per month; and if any convict shall continue to obey the rules of the penitentiary for the remainder of his sentence, after the expiration of two years, he shall be entitled to a deduction of eight days per month until his sentence shall expire. If any convict shall be guilty of willful violation of the rules of the prison, after he shall have become entitled to a diminution of service to which he has been sentenced, the directors shall have power to deprive such convict of a portion or all of such diminution of service to which he has previously become entitled by virtue of the provisions of this act; and it shall be the duty of the directors to direct the discharge of such convict when he shall have served out his sentence, less the time which shall be deducted therefrom by virtue of the provisions of this section." If sentenced under the law which contained these provisions, the appellant would be entitled as matter of right to a deduction from the term of sentence of all time earned for good behavior, and when the time thus earned plus the time served equaled the period of sentence he would be as matter of right entitled to a full discharge. There are no provisions in the law under which the appellant was sentenced entitling him to any reduction of time for good behavior as matter of right. There are provisions authorizing the prison board to establish rules and regulations under which prisoners may be allowed to go upon parole after the expiration of the minimum time for which they were sentenced, and by which they may be discharged six months after being paroled; but these are all matters of favor to be determined by the prison board, the warden, the judge who passed the sentence, and the Governor. The right of the appellant, under the law as it existed when he committed the offense, to have a deduction of his sentence for good behavior, was taken away from him under the act of 1903. This deprived him of a substantial right, and made the law of 1903, as to him, ex post facto.

An indeterminate sentence law was enacted in Massachusetts in 1885. One Murphy was convicted of the crime of embezzlement and sentenced thereunder. The law in existence when the crime was committed provided for a scale of credits for good behavior similar to ours, except that under the Massachusetts law the prisoner was not discharged when the time allowed for good behavior plus the time of service equaled the full sentence. He was admitted to parole for the unexpired term, and if he violated his parole he might be reincarcerated and required to serve the

full term. Murphy prosecuted an appeal. *Murphy v. Commonwealth*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266. It was held that, as to the appellant, the indeterminate sentence law of 1885 was *ex post facto*, because it deprived him of a right to which he was entitled under the law in existence when the offense was committed, viz., the right to receive credit for good behavior while serving his sentence. In *Opinion of the Justices*, 13 Gray, 620, it is said: "But, upon a careful consideration of that provision, we are of the opinion that the benefit promised in consideration of good behavior was intended to be an actual reduction of sentence as a right, and not as a favor. It therefore operated upon the sentence itself."

Under the law as it once existed in Missouri, one charged with murder in the first degree, but found guilty of murder in the second degree, could not thereafter be placed upon trial for the greater offense. The Constitution of that state was thereafter so amended that evidence of a former conviction of murder in the second degree was not a defense to a subsequent prosecution for the same murder in the first degree. One Kring was charged with committing the crime of murder before the change of law, his trial was thereafter, and he pleaded guilty to murder in the second degree and was sentenced accordingly. This sentence was set aside, and he was again placed upon trial for the crime of murder in the first degree. He offered in evidence the record of his former conviction as a defense to the prosecution for murder in the first degree. This evidence was excluded, and he was convicted of murder in the first degree, from which conviction he appealed to the Supreme Court, alleging as error the exclusion of the record of his former conviction. The judgment of the court below was affirmed, and he prosecuted error to the Supreme Court of the United States. *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. The first division of the syllabus reads: "A. was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence, pronounced on his plea of guilty of murder in the second degree and subjecting him to an imprisonment for 25 years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but, before his plea of guilty was entered, the law was changed, so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. Held that, as to this case, the new law was an *ex post facto* law, within the meaning of section 10, art. 1, of the Constitution of the United States, and that he could not again be tried for murder in the first degree."

It was held by this court in *State v. Page*, 60 Kan. 664, 57 Pac. 514, that an indeterminate sentence was for the maximum period. Therefore, unless the appellant was sooner discharged, he would be required to serve 21 years. If he had been sentenced under the law in existence when the offense was committed, he could as matter of right have reduced his term of service by good behavior to 15½ years.

There is another provision in section 8 of the act of 1903 which might result to the material and substantial disadvantage of the appellant. It is there provided that, in case a prisoner violates a parole, he shall be arrested and compelled to serve out the unexpired term of the maximum imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any portion or part of the time served. Other provisions of the act authorize the prison board to make prison rules and stipulate conditions in the parole, a violation of which, although not a violation of any law, would subject the paroled prisoner to rearrest and reimprisonment. The time intervening the declared delinquency and the arrest not being deducted from the maximum time, the period within which appellant might obtain his liberty is extended beyond the maximum time for which he could have been sentenced under the law in existence when the offense was committed; this excess of time depending upon the activity or negligence of the officers whose duty it would be to issue or execute a warrant for the arrest. For these reasons the sentence imposed was *ex post facto*, and should be set aside.

It is contended that, if the law under which appellant was sentenced is *ex post facto*, he should be finally discharged, and that to sentence him under a different statute would inflict a double punishment for the same offense. Section 5045 of the General Statutes of 1901 provides: "When a judgment or final order shall be reversed, either in whole or in part, in the district court or Supreme Court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment." In the present case we find that no error was committed against the appellant on the trial. The only error committed was in pronouncing sentence. This court has the power to remand the cause, with instructions to the court below to set aside the sentence thus pronounced and impose an appropriate sentence under the law in existence when the offense was committed, unless such sentence would inflict a double punishment. If the former sentence is not legal, the appellant is not put in jeopardy a second time, and his constitutional rights are not abridged by being compelled to serve a full term under a legal sentence. *Commonwealth v. Wheeler*, 2 Mass. 173; *Commonwealth v. Peters*, 12 Metc. 387; *McKee v.*



People, 32 N. Y. 239; State of Louisiana v. Walters, 16 La. Ann. 400; Turner v. State, 40 Ala. 21; Gerard v. People, 4 Ill. 362; State of Iowa v. Redman, 17 Iowa, 329.

It is said in *Commonwealth v. Murphy*, 174 Mass. 369, 371, 54 N. E. 860, 861, 48 L. R. A. 393, 75 Am. St. Rep. 353: "One ground on which such a conclusion has been reached it that by bringing the writ of error or making the motion he is deemed to have waived any constitutional objection that he might have had to another trial or to the entry of a proper judgment. \* \* \* If a second trial, where the verdict has been set aside or the judgment arrested, does not constitute legal jeopardy, it is difficult to see how the fact that a party may have served a portion of the sentence that has been set aside for error on proceedings instituted by him can rightfully object to the imposition of another and a lawful sentence by the court to which the case has been remanded." In the syllabus the court stated the law as follows: "A person who has been sentenced by a court having jurisdiction of the offense of which he is convicted and of the person, and having the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, may be resentenced, if it turns out on a writ of error brought by him that the original sentence was unlawful, although the effect of such resentencing will be to compel him to suffer solitary confinement twice, and it will result in his actual confinement for a longer period than the term for which he was sentenced originally." To reverse this holding *Murphy* prosecuted error to the Supreme Court of the United States. *Murphy v. Massachusetts*, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711. It was there said: "*Murphy* was tried in a state court of Massachusetts on an indictment charging him with embezzlement, was convicted, and was sentenced to imprisonment for a term, one day of which was to be in solitary confinement, and the rest at hard labor. He remained in confinement for nearly three years, and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was then remanded to the court below to have him resentenced, which was done. Before imposing the new sentence the court said that, as he had already suffered one term of solitary confinement, the court would not impose another, if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver, and the sentence was accordingly imposed. Upon his taking steps to have the sentence set aside, held, that his contention in that respect was unavailing."

If the appellant in this case had served the entire sentence imposed upon him, he could not be again sentenced for the same offense; but, having sought to have the sentence set aside, and having been successful, he cannot

now say that he would be doing double service for the same offense if a proper sentence is imposed upon him.

There are some minor contentions by the appellant with reference to the instructions and to the form of the verdict. An examination of these satisfies us that no prejudice resulted to appellant, and they are not of sufficient importance to require special attention.

The cause is remanded, with instructions to the court below to set aside the sentence, and impose a proper sentence upon the appellant under the law as it existed at the time the offense was committed. All the Justices concurring.

### STATE v. ROGERS.

(Supreme Court of Montana. June 22, 1904.)

BURGLARY — INFORMATION — DESCRIPTION OF PREMISES — WITNESSES — CROSS-EXAMINATION—DEGRADING AND DISCREDITING WITNESS.

1. The court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks.

2. Where an information for burglary charges the willful entry of a certain house in the rear of No. 111 East Broadway street owned by J. K., and it appears the house burglarized was No. 111 and occupied by M. K., but was situated on the rear of the lot, and there was no other house thereon, accused was not prejudiced by the description or the evidence of ownership.

3. Under Pen. Code, § 1842, providing that no information is insufficient, nor can the judgment be affected for any imperfection in matter of form, which does not prejudice defendant's substantial rights on the merits, a conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced.

4. Where certain witnesses for defendants in a prosecution for burglary testified that defendants resided with their mother at Centerville, it was not erroneous to allow them to be cross-examined as to whether or not defendants had been arrested in a house in Butte, or did not maintain a room there, as showing that they resided there instead of with their mother.

5. Where a witness for the prosecution made statements as to what he had heard, and an objection to a further question was sustained because the witness was not testifying from his own knowledge, the ruling practically withdrew the answer to the previous question, and defendant, if he desired a more specific withdrawal, ought to have moved to strike the evidence from the record.

6. Where, in a prosecution for burglary, a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross-examination to show that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Joe Rogers was convicted of burglary, and he appeals. Reversed.

¶ 2. See *Burglary*, vol. 3, Cent. Dig. § 70.

Wm. Meyer and Alexander Mackel, for appellant. Jas. Donovan, Atty. Gen., for the State.

POORMAN, C. According to the transcript, Joe Rogers and Pat Rogers were jointly informed against for burglary. The transcript does not contain any record of any trial or conviction of Pat Rogers. Joe Rogers, however, was tried and convicted, and subsequently made a motion for a new trial, which was overruled. Pat Rogers now appeals from the order of the court overruling this motion for a new trial, and Joe Rogers appeals only from the judgment of conviction made and entered against him. There being no record of any trial or conviction of Pat Rogers, his appeal will be disregarded, and the statement on motion for a new trial made by Joe Rogers will be treated, so far as applicable, as a bill of exceptions in aid of his appeal from the judgment.

1. It is alleged in the information that the defendants did, on June 25, 1903, "willfully," etc., "enter that certain house situate in the rear of No. 111 East Broadway street \* \* \* owned by one John Kovacevich, \* \* \* with intent \* \* \* the goods, chattels \* \* \* of said John Kovacevich \* \* \* to steal," etc. The evidence is to the effect that the house burglarized was No. 111 East Broadway, and at the time of the burglary was occupied by Michael Kovacevich, who owned property therein, but that the property actually stolen belonged to one Willoczjakske, and was in charge of Michael Kovacevich. On motion of the county attorney the court ordered the information amended by "changing the name from John to Michael Kovacevich." It also appears that this house was situated on the rear of the lot, and that there was no other house thereon. The defendant insists that there is a variance between the proof and the allegations of the information. The entry of a building with the intent to commit a larceny or some felony is all that by the statute is made essential to the crime of burglary. Section 820, Pen. Code. The gravamen of the charge is the entry with this criminal intent. The particular ownership of the goods in the building, and the ownership and the location of the building entered, are only matters of description. This court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks. The description appears to have been inserted in the information on the theory that the number "111" applied to the front of the lot, and, the building being on the rear of the lot, it was proper to designate it as being in the rear of that number. There is no evidence that there were other buildings in that immediate vicinity. "An indictment is sufficient if it can be understood therefrom that the offense was committed at some place

within the jurisdiction of the court," etc. Subdivision 4, § 1841, Pen. Code. In another part of the information it is alleged that the crime was committed at Silver Bow county, Mont. The defendant could not have been prejudiced by this description, or this evidence of ownership. The facts disclosed by this record indicate with sufficient exactness the location of the building entered.

2. It appeared from the evidence that the burglary was committed on June 17th, instead of June 25th, as alleged in the information. Section 1837, Pen. Code, reads: "The precise time at which an offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." Unless time is a material ingredient in the offense or in charging the same (section 1581, Pen. Code), it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. Similar statutes have been construed in this manner in the following cases: *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *People v. La Fuente*, 6 Cal. 202; *People v. Littlefield*, 5 Cal. 355; *State v. Harp*, 31 Kan. 498, 3 Pac. 432; *State v. Williams*, 13 Wash. 338, 43 Pac. 15; *Rema v. State*, 52 Neb. 375, 72 N. W. 474; *United States v. Conrad* (C. C.) 59 Fed. 458. Where it is alleged in an information that a crime was committed on a certain day, and the prosecution then proves another day, the defense of the defendant, if an alibi, might thereby be practically destroyed; the defendant might not be prepared to prove an alibi as to any day except that named in the information. But the defendant in such a case may protect himself by asking for permission to subpoena other witnesses, or, if necessary, to ask for a continuance, and the action of the court thereon would then become a proper subject for review on appeal. *Smith v. Shook* (Mont.) 75 Pac. 513. It does not appear from the record that the defendant made any such request in this case. Section 1842 of the Penal Code provides that no indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. From the facts as they appear in this record, the defendant was not prejudiced.

3. During the trial counsel for the state asked several of the defendant's witnesses as to whether or not the Rogers boys had been arrested in a room in the Hoffman House, or did not maintain a room in that house. These witnesses had not testified as to the arrest of the defendants, but had testified that neither of the defendants was in Butte between the 14th and 20th days of June; that

they lived with their mother at Centerville. The object of the cross-examination was undoubtedly to show, if possible, that the defendants resided at the Hoffman House, in Butte, instead of with their mother at Centerville, and might therefore have been within the city without their mother or the other witnesses knowing it. Pat Rogers, in testifying as a witness on behalf of his brother, Joe Rogers, stated on his direct examination that he and his brother, Joe, were arrested in a room in the Hoffman House, and explained the purpose of their being there, and defendant admitted that he was arrested there. There was no error in permitting this cross-examination.

4. The sheriff of Silver Bow county, when called as a witness on the part of the state, testified that he was acquainted with the defendant Joe Rogers, "and that he has been in my charge as sheriff of Silver Bow county since last July." When asked as to whether or not the defendant had attempted to escape from custody, the witness said: "Well, I know that he escaped, Mr. Breen. That is what I heard; I was not there at the time it happened. Q. Do you know that it occurred?" Both these questions were objected to by counsel for defendant, and the objection sustained as to the last question on the ground that the witness was not testifying from his own knowledge. This ruling of the court practically withdrew from the consideration of the jury the answer to the previous question. Had the defendant desired a more specific withdrawal, he should have made a motion to strike the evidence from the record, which he did not do. There is no error in the rulings of the court with reference to these questions.

5. Defendant's witness Pat Rogers testified as to a fishing trip of himself and brother from Butte, via Anaconda, to Storm lake; that they left Butte June 14th, and did not return until June 26th. On cross-examination by the state's counsel it developed that both of the defendants named in the information went by stage from Anaconda to Cable, thence to Storm lake; that the only purpose of going to Cable was to see the town, as the witness had not been there before, and had heard much of the place. It was in evidence that the parties had taken with them two pistols and one shotgun, in addition to fishing tackle, bedding, and provisions. The witness was then asked: "Is it not a fact that when you went to Cable—when you took that trip—that your object was to find out when the bullion was to be shipped from Cable?" The witness testified that he had ordered a Lee straight-pull gun from Chicago for hunting purposes, but did not have it with him. This further question was then asked: "Now, Mr. Rogers, didn't you get that Lee straight-pull rifle for the purpose of holding up the bullion that was going from the Cable mine?" Both of these questions were objected to as incompetent, irrelevant, and immaterial, and

as having nothing to do with the case. The objections were overruled, and the witness answered in the negative. It is claimed that the court erred in overruling these objections; that the questions have a direct tendency to degrade the witness and his brother, the defendant, in the eyes of the jury. The witness of whom these questions were asked was a brother of the defendant, and was jointly informed against with the defendant, and, according to the testimony, the two brothers had taken this trip for a common purpose. If it could therefore be made to appear to the jury that Pat Rogers had gone to Cable for the purpose of committing a robbery, such evidence would reflect equally upon the defendant, Joe Rogers. It is a rule well established in this state that when an accused becomes a witness in his own behalf, and denies that he committed the crime for which he is on trial, a wide latitude of cross-examination is permissible, owing to the general nature of the defendant's statements. Upon the cross-examination of such witness, such deflections from the matter brought out on direct examination are allowed as may be necessary to bring the whole matter involved in the direct examination before the court, and to extract the whole of the truth concerning the matter brought forward by the accused. *State v. Howard* (Mont.) 77 Pac. 50; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; *People v. Morton* (Cal.) 73 Pac. 609. A witness, whether the accused or any other witness, may be discredited in any of the various ways named in the statute or sanctioned by law, but it is not permissible to ask any witness any question merely for the purpose of degrading him. It is the right of a witness to be protected from irrelevant, improper, and insulting questions (section 3402, Code Civ. Proc.), and he need not give an answer which will have a tendency to subject him to punishment for a felony or to degrade his character, unless it be to the very fact in issue, or to a fact from which the facts in issue would be presumed. Section 3401, *Id.* These questions were totally foreign to the matter before the court, and could have no bearing whatsoever on the guilt or innocence of the defendant of the crime with which he was accused by the information. They could therefore subserve no purpose whatsoever except to degrade and discredit the witness and his brother, the defendant, in the eyes of the jury. It is not presumed that state's counsel, being charged with the protection of the rights of all citizens, would accuse a witness of having committed a crime unless he had some evidence of the truth of the accusation. The questions, therefore, would convey the impression to the jury that the state's counsel had reason to believe that the defendant went to Cable for the purpose of committing a robbery. The fact that it was not intended to prejudice the defendant, or that the

questions only accused the defendant of the intent to commit a crime, or that the negative answers of the witness were conclusive upon the state, could not free the questions of their objectionable character. It was certainly not to be expected that they would be answered in the affirmative. In *People v. Mullings* (Cal.) 23 Pac. 229, 17 Am. St. Rep. 223, the court said: "It is quite evident that the questions, not the answers, were what the prosecution thought important. The purpose of the questions, clearly, was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based." In *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655, this court laid down the rule that such questions are improper and prejudicial. The reasons therefor are discussed in the opinion of the court in that case, and are also elaborately discussed in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078, and it is unnecessary to repeat the discussion here. We cannot recommend that the rule in the *Gleim* Case should be reversed. The same questions are also discussed in *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *Gale v. People*, 26 Mich. 161; *People v. Cahoon*, 88 Mich. 456, 50 N. W. 384; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *State v. Trott*, 36 Mo. App. 29. *Matusevitz v. Hughes*, 26 Mont. 214, 68 Pac. 468, cited by respondent, is not in point on this proposition. There the witness had voluntarily, in part of his testimony, stated that he had been arrested. On cross-examination he was asked, "What were you charged with at that time? What were you arrested for?" This question the court held was not prejudicial.

We think this judgment should be reversed, and the case remanded for a new trial.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the case remanded for a new trial.

#### HANDLEY v. SPRINKLE.

(Supreme Court of Montana. June 28, 1904.)

WRITTEN INSTRUMENTS—CANCELLATION—BILL—ACTIONS—CONSOLIDATION—EFFECT—STATUTES—COSTS—JUDGMENTS—APPEAL—BILL OF EXCEPTIONS—EVIDENCE—CERTIFICATION—REVIEW OF EVIDENCE.

1. Under Code Civ. Proc. § 1894, providing that, whenever two or more actions are pending at one time between the same parties and in the same court on causes of action which might have been joined, the court may order the ac-

tions to be consolidated, actions consolidated are merged into one suit, and hence only a single judgment should be rendered settling the entire controversy.

2. Where actions are consolidated as authorized by Code Civ. Proc. § 1894, the court should require the pleadings to be reconstructed as in one suit.

3. Where actions are consolidated as authorized by Code Civ. Proc. § 1894, the court should determine what costs, if any, should be charged to either party in the original suits, costs subsequently accruing being taxable only in the consolidated action.

4. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was the insolvent, that plaintiff did not have an adequate remedy at law, or that defendant had threatened to dispose of the note before maturity to a bona fide purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.

5. Under a statute providing that in the settlement of statements and bills of exceptions the court shall eliminate all immaterial evidence, if a bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case, referring to the points brought before the Supreme Court for review, that court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.

Commissioners' Opinion. Appeal from District Court, Choteau County; Jno. W. Tattan, Judge.

Consolidated actions by Charles W. Handley against Robert L. Sprinkle. From judgments in favor of plaintiff, defendant appeals. Reversed.

Downing & Stephenson and W. S. Towner, for appellant. Chas. N. Pray and Geo. H. Stanton, for respondent.

CLAYBERG, C. C. Appeal from judgments against defendant, and an order overruling his motion for a new trial.

On June 17, 1900, respondent (Handley) brought suit against appellant (Sprinkle) upon two causes of action, viz.: (1) An action for damages for the breach of a contract for the care and running of a certain band of sheep. In connection with this cause of action plaintiff alleges that, at the date of the making of the contract alleged, plaintiff and wife executed and delivered to defendant their promissory note for \$1,900, and also executed and delivered a chattel mortgage securing payment of the same, but that the said note and mortgage were solely for the purpose of securing future advances of money to defray the expenses of running the sheep under the alleged contract. (2) An action on account for the value of goods, wares, and merchandise sold and delivered to the defendant. The defendant answered the first cause of action by a general denial of all the allegations of the complaint, and by affirmative allegations setting up the existence of a contract with plaintiff for running a band of sheep from the — day of August, 1899, for one year, setting up the terms of the contract, among which was an agreement

¶ 1. See Action, vol. 1, Cent. Dig. §§ 691, 693.

on his (defendant's) part to furnish all money necessary to pay the expenses of running the sheep during the year, which was to be returned to him on final settlement; that plaintiff took possession of the sheep under this contract in August, 1899; that on June 28, 1900, plaintiff's demands for money became so unreasonable that defendant demanded a settlement of all their accounts, which was then and there had, and, after giving plaintiff all the compensation to which he was entitled under the contract, plaintiff was found to owe defendant the sum of \$1,900, whereupon plaintiff and his wife gave defendant their promissory note for this amount, secured by a chattel mortgage, a copy of which is attached to the answer. The defendant further alleged that he was the sole holder and owner of the note and mortgage, and that no part had been paid, except the amount specified in his answer to the second cause of action. In his answer to the second cause of action he admits purchasing the articles, mentioned in paragraphs 1 and 2, of the plaintiff, at the prices stated; denies all the other allegations of the second cause of action. He then sets forth by way of affirmative matter the same facts as alleged affirmatively in his answer to the first cause of action, with the additional allegation that the sum total value of the merchandise admitted to have been purchased from plaintiff, as stated in his answer, was credited on the note above referred to by the agreement of the parties. To this answer plaintiff replied by way of general denial.

On June 17, 1901, plaintiff instituted another suit against defendant, by which he sought to have the note and chattel mortgage set up in the pleadings in the prior suit canceled, and to have plaintiff enjoined from taking possession of the mortgaged property, and from transferring or disposing of the note. Cancellation was asked for on the ground of fraud on part of the defendant in obtaining the note and mortgage. (Further reference to this complaint will hereinafter be made.) To this complaint defendant answered, admitting that prior to June 28, 1900, the plaintiff was running a band of sheep as lessee, which sheep were owned by defendant as lessor; admits the execution and delivery of the note and mortgage, and that he is in the possession thereof. He then denies "each and every allegation of the complaint not hereinbefore specifically admitted."

When the cases above mentioned came on for trial, the defendant moved the court for a consolidation of the suits, "in accordance with section 1894, Code of Civil Procedure." This motion was sustained, over the objection of plaintiff, and the cases were consolidated. The record does not show the order of the court made upon such consolidation. The suits were tried together before a jury, which rendered separate general verdicts in

favor of plaintiff in each original suit. In addition to their general verdicts, the jury made six special findings in plaintiff's favor, two of which were applicable to the suit at law, and four to the suit in equity.

On the day after the rendition of these verdicts, the clerk of the court entered judgment in each original suit, in accordance with the general verdicts of the jury. In the suit at law the judgment was for the sum of \$500 (the amount of damages found by the jury for plaintiff), and \$217 costs of suit. In the action in equity the judgment is in the following form: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the said plaintiff do have and recover from said defendant the sum of — dollars, with interest thereon at the rate of eight per cent. per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of nine dollars and fifty cents (\$9.50)."

On the same day the verdicts were rendered, plaintiff's counsel moved the court in the equity suit to adopt the findings and verdicts of the jury, and render a decree as prayed for in the complaint. On September 28th defendant's attorney moved the court to reject each of the findings in both cases for certain reasons stated in the motion. On December 11th the court adopted the findings of the jury, and rendered a decree in the equity suit against defendant, as prayed for in the complaint, and entered a judgment against defendant for \$226.50 for costs.

Two important questions are presented for determination upon the record in these appeals, viz.: What is the practice after the consolidation of suits, under section 1894, supra; and was such practice followed?

This section is as follows: "Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated." It is apparent that the purpose of this provision is to compel a party having different causes of action against another, which might be joined in one suit, to include such causes of action in one suit, so as not to vex the defendant with several suits and place the burden of extra costs upon him. The consolidation of actions under this statute must be distinguished from what has been known for many years as the "consolidation rule," which was first devised and established by Lord Mansfield. Under that rule, where many cases were pending between the same parties in which the same issues were involved, one case was tried, and all proceedings in the other cases were stayed until after such trial. It must also be distinguished from the old practice in equity of consolidating equity cases. Under such practice, each case was decided upon its own pleadings and evidence. The

consolidation in equity cases under this practice was practically consolidating them for the purpose of trial alone. In our judgment, the consolidation of actions under our statute merges all the actions consolidated into one suit. There may be many causes of action, but the effect of consolidation is to join them all in one suit. If this is true, there can be but one judgment in the consolidated suit, and this judgment must settle all the issues involved. All the suits consolidated are ended as separate suits, and exist thereafter only as parts, respectively, of the consolidated suit. Where an order of consolidation is made, the court should require the pleadings to be reconstructed as in one suit, if necessary, and should determine what costs, if any, should be charged to either party in the original suits. All costs in the consolidated suit accrue only after the consolidation. If the pleadings are ordered reformed, the complaint in the consolidated suit should state all of plaintiff's causes of action against the defendant as alleged in each of the suits consolidated, and the answer of the defendant should present all issues which he has raised in such suits. The complaint in the consolidated suit should be the same as if the plaintiff had joined all causes of action alleged in the original suits in one action. Of course, on the trial, several findings may be had upon the several causes of action stated in the pleadings, and if legal and equitable actions are consolidated they may be tried in the same manner as though such causes had been joined in the same complaint. In this case, although the original suits were consolidated in accordance with the statute, and were tried as one, yet separate final judgments were entered in each original suit. In fact, the record discloses the entry of three separate judgments—one in each original suit—entered by the clerk upon the verdicts, and a decree by the court in the equitable suit. It also appears that the clerk entered as costs against defendant in the judgments in the two original suits the sum of \$226.50, and that the court included the same amount as costs in the decree in the equitable suit.

There is a great dearth of decisions upon the points above decided, but we have gathered our conclusion from the examination of all sources at our command. It is apparent from the record that plaintiff recovered duplicate judgments for the same costs, when he was only entitled to single costs, which should be given in a judgment in the consolidated suit. We cannot consider upon these appeals the question as to whether or not the consolidation was proper under the statute, for the reason that appellant himself caused the consolidation to be made. The legality of the consolidation of actions will not be reviewed by this court unless excepted to at the time and brought to this court by the party excepting. Appellant could not take such exception, having caused

the consolidation to be made, and upon these appeals we cannot consider any exceptions of respondent. If, aside from the question of costs, the judgments rendered were warranted by the pleadings and proofs, this court would have the power to order them to be modified as to costs, and, as modified, affirmed; but we are satisfied that the court erred in entering the decree in the equitable suit, and therefore the judgments must be reversed.

Appellant insists that the complaint in the equitable suit does not state facts sufficient to constitute a cause of action, or to entitle respondent to the cancellation of the note and mortgage. If this position is well taken, the court below erred in rendering the decree. The equitable suit, as before stated, was for the primary purpose of having the note and mortgage surrendered for cancellation; injunctions were asked as incidental to this relief. The cancellation was demanded upon allegations which are, briefly, in substance as follows: That plaintiff was in possession of certain sheep belonging to defendant, under a contract to care for and run the same; that by the terms of this contract the parties thereto were to bear "certain expenses connected with the running of said sheep"; that defendant fraudulently represented to plaintiff that it would be necessary for plaintiff to "execute a chattel mortgage on his property in order that moneys might be procured to defray the expense of running said sheep for the year beginning on said June 28, 1900"; that "by said representations the defendant fraudulently induced the plaintiff to execute a note and chattel mortgage, and the plaintiff, relying upon such fraudulent representations," executed and delivered the note and mortgage in question; that, at the time the note and mortgage were given, plaintiff was not indebted to defendant in any sum; that "it was then and there understood and agreed that the defendant would from time to time advance to the plaintiff the moneys necessary to defray the expenses in running the sheep, to the amount of \$1,900 or over"; that, immediately after the execution of the note and mortgage, defendant violated the contract for running the sheep, and "then and there took possession of all said sheep and removed them," and has kept them ever since, and refused to allow plaintiff to run or care for them or exercise any control over them, "without any fault of plaintiff, and against his will and consent"; that "there was no consideration whatever for the execution or delivery of the said promissory note or chattel mortgage," and that "the defendant never advanced any sums of money whatever to the plaintiff on account of said promissory note or mortgage." These are all the allegations of the complaint upon the cause of action for cancellation; all the others have reference to the issuance of injunctions. It is perceived that there is no allegation of the insolvency of the defendant, no allegation that plaintiff

did not have an adequate remedy at law, and no allegation that defendant threatened to dispose of the note before maturity to a bona fide purchaser, but, on the contrary, the allegation "that the defendant has the possession of said promissory note, and refuses to deliver the same to plaintiff." It is very plain that there is no allegation of any fraudulent act or conduct on the part of defendant sufficient to warrant the court in canceling the note and mortgage. The most that can be said of the allegations is that plaintiff claims and alleges failure of the consideration of the note. The consideration alleged was the advancement of money from time to time under a certain contract, that defendant violated the said contract and refused to carry out the same, and that he did not advance the defendant any money. This is simply an allegation of the making of a contract by the defendant, and the breach thereof, for which the defendant was liable to the plaintiff in damages. The facts alleged in the complaint as above recited would simply furnish the defendant a defense to an action on the note by the defendant and for a foreclosure of the mortgage. If the property should have been seized under the chattel mortgage, plaintiff would have had a right, under such facts, to maintain an action of claim and delivery for their possession, or an action in conversion for their value. There having been an adequate remedy at law against the note and mortgage in the hands of defendant, equity cannot intervene for the cancellation of said instruments. The remedy of plaintiff was either an action against the defendant for damages for a breach of his contract, or a defense to any suit which the defendant might bring on said note or mortgage. It may be claimed that the note was not yet due, and was negotiable. If the plaintiff had alleged in his complaint that the defendant was about to sell or dispose of the note to a bona fide purchaser, which would cut off his defense to the note in a suit by defendant, there might have been some merit in the fact that the note was negotiable and not yet due, but not a solitary allegation tending even to show such facts was made in the complaint. We are of the opinion that the complaint in the equity action did not state facts sufficient to entitle the plaintiff to the relief demanded, and therefore that the decree entered in said action by the court was erroneous.

As above stated, the consolidated suit was simply one suit, and only one judgment could be entered therein. The fact that the decree in the equity suit was entered erroneously is sufficient to reverse all judgments appealed from and direct a new trial. It therefore becomes unimportant to consider the questions as to whether the statement on motion for a new trial in the suit at law was settled in time, or whether the court erred in refusing the nonsuit to plaintiff's first cause of action in the suit at law, or whether the court erred in overruling the defendant's motion for a

new trial in the equity suit, or whether we have a right to consider the sufficiency of the evidence where the record does not disclose that it contains all the evidence. We remark, however, that, under the statute providing for the settlement of statements and bills of exceptions, it is the duty of the court settling the same to cut out all immaterial evidence, so that if the bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case—referring to the points brought before this court for review—we have full power and authority to consider the insufficiency of the evidence, if properly specified.

We advise that the judgments appealed from be reversed, and the cause remanded with instructions to the district court that it first determine whether the two original suits can be consolidated under the statute, and, if it is of the opinion that they cannot be consolidated, to set aside the order of consolidation as now made, and require the actions to be tried separately. If the court below is of the opinion that the original suits can be consolidated, we advise that it try the consolidated suits as a single suit—hearing the equitable suit first and then the action at law—and enter a single judgment settling all the controversies involved.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgments are reversed, and the cause is remanded with instructions to the court below that it first determine whether the two original suits can be consolidated under the statute, and, if it is of the opinion that they cannot be consolidated, to set aside the order of consolidation as now made, and require the actions to be tried separately. If the court below is of the opinion that the original suits can be consolidated, we advise that it try the consolidated suits as a single suit, consisting of various causes of action—hearing the equitable suit first and then the action at law—and enter a single judgment settling all the controversies involved.

BRANTLY, C. J., not having heard the argument, takes no part in this decision

STATE ex rel. CHENOWETH v. ACTON.  
(Supreme Court of Montana. June 27, 1904.)  
COUNTY SCHOOL SUPERINTENDENTS—VACANCIES—TIE VOTE—QUALIFICATIONS—STATUTES—VALIDITY.

1. Const. art. 16, § 5, provides for the election of county school superintendents, and declares that persons elected to such office shall hold the same for the term of two years, and until their successors are elected and qualified, and that vacancies in such office shall be filled by appointment by the board of county commissioners; the appointee to hold office until the next

general election. Pol. Code, § 1101, declares that an office becomes vacant on the happening of certain specified events, none of which relate to the contingency of a tie vote. *Held* that, where there was a tie vote on an election for school superintendent of a county, such vote did not render the office vacant; the previous incumbent being entitled to hold the same until a superintendent was regularly elected.

2. Pol. Code, § 1171, providing that in case of a tie vote for a county officer, except county commissioner, the county commissioners shall appoint some eligible person to fill the office, as in case of other vacancies in such office, in so far as it relates to officers named in Const. art. 10, § 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid, as in contravention of such section.

3. Pol. Code, § 1744, declaring that no person shall be qualified for the office of county superintendent of schools unless he or she holds a certificate of the highest county grade, and is a citizen of the United States, etc., applies to men and women alike.

4. Const. art. 9, § 10, declares that women shall be eligible to hold the office of county superintendent of schools, and shall have the right to vote at school elections. Section 11 provides that any person qualified to vote at general elections and for state officers shall be eligible to any office therein, except as otherwise provided in the Constitution, and subject to such additional qualifications as may be prescribed by the Legislature for city offices and "offices hereafter created." Section 2 declares that a voter shall be a citizen of the United States, and shall have had a certain residence in the state, town, and precinct in which he offers to vote. *Held* that, the office of county superintendent of schools being an office created by the Constitution, it was incompetent for the Legislature to prescribe by Pol. Code, § 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade.

**Commissioners' Opinion.** Appeal from District Court, Teton County; D. F. Smith, Judge.

Action by the state, on relation of Fannie E. Chenoweth, against Rebecca Acton. From a decree in favor of plaintiff, defendant appeals. *Affirmed.*

Jas. W. Freeman, for appellant. Geo. H. Stanton, for respondent.

**CALLAWAY, C.** This action was brought by the state of Montana, on the relation of Fannie E. Chenoweth, against Rebecca Acton, to try title to the office of county superintendent of schools for Teton county; the relator claiming that the defendant had intruded into and usurped the office, and asking that she be ousted and excluded therefrom. The defendant answered, denying the material allegations of the complaint; pleaded affirmatively her own right to the office, and the relator's lack of right and ineligibility thereto; and prayed that she (the defendant) be decreed entitled thereto. The relator, Chenoweth, was elected at the general election in the year 1900, and within the time allowed by law qualified and entered upon her office, which she has continued to hold ever since. At the general election held in the year 1902 the defendant, Acton,

and one Brown were opposing candidates for the office. Both received an equal number of votes therefor. There being no election, the county commissioners of Teton county appointed the defendant to the office, whereupon she assumed to qualify and discharge the duties thereof. The lower court rendered a judgment for relator. Defendant moved for a new trial, which was denied, whereupon she appealed from the judgment and the order denying her a new trial.

The first question presented is, was there a vacancy when the county commissioners made the order appointing the defendant? One of the provisions of section 5, art. 16, of the Constitution, is that there shall be elected in each county one county superintendent of schools. It also declares: "Persons elected to the different offices named in this section shall hold their respective offices for the term of two years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election." Section 1101 of the Political Code provides that an office becomes vacant on the happening of certain events therein enumerated, neither of which relates to the contingency of a tie vote. In construing a section identical with 1101, *supra*, the court said in *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. 261: "An office becomes vacant on the happening of any of the events enumerated in section 996 of the Political Code, among which the event relied on in this case is not mentioned. The enumeration in the statute must be held to be exclusive." Citing *People v. Tilton*, 37 Cal. 621; *Stratton v. Oulton*, 28 Cal. 45; and *People v. Bissell*, 49 Cal. 411. "The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. *Stocking v. State*, 7 Ind. 326; *Collins v. State*, 8 Ind. 344; *Akers v. State*, 8 Ind. 484; *State v. Bemenderfer*, 96 Ind. 374; *Gosman v. State*, *supra* [106 Ind. 203, 6 N. E. 349]; *Butler v. State*, 20 Ind. 169; *People v. Tilton*, 37 Cal. 614; *State v. Lusk*, 18 Mo. 333; *Commonwealth v. Hanley*, 9 Pa. 613." *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

In appointing the defendant, the county commissioners assumed to act under the provisions of section 1171, Pol. Code, which reads, in part, as follows: "In case of a tie vote for clerk of the district court, county attorney, or for any county officer except coun-



ty commissioner, and for any township officer, the board of county commissioners must appoint some eligible person, as in case of other vacancies in such offices; and in case of a tie vote for county commissioner, the district judge of the county must appoint an eligible person to fill the office, as in other cases of vacancy." Section 1171 does not in terms declare that a vacancy in office shall occur when there has been no election to the office by reason of a tie vote. Section 1101, as we have seen, defines "vacancies," and is exclusive. But in view of the constitutional provision it would not make any difference if the Legislature had provided that a failure of election by reason of a tie vote should cause a vacancy at the expiration of the two years for which the county officers are elected, for, by the terms of the Constitution, they "shall hold their offices for the term of two years, and until their successors are elected and qualified." Const. art. 16, § 5. Under this section, it is clear that the relator in this case was entitled to hold her office for the term of two years, and it is equally clear that she is entitled to hold it until her successor is elected and qualified. Indeed, it is not only her right, but it is her duty, to do so. *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; *People v. Hardy* (Utah) 20 Pac. 1118.

Under the provision of the Constitution which we are considering, the right of a duly elected and qualified officer to hold his office until his successor is elected and qualified is as much a part of his term as are the two years specifically mentioned. *People v. Green*, 1 Idaho, 235. In *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858, 30 Am. St. Rep. 208, the court said: "The adjudicated cases seem to be harmonious in holding that, where one is lawfully in the possession of an office under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor. *Gosman v. State*, 106 Ind. 203 [6 N. E. 349]; *State v. Lusk*, 18 Mo. 333; *People v. Tilton*, 37 Cal. 614; *Ex parte Lawhorne*, 18 Grat. 85; *Johnson v. Mann*, 77 Va. 265; *State v. Jenkins*, 43 Mo. 261; *State v. Harrison*, 113 Ind. 434 [16 N. E. 384], 3 Am. St. Rep. 663."

All elections by the people shall be by ballot. Const. art. 9, § 1.

The policy of the provision that certain elective officers shall hold their offices until their successors are elected and qualified rests upon the theory, that in case the electoral body fails to discharge its functions, it is wiser and more prudent to authorize the incumbent to hold over rather than that a vacancy should occur, to be filled by the appointing power. *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663. It

is significant that section 5 of article 16, supra, provides that an elective officer shall hold until his successor is elected and qualified, while one appointed to fill a vacancy holds only until the next general election. The Constitution recognizes that vacancies will inevitably occur, and provides how they shall be filled. What are vacancies, within the meaning of the constitutional words, is not clear. It was, of course, not necessary to provide expressly that vacancies may occur through the processes of nature. It was contemplated that vacancies might occur because of misconduct or malfeasance in office. For such causes all officers not liable to impeachment shall be subject to removal in such manner as may be provided by law. Const. art. 5, § 18. But whatever may or not be vacancies, it is plain that there was none in the office of county superintendent of schools for Teton county when the county commissioners attempted to appoint the defendant to succeed the relator. *People v. Lord*, 9 Mich. 227; *Lawrence v. Hanley*, 84 Mich. 390, 47 N. W. 753; *State ex rel. Everding v. Simon*, 20 Or. 305, 26 Pac. 170; *Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156, 655; *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266; *People v. Osborne*, 7 Colo. 605, 4 Pac. 1074; *People v. Whitman*, 10 Cal. 38; *People v. Tilton*, 37 Cal. 614; *People v. Hammond*, 66 Cal. 654, 6 Pac. 741; *People v. Edwards*, 93 Cal. 153, 28 Pac. 831; *State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

The case of *Adams v. Doyle* (Cal.) 73 Pac. 582, is inapplicable to the one at bar.

It may not be amiss to say that the invalidity of section 1171, Pol. Code, becomes more apparent when it is analyzed with reference to other constitutional provisions. See sections 1, 2, art. 7; section 9, art. 8; section 4, art. 16.

We now come to the second point in the case. It is asserted that relator is not eligible to hold the office of county superintendent of schools, because when she was elected she did not possess the qualifications required by the statute, in this: She was the holder of only a second-grade certificate, whereas the statute prescribes that "no person shall be deemed legally qualified for the office of county superintendent unless he or she holds a certificate of the highest county grade, is a citizen of the United States, has resided one year next preceding the election in this state, and one year in the county in which he is a candidate, and has had twelve months' successful experience in teaching in the public schools of this state. \* \* \* " Pol. Code, § 1744. This section applies to men and women alike, and this fact must be borne in mind. Section 2, art. 9, of the Constitution, declares that "every male person of the age of twenty one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or

hereafter may be elective by the people and upon all questions which may be submitted to the vote of the people: First, he shall be a citizen of the United States; second, he shall have resided in this state one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law." Section 10 of article 9 declares: "Women shall be eligible to hold the office of county superintendent of schools or any school district office, and shall have the right to vote at any school district election." Section 11 of article 9 declares: "Any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this Constitution, and subject to such additional qualifications as may be prescribed by the Legislative assembly for city offices and offices hereafter created." An examination of the Constitution discloses that it prescribes no other qualifications for a county superintendent of schools than those provided for in sections 10 and 11; that is, the person must be either a woman, or a "person qualified to vote at general elections and for state officers in this state." Additional qualifications are prescribed by the Constitution for certain other officers. The latter part of section 11 cannot apply, because the office of county superintendent of schools is a creation of the Constitution. The Constitution has spoken, and it has prescribed the qualifications required of a county superintendent. The Legislature may not supplement the constitutional pronouncement upon this subject. The maxim "*expressio unius est exclusio alterius*" applies.

It is earnestly argued that a person who holds the office of county superintendent should be one of learning and experience—one possessing especial professional attainments; that the statute is salutary and in accordance with the best interests of the public schools. All this is doubtless true, but this argument should be addressed to the Legislature, which has the power to submit constitutional amendments to the people, and not to a court. If there be unwisdom in the law, the courts have not the power to correct it. They must declare the law as they find it. The people have reserved to themselves the right to select their county superintendents from women and the general body of voters. If they desire to change the fundamental law, the way is open to them to do so conformably to their will.

It follows that the judgment and order should be affirmed.

CLAYBERG, O. C., and POORMAN, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MILBURN, J. I concur. If it were not for the fact that the defendant interposed a counterclaim demanding ouster of the plaintiff, and if the court had not adjudicated the defendant's claim to the office upon her said counterclaim, I would not concur, but would hold that the action should have been dismissed for the reason that the record, outside of the complaint of plaintiff, clearly shows that plaintiff never was interfered with by the defendant in the performance of her (the plaintiff's) duties as superintendent of schools. She swears in her testimony, "I was not interfered with by Miss Acton in the conduct of my office at all." Her cause of action, if she have any, is as it appears from the evidence, against the commissioners and the treasurer, who, it is alleged, refused to recognize the plaintiff or pay her.

HOLLOWAY, J., not having heard the argument, takes no part in this decision.

#### GLASS et al. v. BASIN & BAY STATE MIN. CO.

(Supreme Court of Montana. June 27, 1904.)

#### PLEADING—COMPLAINT—CLAIM AND DELIVERY —CONVERSION—CONTRACT—BREACH— ACTIONS.

1. Plaintiffs alleged that, being owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant, and the proceeds used in paying its debts, in consideration of an agreement that plaintiffs should hold the offices of vice president, trustee, and general manager and treasurer of the defendant until its business should be in successful operation; that defendant violated its agreement, and ejected plaintiffs from said offices, and had sold and issued the stock to others, and refused and failed to deliver it to the plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. The prayer was for recovery of the possession of the stock, or its value in case delivery could not be had. *Held*, that the complaint did not state a cause of action in claim and delivery, as the statement that defendant had disposed of the stock showed that, at the commencement of the action, defendant did not wrongfully retain possession of the property from plaintiffs.

2. The complaint did not state a cause of action in conversion, as it did not show a general or special ownership in the property and a right to immediate possession at the time of the wrongful taking by defendant.

3. Plaintiffs could not recover as on a contract, as the alleged contract was illegal, under Civ. Code, § 431, requiring directors of the corporation to be elected annually by the stockholders or members, and section 2240, declaring that unlawful which is contrary to an express provision of the law.

4. Plaintiffs could not recover as on a disaffirmance of an illegal contract, as the complaint showed performance on their part, and reliance on the contract.

Commissioners' Opinion. Appeal from District Court, Jefferson County; M. H. Parker, Judge.

Action by James Glass and another against the Basin & Bay State Mining Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

T. J. Walsh, for appellants. Toole & Bach and Ira T. Wight, for respondent.

CALLAWAY, C. The lower court sustained defendant's motion for a judgment on the pleadings, and plaintiffs appeal.

The determinative question is, does the complaint state a cause of action? It alleges the corporate capacity of the defendant, and states that on or about the 15th day of August, 1895, the plaintiffs, then being the joint owners of 1,425 shares of the capital stock of the defendant, at the instance and request of the defendant deposited with the treasurer of the defendant 1,400 shares of said capital stock, of the par value of \$140,000, and of that actual value in money, "to be sold by the defendant, and the proceeds thereof to be used by the defendant in paying its debts and liabilities, as well as its current expenses, in consideration whereof the defendant then and there agreed" that the plaintiff James Glass should hold the offices of vice president, trustee, and general manager of the defendant until the mining, concentrating, and smelting business of the defendant should be in successful operation, and that the plaintiff Alexander J. Glass should have and hold the offices of trustee and treasurer of the defendant until the business of the corporation should be in successful operation as aforesaid; that there was no other consideration moving the plaintiffs to deposit the said stock with the defendant; that the business of the defendant has never yet been in successful or other operation, but that the defendant, in violation of its agreement, on or about the 20th of October, 1899, ousted and ejected plaintiffs from said offices, and ever since has refused and now refuses to permit the plaintiffs to have, hold, or enjoy the same, by reason whereof the consideration whereby the defendant secured the stock "has, through the wrongful acts of the defendant, wholly failed"; that the defendant has sold and issued all of the stock to other stockholders, and disposed of the same; that the defendant has wholly failed and refused, and now does fail and refuse, to redeliver the stock to the plaintiffs, or to pay the plaintiffs the value thereof, although often requested so to do by the plaintiffs. Other allegations in the complaint are immaterial to this inquiry. The plaintiffs pray for the recovery of the possession of the stock, or for the sum of \$140,000, the value thereof, in case delivery cannot be had, and for costs of suit.

At the outset we are called upon to determine, if possible, the nature of the action. In attempting to do so, we shall bear in mind that, under the Code procedure, distinct forms of action are abolished. The only question is, does the complaint state a cause of action? It is the substance of the pleading, and not its legal verbiage, which must determine the question. Though the Code has abolished all forms of action, and provides that there shall be but one form of civil ac-

tion for the enforcement or protection of private rights and the redress or prevention of private wrongs (Code Civ. Proc. § 460), yet the distinctions between the different causes of action still obtain—the reasons underlying them are still the same—and the plaintiff may not recover beyond the case stated by him in his complaint. *Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614, and cases cited.

From the relief prayed for, it would seem that the pleader intended this action for one in claim and delivery, which is an action to recover specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages for the wrongful detention. *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. The gist of the action is the wrongful detention of the property. *Hynes v. Barnes*, 29 Mont. —, 75 Pac. 523. The value of the property is recoverable only when a delivery of the specific property cannot be had. *Hunt v. Robinson*, 11 Cal. 262; *Ricciotto v. Clement*, 94 Cal. 105, 29 Pac. 414. In such an action it is necessary to state that the plaintiff has either a general or special ownership in the property, with the right to its immediate possession, at the time of the commencement of the action. *Fredericks v. Tracy*, supra; *Afflerbach v. McGovern*, 79 Cal. 269, 21 Pac. 837; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Holly v. Helskell*, 112 Cal. 174, 44 Pac. 466; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Melton v. McDonald*, 22 Am. Dec. 437; *Noble v. Epperly*, 6 Ind. 414. The rule stated in *First National Bank v. McAndrews*, 7 Mont. 150, 14 Pac. 763, is inaccurate, as inspection will show.

The complaint fails to allege these necessary facts. However, it does show affirmatively that, when the action was begun, the defendant had sold and disposed of the stock. This alone would be fatal to the action as one in claim and delivery, for it is essential for the plaintiffs to allege and prove that at the commencement of the action the defendant wrongfully detained the possession of the property from them. *Ricciotto v. Clement*, supra; *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *Herzberg v. Sachse*, 60 Md. 426. "It is the condition and situation of things when the suit is commenced which furnish the grounds for the action." *Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564, and cases cited; *Burt v. Burt*, 41 Mich. 82, 1 N. W. 938. Whoever has the possession of the property to be replevied, and unlawfully detains it, is the proper person to be sued. *Rose v. Cash*, 58 Ind. 278. It is clear that, from what the complaint fails to show and does show, it does not state a cause of action in claim and delivery.

Does it state a cause of action in conversion? To recover in such an action, the plaintiffs must show a general or special ownership in the chattels, and a right to their immediate possession, at the time of the wrongful taking by defendant. *Wetzel v.*

Power, 5 Mont. 214, 2 Pac. 338; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Rear-don v. Patterson*, 19 Mont. 231, 47 Pac. 956; *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. —, 74 Pac. 413. The complaint makes no such showing, and it fails to state that the defendant has converted the property. "A conversion is any unauthorized act which deprives a man of his property permanently or for an indefinite time." *Union S. Y. & T. Co. v. Mallory S. & Z. Co.*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." *Cooley on Torts*, 428.

Was the sale and disposal of the stock by the defendant unauthorized or wrongful? The complaint answers the question in the negative. It recites that plaintiffs deposited their stock with defendant to enable the latter to pay its debts and current expenses. The defendant sold and disposed of the stock, and presumably applied the proceeds to the purposes intended when the stock was received from the plaintiffs. No other conclusion can be drawn from the wording of the complaint. And it does not appear but that these acts were done while the plaintiffs were holding the offices mentioned in the contract, and actively assented thereto.

Having determined that the complaint neither states a cause of action in claim and delivery nor in conversion, we will look to it to see whether plaintiffs may recover upon the contract. The plaintiffs concede the contract to be void, but do not indicate upon what ground they make such concession. In examining the subject, we find that section 431 of the Civil Code provides that the directors of a corporation must be elected annually by the stockholders or members. By the contract pleaded, it was agreed that the plaintiffs should be trustees (directors) until the business of the defendant should be in successful operation. Over four years elapsed, and yet it is alleged "that the business of the defendant has never yet been in successful or other operation." Section 2240 of the Civil Code reads: "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals." It thus appears that this contract is void and unlawful, as being directly contrary to an express provision of law, in so far as it provides for the plaintiffs to succeed themselves as trustees indefinitely; and, in so far as it provides that the plaintiffs shall have a like tenure of the offices of general manager and treasurer of the corporation, it is within the inhibition of the second and third provisions of section 2240. Similar contracts have frequently been declared void as against pub-

lic policy. *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Woodruff v. Wentworth*, 133 Mass. 309; *Forbes v. McDonald*, 54 Cal. 98; *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568. In *Swanger v. Mayberry*, 59 Cal. 91, the court said: "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy. *Ladda v. Hawley*, 57 Cal. 51; *Warren v. M. I. Co.*, 13 Pick. 521, 25 Am. Dec. 341; *Mitchell v. Smith*, 1 Bin. 118, 2 Am. Dec. 417; *Holt v. Green*, 73 Pa. 198 [13 Am. Rep. 737]; *Woods v. Armstrong*, 54 Ala. 150 [25 Am. Rep. 671]." In *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880, the court quoted the foregoing language from *Swanger v. Mayberry*, and continued: "This principle is in accord with the express provision of our Civil Code which makes that unlawful which is either contrary to the express provision of law, or 'contrary to the policy of express law, though not expressly prohibited.' Civ. Code, § 1667." See note to *Parsons v. Trask*, 66 Am. Dec. 506. Section 1667, referred to, is identical with section 2240, *supra*. And see sections 2150, 2151, 2153, 2162, 2163, Civ. Code.

The complaint contains no suggestion that the plaintiffs have repudiated the contract, nor any facts from which a repudiation thereof by them may be deduced. On the contrary, they allege that their side of the contract has been fully executed, but that the defendant ousted and ejected them, from the offices they held and were to hold by virtue of the contract, and refused and still refuses to permit them to hold and enjoy the same. They characterize these acts of defendant as being a violation of the contract and as wrongful. The following language from the opinion in *Williamson v. C., R. I. & P. R. Co.*, 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206, is pertinent here: "In this case the plaintiffs have fully performed the contract on their part. On their side the contract has been executed. The action is not brought in disaffirmance of their contract. Upon the contrary, they allege a full performance of the contract upon their part, and a breach of the contract upon the part of the defendant. It is upon this breach that they predicate their right to recover. Their action is upon the contract. \* \* \* We feel fully satisfied that for a breach of the contract, as alleged and proven, no damages are recoverable." The facts in the case from which we have just quoted were that the plaintiffs procured the conveyance to the defendant of certain lots in the city of Des Moines upon

consideration of a promise by defendant that it would build thereon passenger and freight depots, which should be the only ones built or maintained by it in said city. Defendant built and maintained both passenger and freight depots thereon, but, having also built a depot in another part of the city, an action was brought by plaintiffs to recover, as damages, the value of the lots conveyed. It was held that such action was based upon the contract, which was illegal and void as against public policy, and, the parties being in equal fault, the action could not be maintained. From the facts stated in the complaint before us, the parties, in making and carrying out the contract, which seems to have been fully executed by plaintiffs, and performed by defendant for over four years, were equally at fault. Therefore the maxim that, "as between those in equal fault, the possessor's case is the better," applies in all its force. See *Setter v. Elvey*, 15 Kan. 157; *Bagg v. Jerome*, 7 Mich. 145; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518; *Myers v. Meinrath*, 101 Mass. 368, 3 Am. Rep. 368; *Spalding v. Bank*, 12 Ohio, 544; *Tyler v. Smith*, 18 B. Mon. 793; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48. The general rule is thus stated by Lawson in 9 *Cyclopædia of Law & Procedure*, commencing on page 546: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, 'Ex dolo malo non oritur actio,' and, 'In pari delicto potior est conditio defendentis.' The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back." It is unnecessary to cite authorities in support of this text. "Their name is legion."

Counsel for plaintiffs says that they, upon a disaffirmance of the illegal contract, may recover the property transferred, as upon an implied promise on the part of the defendant to return or make compensation for it. Whether this position is tenable, we need not decide. It cannot be maintained in this action. The facts stated in the complaint are totally at war with such contention. *Phoenix Bridge Co. v. Keystone Bridge Co.*, 142 N. Y. 425, 37 N. E. 562. The position is ingenious, but has no foundation upon the facts alleged. Plaintiffs' house is built upon the sands.

It follows that the judgment should be affirmed.

OLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

LUTEY et al. v. CLARK et al.

(Supreme Court of Montana. June 28, 1904.)

CORPORATIONS — RECEIVERS — APPOINTMENT — SALES — VACATION — REVERSAL OF ORDERS — EFFECT — INVOLUNTARY TRUSTS — ELECTION — APPLICATION OF PROPERTY.

1. Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers, under Civ. Code, §§ 2058, 2059, declaring that one who wrongfully detains a thing is an involuntary trustee for the benefit of the owner, and that one who gains a thing by fraud, accident, mistake, or other wrongful act, unless he have some other or better right thereto, is an involuntary trustee for the benefit of the person who should otherwise have had it.

2. Where orders appointing a receiver and directing a sale of property are reversed on appeal the purchaser of the property at a sale had pending the appeal can recover purchase money paid although the purchased property in his possession has been subjected to the payment of the debts of the corporation for which the receiver was appointed.

3. Where a corporation prosecuted an appeal from orders appointing a receiver and authorizing the sale of certain of its property on which such orders were reversed, such appeal constituted an election by the corporation to have the property restored to it or applied to its benefit, and the application of such property to judgments recovered against the corporation constituted an application of the property to the corporation's benefit.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by William Lutey and another against W. A. Clark and another. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

A. J. Campbell, for appellants. W. A. Clark, Jr., Jno. L. Templeman, and Geo. F. Shelton, for respondents.

HOLLOWAY, J. On October 7, 1897, J. D. Thomas and George P. Bretherton, minority stockholders in the Thornton-Thomas Mercantile Company a corporation doing business at Butte, Mont., brought an action in the district court against that corporation for the purpose of having a receiver appointed to take charge of and wind up the business of the concern. The district court appointed one E. H. Hubbard as such receiver, who immediately took possession of the property, and upon the receiver's petition the district court on October 19th made an order for the receiver to sell at once at public auction or private sale the personal property belonging to the corporation. It appears that pursuant

to such order the receiver sold to Lutey Bros., appellants here, a portion of such personal property for the sum of \$3,241.19, which sum was paid over to the receiver, and by him deposited in the bank of W. A. Clark & Bro., the respondents, in the name of E. H. Hubbard, receiver; that thereafter on October 21, 1897, the Thornton-Thomas Mercantile Company applied to this court for a writ of certiorari to review the action of the district court in appointing the receiver and in making the order of sale above mentioned; that the cause was heard in this court, and on November 15, 1897, this court rendered its judgment and decision reversing the order of the district court appointing the receiver, and vacating all orders of that court made subsequently thereto, including the order of sale above mentioned (State v. Clancy, 20 Mont. 498, 52 Pac. 267); that on the 15th day of November, 1897, these respondents commenced an action in the district court against the Thornton-Thomas Mercantile Company to recover from said company the sum of \$5,653.96 then due and owing to respondents from such company, and caused a writ of attachment to be issued and placed in the hands of the sheriff of Silver Bow county, who thereupon served notice of garnishment upon these respondents through Alex. J. Johnston, the cashier of the banking house of W. A. Clark & Bro., and thereby attached said sum of \$3,241.19, together with other moneys deposited in the name of E. H. Hubbard, receiver, all aggregating the sum of \$3,949.78; that while Lutey Bros. were in possession of said personal property they sold and disposed of a portion thereof of the value of \$415.85; that thereafter, on the 16th day of November, 1897, various other creditors of the Thornton-Thomas Mercantile Company brought actions in the district court against said company, and caused writs of attachment to issue therein, and caused said personal property remaining in the possession of Lutey Bros. to be attached, and the sheriff took possession of said property under and by virtue of said writs of attachment, and thereafter, upon judgments duly made and entered, sold such property so attached to satisfy the judgments thus obtained against the Thornton-Thomas Mercantile Company; that on March 1, 1898, E. H. Hubbard made demand upon W. A. Clark & Bro. for the moneys so deposited in said bank, but such demand was then and thereafter continuously refused; that on the 25th of May, 1898, the said Hubbard sold and assigned all interest that he had in said money so deposited to Lutey Bros., appellants herein; and thereafter, on May 26, 1898, Lutey Bros. commenced this action in the district court against W. A. Clark & Bro. to recover the said sum of \$3,949.78, with interest and costs. The defendants answered, and thereafter the parties agreed upon the facts of the case, and an agreed statement was filed February 13, 1901, containing the facts heretofore re-

cited, and upon such statement of facts the district court found the issues for the defendants W. A. Clark & Bro., and entered judgment in their favor for their costs. From this judgment this appeal is prosecuted.

This court having determined in the certiorari proceedings that the action of the district court in appointing the receiver was without jurisdiction, and having reversed that order and annulled all orders made subsequently thereto, particularly the order under which the receiver pretended to sell certain personal property to Lutey Bros., these appellants, it becomes a question for determination then whose money was it that was attached in the hands of W. A. Clark & Bro., deposited there by Hubbard, the receiver, and whose goods were they that were attached in the hands of Lutey Bros. at the suits of other creditors of the Thornton-Thomas Mercantile Company? It is said that, as Hubbard and Lutey Bros. exercised acts of dominion over these goods without the consent of the mercantile company, and in opposition to its interests, each is liable in conversion; that after the decision of this court Hubbard became an involuntary trustee for that company, and, as the company then could have pursued their goods or the particular funds derived from their sale, respondents W. A. Clark & Bro. could do likewise. Much discussion is indulged in by counsel for respondents which is not pertinent here. Assuming that the pretended sale by Hubbard to Lutey Bros. was wrongful, and constituted a conversion of the goods, and that Lutey Bros., by their acts of ownership over the goods in selling a portion of them, were likewise guilty of a conversion, it must be conceded that the mercantile company, while it could maintain an action against Hubbard for conversion, or could pursue Lutey Bros., and elect either to sue them as for a conversion of the property or in claim and delivery for the return of the specific property or such portion of it as remained in their possession, it cannot maintain an action in conversion against Hubbard and a like action against Lutey Bros., and thereby enforce two judgments for the same cause of action, or it cannot pursue Hubbard in conversion and sue Lutey Bros. for the specific property at the same time. The company was entitled to the property or to its value, but not to both. The effect of the decision of this court in vacating the order of sale was to declare such sale void ab initio; that in fact no sale had ever been made, and that the mercantile company was still the owner of the goods of which Lutey Bros. had come into possession; and whatever right the mercantile company had to make an election to take the property or sue for damages for its conversion, until it exercised such election, the ownership of the property was in it, and such property was subject to attachment at the instance of any

of its creditors. The decision of this court was to the effect that no sale had been made; in other words, that the pretended sale was without effect, and conveyed no title to the property. Hubbard, having received the money belonging to Lutey Bros. on such void sale, became (on such sale being declared void) an involuntary trustee of Lutey Bros. for the amount of money received from them; and likewise Lutey Bros., having received such goods on such pretended sale, became an involuntary trustee for the mercantile company for the goods which they retained and for the money which they had received from a sale of the portion of the goods disposed of by them.

Sections 2958 and 2959 of the Civil Code provide: Section 2958: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2959: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Section 4334 of the Civil Code is cited, and it is said that the presumption of the measure of damages arising from the wrongful conversion of personal property cannot be repelled in favor of one whose possession is wrongful from the beginning by his subsequent application of the property to the benefit of the owner without the owner's consent. But this section has no application here, for the record discloses that the mercantile company did elect to have the sale set aside, to have its property restored to it or applied to its benefit, and when it was applied to the satisfaction of judgments recovered against the mercantile company it was applied to the company's benefit. The proceedings in this court were taken at their instance, and constituted such election.

We are of the opinion that this disposes of the case, and it is not necessary to decide the abstract question, can a plaintiff in an attachment suit secure a lien upon property in his own possession by having himself served as garnishee?

As it does not appear from this record what disposition was ever made by appellants of the \$415.85 received by them from the sale of a portion of the goods belonging to the mercantile company, this court is unable to make any order respecting the same.

The judgment is reversed, and the cause remanded to the district court, with directions to enter judgment in favor of the plaintiffs (appellants here) for \$3,241.19, together with interest and costs.

Reversed and remanded.

BRANTLY, C. J., concurs. MILBURN, J., not having heard the argument, takes no part in this decision.

# LANDT et al. v. SCHNEIDER.

(Supreme Court of Montana. June 27, 1904.)

LANDLORD AND TENANT—LEASE—ABANDONMENT—WARRANTIES—OBLIGATION TO REPAIR—STATUTES—APPLICATION—EVIDENCE—EXTENSION OF LEASE—ACTS OF ATTORNEY—WRITTEN AUTHORITY—STATUTE OF FRAUDS.

1. Leaving the key to a leased building at the lessor's place of business over his protest, and in spite of his refusal to accept a surrender of the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent.

2. In the absence of statute or agreement, there is no implied warranty that leased premises are suitable for the purpose for which they are demised.

3. In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.

4. Civ. Code, §§ 2620, 2621, providing that, where a leased building is intended for the occupation of human beings, the lessor must, in the absence of agreement to the contrary, put the same in a condition fit for habitation, and repair subsequent dilapidations, etc., does not apply to business property, but is limited in its application to property used for dwelling-house purposes.

5. Where there was nothing contained in the description of property in a lease by which it could be determined from the lease itself whether it was intended for occupation by human beings or not, which was one of the issues made by the pleadings, parol evidence was admissible to explain the purpose for which the property was leased, together with its condition and description.

6. A letter written subsequent to the beginning of an action for rent, which did not by its terms ratify any previous act of one of the lessors, was inadmissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessors.

7. A letter written by R. and B., two lessors, to the third lessor, to the effect that they had concluded that R. should go to the place where the third resided, and agree concerning the leased premises, was inadmissible to show that R. had authority to extend the lease as agent of B.

8. Where one of several lessors of a building had no written authority to sign an extension agreement containing an agreement for a conveyance of the land, for one of the other lessors, as required by Civ. Code, § 2185, subd. 5, such extension agreement, which was for more than a year, was invalid.

9. Where it did not appear that the appeal record contained all the evidence introduced at the trial, or the substance thereof applicable to the errors assigned, the Supreme Court could not review the sufficiency of the evidence to sustain the verdict.

Commissioners' Opinion. Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Louis Landt and others against E. G. Schneider. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Blackford & Blackford, for appellants.

POORMAN, C. On February 26, 1900, the plaintiffs, Landt, Ritter, and Buxman, leased to defendant, Schneider, and one Fleiner

¶ 2. See Landlord and Tenant, vol. 32, Cent. Dig. § 442.

certain property for the term of one year. Schneider acquired the interest of Fleiner in the lease, and on the 10th of September, 1900, it was agreed between plaintiffs and defendant, Schneider, that the time of the lease should be extended for an additional year from the 26th day of February, 1901. Schneider occupied the premises until the 25th day of February, 1901. This action was to obtain a judgment against Schneider for the rent claimed to be due for the time named in the extension of the lease. Trial by jury. Verdict and judgment for defendant. Appeal from the judgment and from an order overruling plaintiffs' motion for a new trial.

The defense is to the effect: (a) That defendant surrendered the possession of the premises at the close of one year, and that plaintiff Landt accepted the same. (b) That the buildings leased were occupied, and intended to be occupied, by human beings; that the same had become unfit for such occupancy; that the lessors had been notified, and had failed and refused to make repairs.

1. Where material facts relative to the surrender to and acceptance by the lessor of leased premises are in dispute, the question thus presented is to be determined by the jury; but in this case, for reasons hereinafter stated, we can only say generally that leaving the key of the leased building at the lessor's place of business over the protest of the lessor, and in spite of his refusal to accept the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent. *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

2. It is an elementary principle of law that, in the absence of a statute or agreement, there is no implied warranty that leased premises are suitable for the purposes for which they are demised, or that the lessor will keep the property in repair. *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Petz v. Voigt Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531; *Davidson v. Fischer* (Colo.) 7 Am. St. Rep. 267, and note; *Minneapolis C. Co. v. Williamson* (Minn.) 38 Am. St. Rep. 473, and note; *Hines v. Willcox*, 34 L. R. A. 824, note. Sections 2620, 2621, Civ. Code, provide, however, that, where the building leased is intended for the use and occupation of human beings, the lessor must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and must repair all subsequent dilapidations, etc.; that, if he does not make such repairs within a reasonable time after notice, the lessee may repair the same, where the cost does not exceed one month's rent, or may vacate the premises, in which case the lessee shall be discharged from the further payment of rent. The decision in *York v. Steward*, above cited, was based on a state of facts arising prior to the enactment of this statute, and

merely holds to the common-law doctrine, without making reference to the statute, though the decision was not rendered until subsequent to the enactment of the sections above referred to. This statute, however, is confined to property used for dwelling-house purposes, and is not applicable to business property. *Edmison v. Asleson* (Dak.) 27 N. W. 82; *Minneapolis C. Co. v. Williamson*, supra.

3. The lease between the parties describes the property as "the Maiden brewery plant \* \* \* comprising about four and one-half acres of ground together with the brewery building and machinery and appliances and appurtenances thereto belonging or in any wise appertaining." The written agreement extending the lease does not give any further description of the property leased. It was denied in the answer that the lessor had any land, and alleged that the building was situate upon government land. No proof, so far as this record shows, appears to have been introduced upon this subject by either party. There is nothing in the description of the property contained in the lease by which it can be determined from the lease itself whether it was intended for occupation by human beings or not, and this was one of the issues made by the pleadings. Parol evidence was admissible under these issues to explain the purposes for which the property was leased, and, as incidental thereto, its condition and description, and the court did not err in admitting such evidence.

4. The court refused to admit in evidence a letter which was offered by plaintiffs for the purpose of showing that Landt had authority to act for and on behalf of plaintiff Buxman with reference to leasing this property. This letter was written by Buxman to Landt subsequent to the beginning of this action, and does not by its terms ratify any previous act of the plaintiff Landt; and the same is also true of plaintiffs' Exhibit A, which is the power of attorney executed subsequent to the commencement of the suit, but does not by its terms relate to or ratify past transactions.

5. Plaintiffs' Exhibit C was a letter written by Buxman to Landt, dated prior to the written extension of the lease, containing this statement: "We [Ritter and Buxman] have concluded that Mr. Ritter goes to your place and all what he agrees about the brewery in Maiden is all right with me." This letter is signed by George Buxman. Plaintiffs sought to show by this letter that Ritter had authority to enter into the agreement of September 10th extending the lease as the agent of Buxman. The court refused to admit the letter. This letter is a statement by plaintiff Buxman to plaintiff Landt, and does not purport to grant written authority to Ritter to contract for and on behalf of Buxman. Subdivision 5, § 2185, Civ. Code, provides that an agreement for leasing for a longer period



than one year, or for the sale of real property, or for an interest therein, must be in writing, and such agreement, if made by an agent, is invalid, unless the authority of the agent be in writing, subscribed by the principal sought to be charged. Section 1504, Civ. Code, provides that, when an attorney in fact executes an instrument transferring an interest in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact. Ritter had no written authority, as appears from this record, to contract for Buxman; nor is Buxman's name signed to the agreement extending the time of this lease. This lease and agreement of extension also embody an agreement for the sale and conveyance of this land to defendant. Under the facts here presented, this alleged agreement of Buxman amounts to nothing more than a parol agreement to extend the terms of the written lease and agreement to convey for more than one year beyond the date when the contract of extension was entered into. In *Delano v. Montague*, 4 Cush. 42, the court says, in substance, that a parol agreement between the parties to a lease in writing, entered into before the expiration of the lease, that the lessee would take the premises for another year on the same terms, is within the statute of frauds, as an agreement not to be performed within a year, and no action can be maintained thereon. The agreement extending the terms of this written lease as to plaintiff Buxman is within the statute of frauds (subd. 5, § 2185, Civ. Code), and is wholly void. It is not such an agreement as the defendant could have enforced against the plaintiff Buxman.

Query: Whether this did not invalidate plaintiffs' entire cause of action?

6. Appellants also claim that the evidence is insufficient to sustain the verdict, and this assignment appears to have been intended as presenting the real issue on this appeal. The record, however, does not positively or even inferentially disclose that it contains all the evidence introduced at the trial thereof, or the substance thereof bearing upon the errors assigned. This court has so many times decided that, in order to present a question of this character, the record must disclose all the evidence introduced at the trial below, or its substance, applicable to the errors assigned, that the rule is now *stare decisis*, and we cannot recommend that it be changed. A collection of the cases on this point may be found in *King v. Pony Gold M. Co.*, 28 Mont. 74, 72 Pac. 309.

We therefore recommend that this judgment be affirmed.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

#### DAWES v. CITY OF GREAT FALLS.

(Supreme Court of Montana. June 27, 1904.)

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—PERSONAL INJURIES—ACTION—DEMAND—APPEAL—RECORD.

1. Where defendant's motion for new trial was denied, and he appealed from the judgment alone, assignments of error referring to instructions, not in the record as a part of the judgment roll, but in the statement on motion for new trial, cannot be considered.

2. Pol. Code, §§ 4811, 4812, requiring all accounts and demands against a city to be presented to the council, itemized and accompanied by affidavit with necessary vouchers, etc., within one year from the date the same accrued, and barring claims not so presented, do not apply to a claim for damages arising from personal injuries.

3. Where an appeal is from the judgment, and not from the order overruling the motion for new trial, the court will not determine the sufficiency of the evidence, but only determine whether there is any evidence to support the judgment.

4. On appeal the court will not consider the question of alleged variance between the proof and complaint, not called to the attention of the court below.

Commissioners' Opinion. Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by E. A. Dawes against the city of Great Falls. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Freeman, for appellant. J. A. McDonough, for respondent.

CLAYBERG, C. C. Appeal by the city of Great Falls from a judgment of \$1,000 entered against it. The cause of action stated in the complaint is based upon the alleged negligence of the city in making a dangerous excavation in one of its streets, and negligently allowing such excavation to remain in a dangerous condition, with full knowledge of such condition, whereby plaintiff was injured by falling into the same. The answer denied all the allegations of the complaint, except that of its corporate character, and set forth as an affirmative defense the contributory negligence of plaintiff. The replication denied all the allegations of the answer. A trial was had by the court with a jury, which resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,000 damages. The defendant moved for a new trial, which was denied, and afterwards appealed from the judgment alone. At the close of plaintiff's evidence, defendant's attorney made a motion for nonsuit, which was overruled.

Appellant assigns eight errors, the first of which is the overruling of the motion for nonsuit; the second to the seventh, inclusive, are to the giving of certain instructions to the jury; and the eighth based upon the reason that the complaint does not state

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1697.

facts sufficient to constitute a cause of action.

Under the decisions of this court, assignments of error 2 to 7 cannot be considered, because they all refer to instructions of the court, and these instructions are not in the record as a part of the judgment roll, but in the statement on motion for a new trial. *Butte M. & M. Co. v. Kenyon*, 76 Pac. 696; *Shropshire v. Sidebottom*, Id. 941; *Glavin v. Lane*, 74 Pac. 406; *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972. While the rule thus announced may seem harsh in certain instances, and savor considerably of technicality, it is based upon our statutes, and in no instance can it work a hardship if the attorneys preparing the record on appeal give this preparation proper attention. Further, this court announced to the profession in the *Featherman Case*, *supra*, that "counsel may, upon timely application to the court, upon suggestion of diminution, amend their records."

This leaves only two questions for consideration, viz.: (1) Does the complaint state facts sufficient to constitute a cause of action? and (2) did the court err in overruling the motion for a nonsuit?

1. Of the complaint: The only ground of insufficiency charged is "that there is no allegation that the demand of plaintiff was ever presented to the city council, as required by the provisions of sections 4811 and 4812 of the Political Code." These two sections are as follows:

"Sec. 4811. All accounts and demands against a city or town must be submitted to the council, and if found correct must be allowed, and an order made that the demand be paid, upon which the mayor must draw a warrant upon the treasurer in favor of the owner, specifying for what purpose and by what authority it is issued, and out of what fund it is to be paid, and the treasurer must pay the same out of the proper fund.

"Sec. 4812. All accounts and demands against a city or town must be presented to the council, duly itemized and accompanied by an affidavit of the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon."

It is apparent from these two sections that the requirement that "all accounts and demands" against the city should be submitted to the council was for the purpose of al-

lowing the city to audit such accounts and demands and direct their payment. This purpose could not apply to a claim for damages arising from a tort. It would be difficult to present a demand arising out of a tort under the provisions of these two sections. The great weight of authority as to legislative provisions of the character of these two sections is that they do not apply to demands arising out of torts, but simply to accounts and demands upon contracts. *Adams v. City of Modesto* (Cal.) 63 Pac. 1083; *Sutton v. City of Snohomish* (Wash.) 39 Pac. 273, 48 Am. St. Rep. 847; *Kelley v. Madison*, 43 Wis. 638, 28 Am. Rep. 576; *Lay v. City of Adrian*, 75 Mich. 438, 42 N. W. 959; *Warren v. Davis*, 43 Ohio St. 447, 3 N. E. 301; *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925; *McGaffin v. Cohoes*, 74 N. Y. 387, 30 Am. Rep. 307; *Howell v. City of Buffalo*, 15 N. Y. 512; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43. A full discussion of the principles involved in this application of these sections is found in the above-cited authorities, and it would serve no useful purpose to repeat the same in this opinion.

2. As to the motion for nonsuit: The motion for nonsuit was based upon the following grounds: "(1) The evidence conclusively shows that the plaintiff was guilty of contributory negligence. (2) That there is no evidence of defendant's negligence. (3) That the evidence introduced is not sufficient to entitle plaintiff to a verdict. (4) For the reason that the facts stated in the complaint are not sufficient to support the judgment in this action." In the argument of the error assigned on the overruling of this motion, counsel takes four positions, some of which were not urged in the court below. They are as follows: (1) Insufficiency of the complaint, because it does not allege compliance with sections 4811 and 4812 of the Political Code. (2) There was a fatal variance between the proof and the allegations of the complaint. (3) Because the evidence does not disclose that the excavation was the proximate cause of plaintiff's injury. (4) Because the evidence conclusively showed that plaintiff had knowledge of the excavation of the street, that he could have easily avoided the same, and that he acted negligently.

Upon motions for nonsuit, everything is deemed proved which the evidence tends to prove, and no such motion should be granted unless the facts disclosed are such that all reasonable men must draw the conclusion from them that the plaintiff cannot recover. *Nord v. B. & M. M. Co.* (Mont.) 75 Pac. 681, and cases cited. We have examined plaintiff's evidence given prior to the making of this motion, and are satisfied that it tended to show facts sufficient to sustain his cause of action. It made a *prima facie* case. We cannot consider the question of the sufficiency of the evidence, because the ap-

peal is from the judgment, and not from the order overruling the motion for new trial. *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422. This court can only examine the evidence to determine the legal question whether there is any evidence to support the judgment.

Neither can we consider the question of the alleged variance between the proof and the complaint, as this point was not called to the attention of the court below. Had it been, and the court below found such variance, it might have permitted an amendment to the complaint.

Therefore it follows that the only error assigned upon the correctness of the ruling on this motion is that the complaint does not state facts sufficient to constitute a cause of action. We have considered this proposition fully above, and are satisfied that the complaint does state sufficient facts to constitute a cause of action.

We therefore recommend that the judgment appealed from be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

#### MURPHY v. LEVENGOOD.

(Supreme Court of Montana. June 26, 1904.)

ELECTIONS — CONTEST — STATEMENT — VERIFICATION — AFFIDAVIT — SUFFICIENCY.

1. Under Code Civ. Proc. § 2014, requiring that a person contesting an election shall file a statement setting forth certain facts and the particular grounds of such contest, verified by the affidavit of the contesting party that the matters therein contained are true, an affidavit was sufficient, though the grounds on which the contest was based were alleged on information and belief.

2. Code Civ. Proc. §§ 2021, 2016, permitting the court to dismiss proceedings contesting an election, if the statement of the cause of contest is insufficient, and declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed for want of form, if the grounds are alleged with such certainty as to advise defendant of the particular cause for which such election is contested, merely require that the contestant shall definitely apprise the contestee of the charges relied on, so that he may be prepared to meet them with appropriate proof.

Commissioners' Opinion. Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Proceedings by Felix Murphy against Newton E. Levengood. From a judgment for defendant, plaintiff appeals. Reversed.

J. R. Boorman, for appellant. Jno. J. McHatton, W. C. Jones, R. B. Smith, Jos. McCaffeny and T. O'Leary, for respondent.

CALLAWAY, C. This action was brought by the appellant to contest the election of respondent to the office of county assessor of

Deer Lodge county, and is a result of the election held in November, 1902. It is brought under the provisions of sections 2010 to 2025, inclusive, of the Code of Civil Procedure. To the complaint, or statement of contest, the respondent interposed a motion asking that the complaint be stricken from the files, and the contest dismissed, "for the reason that the grounds upon which the contest is based are alleged upon information and belief, and for the reason that the verification to said petition is made upon information and belief, and is not in accordance with the statute in such cases made and provided." The court sustained the motion and entered judgment thereupon in favor of the respondent. From the judgment this appeal is prosecuted.

An inspection of the verification to the complaint discloses that it is in practically the same form as that appended to the complaint in *Lane v. Bailey*, 29 Mont. —, 75 Pac. 191. The case of *Kirk v. Rhoads*, 46 Cal. 398, referred to in *Lane v. Bailey*, is applicable to this case upon both of the grounds urged in the motion, and we therefore quote the following language from it: "The affidavit in this case was in the ordinary form of a verification of a pleading, and averred that the statement was true, except as to matters therein set forth on information and belief, and as to those matters affiant believed it to be true. This was a substantial compliance with the statute. To hold that the contestant must make oath to the absolute verity of every averment of the statement would prevent the contest of an election in almost any conceivable case, and would work a practical abrogation of a beneficial law. From the very nature of the case, many, and frequently most, of the essential facts must come to the knowledge of the contestant through the statements of others; for he cannot be present at the various polling places to observe the conduct of the officers of election. We think the object of the provision was merely to require a verification of the statement, but not to prescribe its form or terms. The object of the law is gained when the affidavit is in the ordinary form of a verification of a pleading." The Supreme Court of Indiana in *Curry v. Baker*, 31 Ind. 151, said that to construe the language of the statute as is contended by respondent, "and require the affidavit to be founded alone upon the personal observation of the contestor, would involve a practical change in the title of the act, so that it should read, 'An act to prohibit the contesting of any election.'" And see *McCrary on Elections*, § 433. In *McCrary on Elections* (4th Ed.) § 431, it is said: "It may be stated as a general rule, recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections." It is thus apparent

that the objections lodged by the contestee against the complaint are untenable.

We have examined the complaint to ascertain whether the court was correct in sustaining the contestee's motion upon the ground that the complaint is bad for want of substance. Section 2021, Code of Civil Procedure, provides that the court may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient. Section 2016, following, provides: "No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested." While it is true that the complaint in some particulars is subject to criticism as being indefinite, yet we cannot say that it does not state a cause of action. All that the statute requires is that the contestant shall definitely apprise the contestee of the charges relied upon, so that he may be prepared to meet them with appropriate proof. Except in one or two instances, which are not fatal to the maintenance of the action, we think the contestee is advised with certainty to a common intent of the charges which he is to meet.

We are therefore of the opinion that the judgment should be reversed, and the cause remanded for further proceedings.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

MILBURN, J., not having heard the argument, takes no part in this decision.

STATE ex rel. ANACONDA COPPER MIN. CO. v. CLANCY, Judge, et al.

(Supreme Court of Montana. June 22, 1904.)

STATES — LEGISLATURE — EXTRA SESSION — AUTHORITY OF GOVERNOR — PROCLAMATION — STATUTES — VALIDITY — UNIFORMITY — JUDGES — ELIGIBILITY — DISQUALIFICATION — PREJUDICE — CONSTITUTIONAL LAW — DUE PROCESS OF LAW — DELAY OF JUSTICE.

1. The authority of the Governor over the Legislature is limited to the recommendation of such legislation as he deems expedient, as authorized by Const. art. 7, § 10, the subjects of which, in case of extra sessions, are required by section 11 to be enumerated in the proclamation or in the Governor's message to the Assembly, after which the power of the Legislature to enact legislation on such subjects is plenary.

2. A proclamation of the governor convened the Legislature in extra session in December, 1903, for the purpose of enacting general legislation by which the bias and prejudice of district judges should be made a disqualification of such judges to try any case that may come before them, as well as legislation making suitable provision for the trial of such case or

cases in such event. The Legislature met and passed Act Dec. 10, 1903, amending Code Civ. Proc. § 180, so as to provide that, on the filing of an affidavit of prejudice against a district judge, he should no longer act, and also amended section 615, so as to provide that in such case, if a qualified judge should be called to try the cause within 30 days after such disqualification, no change of venue therefor should be had. *Held*, that such legislation was germane to the Governor's call, as required by Const. art. 7, § 11.

3. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, so as to provide for the disqualification of a district judge by the mere filing of an affidavit of prejudice, is not in violation of Const. art. 8, § 16, providing the qualifications of district judges; such qualifications being limited to qualities necessary to render the person eligible to the office, without application to his qualifications to try particular cases.

4. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the case except to arrange his calendar, notify another judge to try the case, or, if he fails to do so within 30 days, to change the place of trial, etc., and amending section 615, so that, if another judge is called in within such time, the change of venue shall not be granted, does not contravene, but is in harmony with, Const. art. 8, § 12, providing that any judge of the district court may hold court for any other district judge, and shall do so when required by law, since under the statute, both before and after its amendment, a judge can only be secured to preside for another on the invitation of a resident judge.

5. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, providing for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Const. art. 8, § 11, conferring on district courts original jurisdiction in "all" cases in law and in equity, by reason of the fact that the filing of the affidavit, without a determination of the question of prejudice, deprives the judge of jurisdiction, since it is the imputation of prejudice, and not prejudice in fact, that constitutes the disqualification, which imputation is not subject to judicial investigation.

6. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Const. U. S. Amend. 14, § 1, nor Const. Mont. art. 3, § 27, as depriving a litigant of his property without due process of law, in that no notice is required to be given of the filing of the disqualifying affidavit, since, as the mere filing of the affidavit works the disqualification, the giving of notice would serve no purpose.

7. Since Act Dec. 10, 1903, amending Code Civ. Proc. § 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is general in its terms and operation throughout the state, and therefore sufficiently complies with Const. art. 8, § 26, requiring all laws relating to courts to have a uniform operation, it is immaterial that it was passed at an extra session of the Legislature, called by the Governor for the purpose of relieving an industrial condition existing in only three of the populous cities of the state.

8. Code Civ. Proc. § 180, as amended by Act Dec. 10, 1903, provides "that any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding when the other party makes and files an affidavit that he had reason to believe and does believe he cannot have a fair trial before a district judge by reason of the bias or prejudice of such judge." *Held* that, though such section as amended was defective in declaring that a "justice" of the Supreme Court or a justice of the peace should not act as such in any case in the district

court, it would be assumed that the word "judge" in the first sentence referred to district judge, and the words "justice" and "justice of the peace" would be disregarded.

9. Code Civ. Proc. §§ 180, 615, as amended by Act Dec. 10, 1903, providing for the disqualification of district judges on the filing of an affidavit of prejudice, and declaring that a change of venue shall not be granted for that reason if, within 30 days after the filing of the affidavit, another judge shall be called in to try the case, etc., does not authorize the disqualifying affidavit to be filed after the trial of the case has been begun, after which period no change of venue can be granted.

10. Code Civ. Proc. § 180, as amended by Act Dec. 10, 1903, provides for the disqualification of district judges by the filing of an affidavit of prejudice, upon the filing of which the judge is authorized to transfer the cause or call in another judge to try the same. Section 615 authorizes a change of venue where a judge is disqualified, and as amended by the same act declares that, if a judge is disqualified for prejudice, no change shall be granted if another judge is called in to try the cause within 30 days. *Held*, that such amendatory act was not in contravention of Const. art. 3, § 6, guarantying administration of justice without delay, in that it permits a party filing a disqualifying affidavit to prevent further action in case the disqualified judge will not call in another judge, since in that event the opposite party would at once be entitled to a change of venue under section 615.

11. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, authorizing each party to a suit to disqualify five district judges by filing an affidavit of prejudice, could not be held in contravention of Const. art. 3, § 6, guarantying the administration of justice without delay, though it authorizes the successive disqualification of two-thirds of the district judges in the state, in the absence of a showing that the "necessary" consequence of the enforcement of the act will be to deny litigants a speedy trial.

Application by the state, on the relation of the Anaconda Copper Mining Company, for a writ of prohibition against the Second judicial district court and William Clancy, judge thereof. Writ granted.

A. J. Shores, C. F. Kelley, and Forbis & Evans, for relator. John J. McHatton, T. J. Walsh, J. M. Denny, Toole & Bach, and J. B. Roote, for respondents.

HOLLOWAY, J. On November 10, 1903, the Governor of Montana issued his proclamation convening the Eighth Legislative Assembly in extraordinary session at the capital of the state on December 1, 1903. The purposes for which this Assembly was convened are indicated in the preamble to the proclamation. After reciting the fact that a large number of petitions had been addressed to him, asking that the Legislature be convened in extra session, the Governor continues: "Whereas, they [certain petitioners] further represent the desirability of general legislation by which the bias and prejudice of district judges be made a disqualification of such judges to try any case that may come before them or either of them, as well as legislation making suitable provision for the trial of such case or cases in such event: \* \* \* Now, therefore, I, J. K. Toole, Governor of the state of Montana, \* \* \* do hereby

and by virtue of the power and authority in me vested by the Constitution convene the Eighth Legislative Assembly in extraordinary session, at Helena, Montana, the capital of said state, at 12 o'clock m., on December 1, A. D. 1903, for the purpose of considering the legislation hereinbefore referred to and taking such action thereon as it may deem wise or expedient."

Pursuant to this call the Legislature met and passed two measures, which received the Governor's approval and are now before us for consideration. The first of these is entitled "An act to amend section 615 of the Code of Civil Procedure." The other is entitled "An act to amend section 180 of the Code of Civil Procedure." The only material change made in section 615 was to provide that: "If any qualified district judge shall be called in and shall within thirty days after the motion is made, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made." Section 180 was amended by adding thereto subdivision 4, the portions of which material here read as follows: "(4) When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. \* \* \* Upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding. No more than five judges can be disqualified for bias or prejudice, in said action or proceeding, at the instance of the plaintiff, and no more than five at the instance of the defendant in said action or proceeding. \* \* \*

Thereafter an action was pending, ready for trial, in department No. 2 of the district court of the Second judicial district of Montana, which action is entitled "Anaconda Copper Mining Company, Plaintiff, versus Montana Ore Purchasing Company and Others, Defendants," and numbered 8,833 of the files and records of that court. This cause was set for trial for the 10th day of February, 1904. On February 5, 1904, the plaintiff, through its secretary and agent, made and filed an affidavit in accordance with the provisions of subdivision 4 of section 180, as amended by the act to which reference is made above. The filing of this affidavit was called to the attention of the court; but, notwithstanding this fact, the district judge presiding in the department in which the cause was set for trial, and against whom the affidavit of disqualification had been

filed; announced his intention of proceeding with the trial. Thereupon an alternative writ of prohibition was issued from this court, directed to the district court and to the Honorable William Clancy, judge of department 2 thereof, requiring him to desist and refrain from any further proceedings in the cause until the further order of this court. This writ was made returnable, and the matter was argued and submitted to this court, on February 27, 1904.

The two acts above referred to are companion measures. The amendment to section 615 is intended to carry into effect the provisions of section 180 as amended. Numerous objections are lodged against the constitutionality of these acts. However, no particular infirmity is pointed out respecting the act amending section 615. If the act amending section 180 is valid, it is quite clear that no constitutional objection can be urged against the other.

1. In the first instance it is contended that the legislation is not within the purview of the Governor's call. Section 11, art. 7, of the Constitution provides: "He [the Governor] may on extraordinary occasions convene the Legislative Assembly by proclamation, stating the purposes for which it is convened, but when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the Governor." There is nothing contained in the Governor's recommendations to the Legislature, after it convened, in any manner qualifying the terms of the proclamation, so far as the particular measures under consideration are concerned. It must be borne in mind that the Governor is not a part of the lawmaking body. When convened in regular session, the power of the Legislature to enact laws is plenary, except in so far as the Constitution has limited it. *State v. French*, 17 Mont. 54, § 41 Pac. 1078, 30 L. R. A. 415. The utmost extent of the Governor's authority, so far as constructive legislative work is concerned, is to recommend such measures as he shall deem expedient (section 10, art. 7, Const.); but there is not any legal or moral obligation resting upon the members of the Legislative Assembly to follow such recommendations, if they deem them unwise or the measures indorsed inexpedient. When the exigencies of the times require it, the Legislature may be called in extraordinary session by the Governor to consider particular subjects of legislation. Those subjects must be enumerated in the proclamation or in the Governor's message to the Assembly, and the power of the Legislature is limited to enacting laws affecting those subjects only. Section 11, art. 7, above. In other words, the Governor may submit the subjects with reference to which legislation is desired, but the lawmaking body then has absolute power to construct such laws respecting those subjects as it shall see fit (unless restrained by constitutional inhibition),

or to disregard the subjects altogether and not enact any measures respecting them. The Governor has the same authority at a special session of the Legislature that he has at a regular session to recommend any particular measures which he may deem expedient; but such recommendation does not measure or limit the legislative authority. That authority is only limited by the scope of the subjects submitted for consideration, and any recommendation respecting a particular measure would not be binding upon the legislative assembly.

In order to determine whether a particular measure is germane to the subjects stated in the Governor's proclamation, it is incumbent upon us to examine the proclamation as a whole (*Chicago, B. & Q. R. R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441) giving to the language used its ordinary meaning. It is fairly deducible from an examination of the proclamation that the Governor's purpose in calling the Legislative Assembly in extraordinary session was to secure, if possible, the enactment of some measure whereby a district judge, charged with entertaining bias and prejudice against a litigant, to such an extent as to engender the belief in the litigant's mind that he could not have a fair and impartial trial of his cause, should not be permitted to sit and hear the same. It was not the Governor's purpose to advocate any particular measure, but, with this subject for consideration laid before the lawmaking power, to permit it freely to exercise its legislative discretion in framing any measure which might accomplish the result sought in calling the members together. To say that because, in his proclamation, the Governor specified "general legislation by which the bias and prejudice of district judges be made a disqualification of such judges to try any case," etc., no law enacted in pursuance thereof would be valid which did not expressly declare bias and prejudice a disqualification, would be to lodge in the Governor greater power than was ever contemplated by the constitutional provision under consideration. He cannot in advance tie the hands of the Legislature. He cannot submit the draft of a proposed bill, and direct the Legislature to enact it, or no measure at all; but any enactment which will meet the ends sought to be accomplished in his call must be deemed to be embraced within the limits of the subjects submitted for consideration. That a liberal rule for the interpretation of these proclamations has been generally applied, to the end that the legislation enacted in pursuance thereof be operative, is apparent from the adjudicated cases. *Chicago, B. & Q. R. R. Co. v. Wolfe*, above; *Baldwin v. State*, 21 Tex. App. 591, 3 S. W. 109; *In re Governor's Proclamation*, 19 Colo. 333, 35 Pac. 530; *Mitchell v. Turnpike Co.*, 22 Tenn. 456. We are therefore of the opinion that the act amending section 180 above is within the purview of the Governor's call, and, as the amendment to

section 615 is obviously intended to carry section 180 as amended into effect, by providing a means by which all cases in which a district judge is disqualified may be tried, this amendment to section 615, then, is clearly comprehended within that portion of the proclamation quoted above, which reads: "Legislation making suitable provision for the trial of such case or cases in such event."

2. It is urged that the necessary effect of this act amending section 180, in providing for the disqualification of a judge by the mere filing of an affidavit, is to do by indirection what the Legislature could not do directly—add to the qualifications prescribed for district judges by section 16, art. 8, of the Constitution. That section reads: "No person shall be eligible to the office of judge of the district court unless he be at least twenty-five years of age and a citizen of the United States, and shall have been admitted to practice law in the Supreme Court of the territory or state of Montana, nor unless he shall have resided in this state or territory at least one year next preceding his election." It is elementary that the Legislature cannot impose any additional conditions to those enumerated above as a prerequisite to any man's holding the office of district judge who might be elected or appointed to that office, and neither do we think that any effort in that direction was made by the enactment of the amendment to section 180 above. The qualifications enumerated in section 16, art. 8, above, have to do with the eligibility of a man to hold the office, but it does not follow that, because a district judge possesses those qualifications, he shall have a right, by virtue of his office or otherwise, to try every cause which may be commenced in or transferred to his district. To say that he has such right is to say that he may try a cause to which he is a party plaintiff or defendant, and that his opposing litigant is helpless to prevent it. No such contention can be urged successfully. The Constitution attempts to prescribe the qualifications without which a man ought not to hold the office of district judge. This act does not attempt to add to or take from those constitutional qualifications; in fact, it does not have anything to do with the right or eligibility of any one to hold or exercise the office, but provides the circumstances under which a particular judge, though possessing the qualifications necessary to hold the office, may not try a particular cause. The act does not in any manner infringe the provisions of the Constitution referred to.

3. It is contended that this act amending section 180 violates that portion of section 12, art. 8, of the Constitution which reads as follows: "Any judge of the district court may hold court for any other district judge, and shall do so when required by law." There is nothing whatever in the foregoing provision which would indicate an intention on the part of the framers of the Constitu-

tion to limit the method of securing the trial of a cause, in which the resident judge is disqualified, to calling in another judge. This provision is simply a means placed in the hands of the judges themselves to facilitate the dispatch of business in which they may be interested or otherwise disqualified from acting. There is no obligation resting upon a particular judge to call in another, and likewise no obligation resting upon an invited judge to accept the invitation. All that was decided in the *Weston Case*, 28 Mont. 207, 72 Pac. 512, respecting this matter, was that the only method by which one judge can be secured to preside for another is upon the invitation of the resident judge himself, and in this respect the provisions of section 12, art. 8, are prohibitory. There is nothing in the act which impinges upon this provision. Under section 180, as amended, a district judge may be disqualified by the filing of the affidavit provided for in subdivision 4 thereof. His authority with reference to the particular matter then ceases, except that he may arrange his calendar, invite in another judge to try the cause for him, or, if he invites another judge, who fails to come within 30 days after a motion for a change of venue is made, he still retains authority to change the place of trial. While this constitutional provision lodges in a disqualified judge the sole power to invite in another judge to try the case in which he is disqualified, it was never intended thereby to enable such disqualified judge, by refusing to call in another judge, or by delaying unreasonably his invitation, to deny altogether to a litigant a trial of his cause. So that this act, and section 615 as amended, not only do not contravene the provisions of section 12, art. 8 above, but are subject to a construction in harmony with them. This is the conclusion reached by the Supreme Court of Florida with reference to a somewhat similar statute against which was lodged the same objection now under consideration. *Thebaut v. Canova*, 11 Fla. 143.

4. It is also urged that this act amending section 180 violates section 11, art. 8, of the Constitution, which confers on district courts "original jurisdiction in all cases at law and in equity," etc. The particular objection made here is that the filing of the affidavit operates *ipso facto* to deprive the judge against whom it is aimed of authority to proceed with the trial of the cause, and that no provision is made at all for determining judicially whether, as a fact, the judge is actually biased or prejudiced, or, in other words, that this act attempts to determine the question of bias and prejudice in advance, or permits the litigant to do so, whereas that can only be done by a judicial investigation and determination. But this proceeding to disqualify a judge is analogous to a proceeding for change of venue, and no one has yet denied the right of the Legislature to provide for a change of venue

upon such terms as it may propose. The authority to enact such statutes is not derived from the Constitution, but is inherent in the Legislature, subject only to the constitutional provision that such laws shall not be local or special. In the absence of any constitutional inhibition, we know of no reason why the Legislature might not provide for a change of venue merely upon demand of either party, without assigning any reason whatever. 4 Enc. Pl. & Pr. 431. The mere fact that no provision is made for a judicial determination of the bias or prejudice of the judge against whom the affidavit may be directed is not itself sufficient to invalidate this act. As a matter of fact, it is not the bias or prejudice of the judge which disqualifies him, but the mere imputation of such bias and prejudice, and that leaves nothing to be judicially determined. In considering this same objection to a similar statute, this court in *Godbe v. McCormick*, 1 Mont. 105, said: "So far as the [first] question is concerned, we do not regard the act of the Legislature as affecting the jurisdiction of the district court. It lays down a rule of procedure, in certain cases, for the observance of the courts in the exercise of their jurisdiction, of the same character as the laws regulating continuances, appeals, new trials, and the entire subject of remedies and of practice."

In this connection it is also said that the act amending section 615 seeks to take from the district court its discretion with reference to granting a change of venue and to impose a mere ministerial duty upon a judicial body. But it is not every question arising in court that is entitled to a judicial determination, or with reference to which judicial discretion need be exercised. In *Godbe v. McCormick*, above, the court said: "The mere fact that a law requires the performance by a court of a particular act upon a given state of fact is not a sufficient test by which to determine its invalidity, and in many instances the Legislature may deprive the court of discretion in the exercise of its jurisdiction." To the same effect is the decision in *Smith v. District Court*, 17 Cal. 557, where it is said: "It is true that the court, having a discretion as to a particular matter, cannot, so long as it retains that discretion, be controlled in the exercise of it. But the whole error is in forgetting that the court has the discretion only by virtue of the law giving it, and that the same law can take away that discretion as to all matters of remedy, and leave to the court a simple ministerial duty." This doctrine is emphasized by numerous examples in our own practice, as well as elsewhere. A party to an action may amend his pleading once as a matter of right—a right which the court cannot deny him, and respecting which it cannot exercise any discretion whatever. Section 773, Code Civ. Proc. Each party to a civil action may, by a mere ob-

jection, peremptorily challenge four jurors (section 1050, Code Civ. Proc.), and when these challenges are exercised the court has no discretion in the matter whatever. The jurors challenged may be thoroughly qualified to try the cause, and free from any interest, bias, or prejudice, and the challenges may be interposed out of pique, wantonness, or a mere desire to hinder and delay the court, and yet no one can deny the right under our law, or say that the statute is invalid, because it does not require these challenges to be tried and determined by a court. In proceedings to transfer a cause from the state to the federal court on the ground of diverse citizenship, upon filing the requisite affidavit and bond, the state court has no discretion in the matter, but must make the transfer. These examples might be extended, but the foregoing suffice to illustrate the principle that with reference to many judicial proceedings there need not be judicial discretion exercised.

5. It is further contended that the act amending section 180 violates section 1 of the fourteenth amendment to the Constitution of the United States, and section 27, art. 3, of the Constitution of Montana, in that no notice is required to be given of the filing of the disqualifying affidavit, and therefore the litigant is denied due process of law. But those constitutional provisions cannot be invoked here. That portion of section 1 of the fourteenth amendment above, to which reference is made, reads as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law." Section 27, art. 3, above, reads: "No person shall be deprived of life, liberty, or property without due process of law." It is hardly necessary to say that a party is not deprived of life, liberty, or property by the mere fact that he cannot have his cause tried before a particular judge. The fact that the Constitution of Montana provides that "any judge of the district court may hold court for any other district judge," and that liberal laws for change of venue are on the statute books of this state, sufficiently negatives the idea that a litigant has any right to have his cause tried before the judge of the district where the action was commenced; for, if he has such right, the venue could not be changed to another district, nor could a judge from another district ever preside at the trial of the same. There is a sufficient reason for the rule that notice should be given of most proceedings in course of litigation, but in this instance there can be none. No hearing is to be had upon the matter. The filing of the affidavit itself works the disqualification, and no purpose whatever could be served by giving notice. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848. When the reason for the rule ceases, so does the rule itself.

6. It is further said that the act amending section 180 is special legislation, and violates



section 26, art. 8, of the Constitution, and that its terms are so uncertain and unintelligible as to render the act void. The first of these contentions is based upon the theory that, as the Governor in his proclamation referred to the industrial condition existing in three of the populous cities of the state, consequent upon the cessation of operations of certain large industries, and expressed his belief that work would be forthwith resumed in all such suspended operations if an extraordinary session of the Legislature was convened to consider certain legislation, and as the extraordinary session did consider and pass this amendment to section 180, it must result that the legislation was enacted for the express benefit of the people whose industries had been idle, entailing the industrial depression referred to by the Governor. But, regardless of the circumstances under which the Legislature was called in extraordinary session, or the motives which prompted this particular legislation, we are concerned only with the law itself, and if its terms are general and operate throughout the state, and affect all judges and litigants alike, it meets the constitutional requirements that "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform." Section 26, art. 8, Const. Mont. We need not, therefore, concern ourselves with the place of conception of this measure, or the history or circumstances surrounding its enactment.

Particular stress is laid upon its crudeness and inaccuracy. As amended, section 180 now reads: "Section 180. Any justice, judge or justice of the peace must not sit or act as such in any action or proceeding \* \* \* (4) when either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. \* \* \*" Of course, it was quite gratuitous for the Legislature to say that a Justice of the Supreme Court or a justice of the peace should not act as such in any case in the district court, if that is what the act means. But we are of the opinion that, crude as the measure is, there is yet enough expressed to enable its terms to be carried into execution and to render it intelligible. We must assume that the word "Judge," in the first sentence above, refers to district judge; and, if then we disregard the reference to the justices of this court and to justices of the peace, the measure is susceptible of intelligible construction. And while it may appear that we are approaching dangerously near legislation, when we give the interpretation indicated, still we think we have not trespassed on legislative functions in so doing, and prefer to give this

construction to the measure in order that the legislative will may be carried out.

7. Does this act violate section 6, art. 3, of the Constitution? That section provides: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character; and that right and justice shall be administered without sale, denial or delay." Whatever may be the infirmities of the act, it is not open to the particular objection that it permits the disqualifying affidavit to be filed at any stage of the proceedings. While considered alone, section 180 as amended would appear to be open to this objection, yet, as said before, these two measures must be construed together; for one is the counterpart of the other, and when this is done, and the terms of section 180, as amended, limited as they must be, the objection is removed. In the first place the disqualifying affidavit cannot be filed after the trial of a cause has been begun. This must be so necessarily, for after that stage in the progress of litigation has been reached there cannot be a change of venue. 4 Enc. Pl. & Pr. 426, and cases cited. It was not intended by this act to permit a judge to be disqualified in any event when a change of venue cannot be had upon the failure of a judge of another district to appear and assume jurisdiction. The very purpose of the amendment to section 615 would be defeated if a disqualifying affidavit could be filed at any time after a trial had been begun; for that section, as amended, assumes to provide for the trial of all causes in which a judge has been disqualified under subdivision 4 of section 180, as amended, and, as we have already said, a change of venue cannot be had after a trial is commenced. It would be absurd to speak of a change of venue, or change of place of trial, after a trial has been had, and while a motion for a new trial, for instance, is pending.

Neither is the act open to the objection that it permits a party, by filing a disqualifying affidavit, to prevent further action in the case in the event the district judge disqualified cannot or will not secure another judge to try it; for section 615, as amended, may be taken advantage of by either party, and, if the plaintiff files the disqualifying affidavit, there is no reason why the defendant may not at once apply for a change of venue on the ground that the judge has been disqualified, and, if another judge does not appear within 30 days after such motion is made, the venue must be changed, and the cause then proceed. It may be that the anomalous situation is presented of a party applying for a change of venue who does not want it, except as an alternative of no trial at all, or an indefinite postponement of the day of trial while awaiting the coming of another judge; but this only illustrates an infirmity in the measure, which might with

propriety be urged upon the lawmaking body, but which does not necessarily affect the validity of the act.

Finally, it is contended that the necessary effect of the operations of this law will be to prevent the trial of cases altogether, or that such delay and inconvenience will result as will be tantamount to a denial of justice. Whether either of these results will follow can only be determined from experience in the actual operations of the law itself. We cannot say that such would necessarily be the case, even if in every cause each side should avail itself of the utmost authority provided by the act and disqualify successively five judges. We are not aware that a like statutory provision has ever been the subject of construction by the courts of the other states. Counsel have been unable to find any such decisions, and doubtless there are none. This dearth of decisions upon the question may be accounted for by the fact that, of the 11 states which have somewhat similar statutes, in 10 of them only one change of judge is permitted, and in the other (Iowa) only two. The reasonableness of the measures adopted in those states has doubtless prevented any contests over them. The possibility that one party even may disqualify five judges, and that successive changes of venue may be granted until the cause is removed for trial to a distant part of the state from the residence of the parties, and that a long time may elapse before a trial can be had at all, only illustrates an extreme case, where a great wrong would be perpetrated, and one's sense of justice is outraged by the infinite abuse of legal rights which may possibly follow the acknowledgment of the validity of such a measure; and yet this, also, is an argument which might with propriety be addressed to the legislative body, but not to a court, for we cannot hold legislation for naught merely because it is unwise, or under it great wrongs may be perpetuated, or even because the measure itself is vicious. The act may seem to stand out in striking contrast with similar statutes in Arizona, California, Colorado, Florida, Illinois, Indiana, Missouri, Oregon, Wisconsin, and Wyoming, in each of which states the number of judges who may be disqualified is limited to one; but the fact that under this act two-thirds of all the judges of the state may be disqualified in any one action does not necessarily render it void. By this we do not mean to say that there is no limit beyond which the Legislature may not go. The Constitution has wisely provided that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and that right and justice shall be administered without sale, denial or delay"; and whenever it affirmatively appears that any measure has transgressed this provision, it will be held inoperative. But it must be shown that the necessary consequence of

the enforcement of the act will be to deny to litigants a speedy trial before we can say that the Legislature exceeded its powers. Certainly, the extreme limits of legislative authority were reached in enacting this measure; but we cannot say that it appears conclusively that the operations of the law will result in a denial of justice.

After a consideration of the various objections urged against these measures, we are not prepared to say that their unconstitutionality is established beyond a reasonable doubt; and this is the criterion now recognized in this jurisdiction by which the invalidity of a solemn legislative declaration is to be determined. In *re O'Brien* (Mont.) 75 Pac. 196, and cases cited. It is ordered that the peremptory writ issue as prayed for.

Writ granted.

BRANTLY, C. J., and MILBURN, J., concur.

(30 Mont. 547)

STATE *ex rel.* DURAND *v.* DISTRICT  
COURT OF SECOND JUDICIAL  
DIST. *et al.*

(Supreme Court of Montana. June 22, 1904.)

JUDGES — DISQUALIFICATION — AFFIDAVIT OF  
PREJUDICE — MOTIONS — STATUTES — CONSTITUTIONALITY — APPLICATION — CONTEMPT —  
REVIEW — PROHIBITION.

1. Code Civ. Proc. § 180, as amended by Act Dec. 10, 1903, making the alleged prejudice of a district judge a ground of disqualification, is not unconstitutional.

2. Code Civ. Proc. § 180, as amended by Act Dec. 10, 1903, making the alleged prejudice of a district judge a ground of disqualification in civil cases, and providing for a change of venue under certain circumstances therefor, has no application to a motion to strike the answer of a defendant from the files, which was treated by both parties as a proceeding in contempt.

3. Code Civ. Proc. § 180, as amended by Act Dec. 10, 1903, provides that alleged prejudice of a district judge shall constitute a ground of disqualification, and declares that on the filing of an affidavit of prejudice the judge as to whom the disqualification is averred shall be without authority to act further in the action, motion, or proceeding, with certain specified exceptions. *Held*, that section 180, as amended, was rendered available by the filing of an affidavit of prejudice, and that a motion for a change of judge on that ground was not permissible.

4. An order denying a motion for a change of venue can be reviewed only on appeal from final judgment, and not on an application for a writ of prohibition.

Application by the state, on the relation of Millie Durand, for a writ of prohibition against the Second Judicial District Court for Silver Bow county, Mont., and Hon. E. W. Harney, judge thereof. Dismissed.

McBride & McBride, for relator. John J. McHatton, J. M. Denny, and Geo. F. Shelton, for respondents.

HOLLOWAY, J. On January 15, 1904, Fay A. Durand commenced an action in the district court of Silver Bow county against

¶ 4. See Prohibition, vol. 44, Cent. Dig. § 2.

Millie Durand, Oscar Durand, the Equitable Life Assurance Society, F. T. McBride, and Robert McBride. The defendants Millie Durand and F. T. and Robert McBride appeared and answered on January 22d. On the same day defendant Robert McBride, for himself and for Millie Durand and F. T. McBride, filed an affidavit disqualifying Hon. E. W. Harney, judge of the department in which said action was pending, and incorporated in his affidavit of disqualification a motion for change of venue, or, in lieu thereof, a change of judge. This affidavit of disqualification was made pursuant to the provisions of section 180 of the Code of Civil Procedure, as amended by the second extraordinary session of the Eighth Legislative Assembly. On January 29, 1904, the plaintiff had the deposition of defendant Millie Durand taken before a notary public, and on the taking of such deposition Millie Durand was asked to attach to and make a part of her deposition a certain insurance policy and a certain assignment in writing which she had in her possession. This request she refused to comply with, and her deposition showing such refusal was filed in the court, the matter called to the attention of the court, and the plaintiff thereupon moved to strike from the files the separate answer of Millie Durand, for the reason that she had so refused to answer proper and pertinent questions asked in taking her deposition. On February 13, 1904, Robert McBride again filed a disqualifying affidavit, similar to the one filed January 22d. On February 13th the district court, over the objection of counsel for the answering defendants, set the motion to strike the answer of Millie Durand from the files, and the motion of the answering defendants for change of venue or change of judge for hearing on February 15th. On February 15th the motion for change of venue or change of judge was denied, and the hearing on the motion to strike from the files the answer of Millie Durand was continued until February 18th. On February 17th, on the application of Millie Durand, this court issued an alternative writ of prohibition, enjoining the district court and Hon. E. W. Harney, judge thereof, from further proceeding in the hearing of said motion of the plaintiff to strike from the files the answer of Millie Durand, or otherwise proceeding in said action, except to arrange the calendar, call in another district judge to try the cause, or change the venue. This writ was made returnable, and the matter was heard and submitted, on February 27, 1904.

In this court it is contended, on behalf of respondent, first, that the act of the second extraordinary session of the Eighth Legislative Assembly, approved December 10, 1903, amending section 180 of the Code of Civil Procedure, which authorizes the filing of a disqualifying affidavit such as was filed in the district court in this instance by the defendant Robert McBride, is unconstitutional;

second, that the proceeding sought to be restrained by the writ of prohibition is one in contempt, and that the act above mentioned, even if valid, has no application to such proceeding; and, third, that the district court properly denied the motion for change of venue or change of judge, for the reason that all of the defendants did not unite in the motion.

1. The first of these contentions is disposed of by the decision in *State ex rel. Anaconda Copper Mining Company v. District Court*, 77 Pac. 312, this day decided.

2. Both parties in this court have treated the motion to strike the answer of defendant Millie Durand from the files as a proceeding in contempt, and on the authority of *State ex rel. Boston & Montana Con. C. & S. Mining Company v. District Court*, 76 Pac. 10, the act amending section 180 above is held to have no application to such proceeding.

3. It is not contemplated by either section 180 above, as amended, or section 615 of the same Code, as amended, that a motion for a change of judge shall be made, and such motion, if made, is of no effect, and could properly be disregarded altogether. Upon the filing of the affidavit by defendant McBride, the judge against whom such affidavit was directed was thereupon deprived of any authority to proceed further in the case of *Fay A. Durand v. Millie Durand et al.*, except to arrange the calendar, call in another judge, or change the venue. Such disqualification of the judge is made a ground of motion for change of venue under the provisions of section 615 above, as amended; and, unless another judge appears and assumes jurisdiction of the cause within 30 days after the motion for change of venue is made, the venue must be changed. We therefore disregard the motion for change of judge, as not provided for by the statute. So far as the action of the court in overruling the motion for change of venue is concerned, that cannot be considered on this application for a writ of prohibition. It can be reviewed only on appeal from the final judgment.

As the relief sought here is to prevent the respondent judge from hearing the contempt proceedings, and as the act amending section 180 above has no application to proceedings in contempt, it is ordered that the alternative writ of prohibition heretofore issued be quashed, and these proceedings dismissed.

Dismissed.

BRANTLY, C. J., and MILBURN, J., concur.

BUTTE MIN. & MILL. CO. v. KENYON  
et al.

(Supreme Court of Montana. June 13, 1904.)

APPEAL—RECORD—INSTRUCTIONS—REVIEW.

1. On a motion for rehearing, it was alleged as a ground of surprise that the court refused to consider the instructions on the ground that

they were not contained in the judgment roll; the moving party alleging that the court permitted the certificate of the clerk of the district court to be amended at the hearing so as to show that the transcript contained a copy of the judgment roll, and that he would have amended the transcript so as to complete the judgment roll upon an intimation that it did not contain a complete copy. *Held*, that such ground was insufficient, inasmuch as the court during a hearing cannot examine the record to determine what questions raised by the argument are properly presented.

2. Code Civ. Proc. § 1196, provides that after entering judgment the clerk must attach together certain papers which constitute the judgment roll—such papers including all orders, matters, and proceedings deemed excepted to without bill of exceptions; and section 1151 declares that the instructions are to be deemed excepted to, and that no bill of exceptions is required. Section 1080, as amended by Act 1897 (Sess. Laws 1897, p. 241), declares that all instructions must be filed as a part of the record, and that the refusal to give instructions shall be deemed excepted to, and no bill of exceptions shall be required. *Held*, that where instructions on appeal do not appear in the judgment roll, but merely in the statement on motion for a new trial, they cannot be considered.

On motion for rehearing. Rehearing denied.

For former opinion, see 76 Pac. 696.

BRANTLY, C. J. 1. Appellant has submitted a motion for rehearing herein, in which complaint is made that certain facts appearing in the record were not given due weight in determining the question of the sufficiency of the evidence to sustain the verdict. The criticism of the Commissioners' opinion seems to be founded upon the presumption that, as these facts are not set forth particularly in the statement of the case, they were overlooked by the Commissioners and by the court. This was not the case. There is a substantial conflict in the evidence. This being so, this court had to accept the opinion of the district court thereon, and refuse to reverse the judgment on the ground of alleged insufficiency of the evidence. This court does not usually in such cases undertake in its opinion to set forth an analysis of the evidence for the purpose of pointing out the conflict, as this course serves only to encumber the Reports, and involves a useless expenditure of time and labor.

2. The appellant alleges surprise at the action of the court in refusing to consider the instructions. Counsel say that the court permitted the certificate of the clerk of the district court to be amended at the hearing so as to show that the transcript contains a copy of the judgment roll, and that they would have amended the transcript so as to complete the judgment roll, upon an intimation that it did not contain a complete copy. They also say that they had gained the impression from an intimation by one of the Justices that the strict rule of the case of *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972, would not hereafter be followed, and that it was followed in this case

is alleged as a second distinct ground of surprise. As to the first allegation of surprise, it is sufficient to say that the court cannot, during a hearing, examine the record to determine which of the questions argued by counsel are properly presented by it. It is no part of the court's duties to do this at that time, as its attention is then absorbed in following counsel through the course of their argument. Touching the rule laid down in *Featherman v. Granite County*, supra, as to how the record should be made up, the only modification that the court has made of it is stated in the case of *Glavin v. Lane*, 29 Mont. —, 74 Pac. 406, in which the use of the word "jurisdiction," used in *Featherman v. Granite County*, is criticised and limited in its application in its strictly technical sense to the steps necessary to perfect the appeal. These steps are jurisdictional, and, unless they are taken as provided by the statute, this court has no power to consider the case. The preparation of the record to present to this court is not a jurisdictional matter. Nevertheless the directions of the statute must be substantially pursued, in order to present alleged errors for review. Section 1196, Code Civ. Proc., directs what the judgment roll shall contain. This section, read in the light of section 1151 and section 1080 as amended by the act of 1897 (Sess. Laws 1897, p. 241), leaves no doubt as to what papers shall be included. Sections 1736 and 1738 are equally clear as to what the record presented to this court on appeal from a judgment or an order denying a new trial should contain, as well as the order in which they should appear. It is not proper to incorporate the judgment roll in the statement or bill of exceptions, and undertake in this way to get it before this court. The statement or bill should not include any of the papers which properly belong to the judgment roll. This is clearly stated in *Featherman v. Granite County*, supra. The judgment roll should be certified up as a separate entity. If the record is made up in accordance with the statutory direction, this court can then readily turn to any portion referred to or desired. The question sought to be presented is then presented as the statute requires. A substantial departure from the statutory directions destroys any semblance of uniformity in practice. For one substantial departure is no more important than another, and, if an observance of the provisions of the statute may be omitted in one substantial particular, they may be disregarded altogether, as was frequently the case prior to the decision in *Featherman v. Granite County*, supra. This court has never intended that the profession should understand that a strict, technical compliance with the statute would be required. So long as a substantial compliance is apparent, this court will proceed to determine all questions properly raised by the record. If, for instance, the record contains the pleadings and a judgment

as a separate entity purporting to be the judgment roll, the merits of the case, so far as the judgment roll as made up will permit, will be considered without question whether all the papers are in the roll which the statute requires should be there. To illustrate: If it be sought to have this court review the action of the district court upon a demurrer to the complaint, and the judgment roll contains the demurrer, with the order disposing of it, this court will consider that question, notwithstanding the fact that the instructions may not be incorporated in the judgment roll. In the same way, it will consider the merits of the instructions, if they are found in the judgment roll, notwithstanding demurrers and the orders disposing of them, and like matters, may be omitted. The provisions of the statute direct how and in what form the evidence of what took place in the district court shall be presented to this court, and the sooner counsel learn that these provisions are to be followed as the correct rule of practice, instead of the loose methods which have hitherto prevailed, the better it will be for counsel and litigants. This course will necessarily lessen the labors of this court. In this case what purports to be a copy of the judgment roll is in the record as a separate entity, but no instructions are incorporated therein, and there is no legal evidence before this court that any were in fact given. In the statement, where they should not be, are found what are alleged to be the instructions. They were not considered for this reason. In view of the fact that what may be the judgment roll appears in the transcript in the proper place, we considered the only question which was properly presented.

3. Under a strict application of the rule relative to briefs, the judgment and order should have been affirmed without considering the merits at all. Besides the defects pointed out in the Commissioners' opinion, there are others which render the brief of no aid in the examination of the somewhat voluminous record, owing to the fact that in its preparation counsel failed to observe the rule, by not pointing out where in the record the matters illustrating the exceptions taken and reserved can be found.

The motion for rehearing is denied. Denied.

MILBURN and HOLLOWAY, JJ., concur.

BOISE CITY IRRIGATION & LAND CO. v.  
STEWART, Judge, et al.

(Supreme Court of Idaho. July 1, 1904.)

For majority opinion, see 77 Pac. 25.

STOCKSLAGER, J. (dissenting). I concur with my associates in the conclusion that the district court, in the exercise of its discretion, may appoint a referee to take the evidence and report findings and conclusions

to that court. When such an order is made, this court will not disturb it, unless it distinctly shows an abuse of such discretion. The fact that the wisdom of such proceeding might be doubted or questioned is not sufficient cause for a reversal. We find by the admitted facts in this case that by the provisions of sections 33 and 37 of the Laws of 1903, pp. 246, 249, this case reaches the referee loaded down with about \$11,000 costs, all of which have accrued in the office of the state engineer. Following this will come the cost of the referee and the trial before him. Then any one who feels aggrieved by his findings and conclusions must follow his case into the district court, with the additional cost of a further hearing there. We are told that great benefits will flow from the record to be made in the office of the state engineer, in that it will there be shown just how much water is appropriated and used from the Boise river. This may be information of value to the future appropriator, but of what interest is it to the appropriator who has spent years of his time, labor, and money acquiring a home, all dependent upon the energy he has put forth in securing his prior right to the use of such water? It certainly must be conceded that the provisions of this law providing for making a record in the office of the state engineer for use on the trial and for future reference, as well as the maps provided for, adds enormously to the cost of this trial. Can it be said it is for the benefit of the present appropriators? We think not. They should be permitted to try their case on such evidence as suits their convenience and ability to pay for. If the parties to this litigation desire to use maps, why should they not be permitted to employ a civil engineer of their own choice to prepare such maps as they need? It is urged that one party to this litigation has a complete map, showing all necessary things to establish its right to the use of the waters of this stream; that this map was prepared at large expense. Should it be required to pay its share of the expense of a map prepared by the state engineer, for which it has no use? We think not. The theory of the law is that all parties to litigation may proceed in such way as seems best to them, and provide the court with the kind or character of evidence as will best serve their purposes; and hence they are not chargeable with a class of evidence they have not asked for, and which the Legislature has attempted to force upon them, and make it a proper and necessary charge against them. It is not within the constitutional power of the Legislature to prescribe any particular method by which a citizen of this state must establish his right to the use of the waters of the streams of the state prior to the enactment of such laws. It is urged that no one is bound by the report and maps of the state engineer; that any one may produce other evidence or witnesses on

the trial of the cause. This is true, but nevertheless each and all parties to the litigation are required to pay their proportionate share of the \$11,000 expenses of the state engineer's office. In other words, the litigant is not consulted as to whether or not he is willing to accept the maps and report of the state engineer as evidence in the case, but he must pay his proportion of such costs, and, if he is dissatisfied, counsel for defendants are charitable enough to suggest that he may procure such other evidence as suits him to impeach the record of the state engineer—so long, of course, as he is willing to pay for the evidence furnished, not at his request, or even his consent, but by legislative enactment. I do not think the Legislature has the power to thus burden the people of the state who are so unfortunate as to have homes dependent upon the waters of an unlitigated stream. The settlers should be permitted to determine their rights as between themselves by such evidence as seems satisfactory to them, and, if it is a matter of state interest, it is the duty of the state to provide such maps and records at the expense of the state; or, if in the interest of the future applicants for the waters of such streams, then the burden should be borne by them, or the state for them, and not by those who have been diligent and industrious in procuring what they had a right to believe was a home, and sufficient water to irrigate it, without molestation and expense imposed upon them by the state. It is clear to me that they have this right, and any act of the Legislature attempting to provide evidence at their expense in the settlement of their rights as between themselves or future appropriators is a violation of section 19, subd. 3, art. 3, of the state Constitution, which says: "The Legislature shall not pass local or special laws in the following cases, that is to say, regulating the practice of courts of justice." In the case of *Bear Lake County v. Budge*, 75 Pac. 614, in passing upon the constitutionality of sections 34, 35, and 36 of the act in question, this court said: "We have a general law providing how the summons must be served in cases to quiet title or determine adverse interests to private property, and the provisions therefor in the act under consideration provide a different method brought by a water commissioner for that purpose. Said act is also in violation of our statute which requires suits to be brought in the name of the real party in interest." I concurred in that opinion, and for the reason therein enunciated and the authorities therein cited I cannot concur in this. If sections 34, 35, and 36 were special legislation for the reasons therein stated, then section 37 is special legislation for the reason that it attempts to provide evidence, and charge it to all the litigants of the case, irrespective of whether they need or desire it or not. Again, it does not even leave it to the discretion of the court to determine who should pay for this special class of evi-

dence. If it did, there would be more justification in the law, as the court could, in the interest of justice, charge the costs of this class of evidence to such claimants as should rightfully pay for it.

Another serious and important question is raised and urged by the plaintiff in this action, and that is the manner in which the law attempts to enforce the collection of the costs of the state engineer's office. It provides that a judgment shall be rendered against each party, let him be plaintiff or defendant, but does not say in whose favor the judgment shall run; hence the question arises, how shall this judgment be entered? Not in the name of the state engineer, for the reason that he is not a party to the action; not in the name of the state or county, for the same reason. I think the Legislature had the same difficulty in settling this question that confronts me. The majority opinion says: "It has been the custom of courts in this state to apportion the costs of such litigation to the respective parties, and, we think, properly so. The court in the suit in question had jurisdiction and power to so apportion such costs." That is true so far as all costs in an action of this kind may be concerned aside from the cost of the state engineer's office. Here is a special provision of the law providing that each party shall pay his proportion of this cost, and that a judgment shall be entered for it. Again we ask, in whose favor? If the law had provided that, any one refusing to pay his proportion of this cost, the state or the plaintiff in the action should pay it, and a judgment entered against the party refusing to pay in favor of the party paying it, then the court could enter a proper judgment.

I apprehend the trial court will find difficulty in rendering a judgment that will have validity or can be enforced.

For the foregoing reasons, I think the writ should issue.

#### VILLAGE OF ST. ANTHONY v. BRANDON et al.

(Supreme Court of Idaho. June 17, 1904.)

#### INTOXICATING LIQUORS—VILLAGE ORDINANCE —TITLE—SUFFICIENCY OF.

1. The title to an ordinance of a city or village in this state, to wit, "An ordinance regulating and licensing liquor dealers within the village of St. Anthony," is sufficient, where the ordinance provides for the payment of a fixed sum for retail liquor dealers only, and prohibits the business of running a restaurant or lunch counter in connection therewith, or in the same room, and also requires the doors to be closed on Sunday, and also prohibits music, singing, and dancing in the room occupied as a saloon.

(Syllabus by the Court.)

Appeal from District Court, Fremont County; James M. Stevens, Judge.

J. C. Brandon and another were convicted of violating an ordinance of the village of St. Anthony, and appeal. Affirmed.

Hawley, Puckett & Hawley and King & Millsaps, for appellants. Caleb Jones, for respondent.

**STOCKSLAGER, J.** This case was submitted to the lower court on an agreed statement of facts, to wit:

(1) That the plaintiff, the village of St. Anthony, is a municipal corporation duly and regularly organized and existing under and by virtue of the laws of the state of Idaho, and is a village, and situated in Fremont county, in the state of Idaho; that M. E. Jamison, B. C. Bowers, W. C. Yager, W. W. Yoemans, and J. L. Pratt are the duly qualified and acting board of trustees of the village of St. Anthony; that M. E. Jamison is the duly qualified and acting chairman of the board of trustees; and that Charles C. Bowerman is the duly qualified and acting clerk of the said board.

(2) That the defendants, Thomas J. Brandon, Jr., and J. C. Brandon, are partners, and doing business under the firm name and style of Brandon Bros., in said village of St. Anthony, in Fremont county, state of Idaho, as proprietors and keepers of a saloon, wherein they sell and dispose of spirituous, malt, and fermented liquors and wines, to be drank on the premises where sold, and cigars, and that they have been and are now engaged in said business at said place.

(3) That on the 14th day of July, 1903, at a regular meeting of the board of village trustees of said village of St. Anthony, an ordinance (No. 90) was regularly presented to said board of village trustees for their action thereon, which said ordinance, and the title thereof, are, in substance, the following: "An ordinance regulating and licensing liquor dealers within the village of St. Anthony." Section 1 prohibits the sale of liquors of any kind, to be drank in, on, or about the premises where sold, without first procuring a license and giving a bond as "hereinafter provided." Section 2 requires all applications to sell liquors to be drank in, on, or about the premises to be made to the board of trustees in writing, setting forth the names of the parties, and a description of the place wherein it is proposed to commence and conduct said business. Section 3 provides that, before any license is issued, the applicant shall produce before the board of trustees the receipt of the village treasurer, showing payment of the amount due for such license, and execute and deliver to said board a bond to the state of Idaho in the penal sum of \$1,000, with at least two good sureties. Section 4 provides that each applicant shall pay the sum of \$75 per quarter for such license, and no license under the provision of the ordinance shall be issued for a longer period than three months. Section 5 provides for a revocation of a license in case of a violation of any of the provisions of the ordinances of the village or of the penal statutes

of the state, and makes it the duty of the board of trustees to revoke such license in case of any such violation. Section 6 permits druggists to sell wines or liquors for sacramental, mechanical, medicinal, and scientific purposes without a license. Section 7 provides that, on the presentation of an application to the board of village trustees, they shall, on the approval of the bond, direct the clerk to issue such license. Section 8 provides that the license shall specify by name the person, firm, or corporation to whom it shall issue, and shall designate the particular place at which the business shall be carried on. Section 9 provides that "any person licensed as aforesaid, or any person refusing or neglecting to obtain a license as herein provided, who shall sell, give away or otherwise dispose of any intoxicating drink at any time during the first day of the week, commonly called Sunday, except he be a druggist, and then only for medicinal purposes upon the prescription of a regularly licensed physician, shall be deemed guilty of a misdemeanor. \* \* \*" Section 10 prohibits any idiotic person, or any minor under the age of 21 years, or any female, to enter, be, or remain in said place. Section 11 prohibits any other business to be carried on in the same place or room, or to permit the door or doors to be opened on Sunday, or allow the door or doors to be used as a means of egress or ingress or entrance or exit to any other room where any other different class of business is carried on. Section 12 prohibits any dancing, music, singing, or loud or boisterous talking, or any disorderly conduct, on the premises where intoxicating liquors are sold. Section 13 provides punishment for violation of any of the provisions of the ordinance.

It is stipulated that the ordinance was regularly passed and approved by the chairman of the board of trustees, and thereafter published; that appellants have no license for carrying on business as retail liquor dealers from the village of St. Anthony, and have not paid the sum required by the ordinance to said village or any officer thereof—neither have they applied for a license, or executed the bond provided for by the ordinance; that appellants have for three months last past permitted one William Weller to carry on, under and by virtue of a lease and rental made with the said Weller, expiring on June 30, 1904, the business of keeping a restaurant and lunch stand in the same room wherein they carry on their said business.

The questions submitted are:

(1) Is the ordinance in question, or any portion thereof, a valid and existing ordinance of said village of St. Anthony? Have the defendants any right to carry on their said business without first procuring a license from the said village?

(2) Is that portion of said ordinance requiring retail liquor dealers to give a bond

and procure a license before carrying on or engaging in said business within the power of the board of trustees of plaintiff to enact?

(3) Had the plaintiff's said board of trustees, power or right to enact that portion of said ordinance making it unlawful to carry on, or allow to be carried on, any other business in the same room wherein intoxicating liquors are sold?

(4) Had the plaintiff's said board of trustees power or right to enact that portion of said ordinance making it unlawful for persons engaged in the sale of intoxicating liquors to permit the door or doors of their places of business to be opened on Sunday?

(5) Had the said board of trustees any power or right to pass that portion of said ordinance making it unlawful for a person engaged in the sale of intoxicating liquors to permit singing, music, or dancing in his or their place of business?

Findings of fact and conclusions of law were waived, and the judgment of the trial court sustained each and every provision of the ordinance, save and except that part requiring retail liquor dealers to give a bond to procure a license. This part is held invalid, but without affecting the remainder of said ordinance.

The first contention of counsel for appellants is that the subject of the ordinance is not clearly expressed in its title, as required by section 1910, Pol. Code (Sess. Laws 1893, p. 122; Sess. Laws 1899, p. 209, § 83). The particular part of this section to which our attention is called is as follows: "An ordinance shall contain no subject which shall not be clearly expressed in its title. \* \* \*". Much depends upon the construction to be given to the language above quoted, construed in connection with the title to the ordinance under consideration. It is earnestly insisted by learned counsel for appellant that, by examining the ordinance, it is shown that it regulates the sale of spirituous, malt, or fermented liquors or wines, etc., but, according to the title, it only pretends to regulate and license the dealer, and not the sale, as it does in the body of the ordinance. And again, the title simply refers to liquor, while in the first section of the ordinance it specifies spirituous, malt, or fermented liquor or wines; in other words, intoxicating liquors. It is not contended by counsel for appellants that the village of St. Anthony, by proper ordinance or ordinances, may not do all that is claimed for this ordinance, except that part requiring a bond before a license can issue. It is conceded by counsel for respondent that the holding of the court on this issue submitted is correct, and hence we are not called upon to pass on this question.

As we read the record and briefs in this case, a disposition of the question of the sufficiency of the title to the ordinance disposes of all the questions submitted to the lower court, and here for review on this appeal. Section 256, Dillon's Municipal Corporations,

is cited by counsel for appellants to support the contention that the ordinance attempts to regulate the sale of liquors at retail, but not the sale of liquors at wholesale or by druggists, which it is urged is class legislation. Mr. Dillon says: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and, if done by another, not so, ordinances which have this effect cannot be sustained. Special or unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." The soundness of this principle cannot be questioned, but attention must be given to the language of the author, to wit, "under the same circumstances." Can it be said that the same conditions or the same circumstances exist where the druggist sells on prescriptions or for certain prescribed purposes, or the wholesale dealer, who only sells in large quantities, as where the retail dealer keeps his place of business open especially for the retail of his liquors? Common observation teaches that a very different state of facts exists. *City of Cairo v. Feuchter et al.* (Ill.) 42 N. E. 308, is also cited in support of the same contention of appellants. In this case the ordinance provided that any wholesale liquor dealer might be granted a license upon payment of \$100 to the city treasurer. Another section of the same ordinance provided that the ordinance shall not apply to persons who shall have a valid license for the sale of liquors in less quantities than one gallon. It would seem that the city attempted by this ordinance to grant a retail dealer a license to do a wholesale business without requiring him to pay a wholesale dealer's license, thus discriminating against the wholesale dealer. The ordinance under consideration does not go to this length. There is no discrimination between parties engaged in the same kind of business. The entire ordinance is leveled at the business of retail liquor dealers. Whether the village has an ordinance regulating wholesale dealers, we are not informed, nor is it material for the determination of this question. Section 6 of the ordinance permits druggists without a license to sell wines or liquors for sacramental, mechanical, medicinal, and scientific purposes. This is in no sense a license to either wholesale or retail intoxicating liquors. If the title of this ordinance is sufficient, there is no question of the power of the trustees of the village of St. Anthony to require all saloons or places where liquors are sold to be drank on the premises—retail dealers—to remain closed on Sunday. They may also prohibit a restaurant or lunch counter from being conducted in the same room where intoxicating liquors are sold. Likewise they may prohibit music, singing, and



dancing in such places. Under the police power of the state, they may regulate the business to be conducted in the village; and, as said in *State v. Cantieny* (Minn.) 24 N. W. 458, "the one purpose and whole scope of the ordinance is to prohibit certain acts derogatory to peace, good order, and morals, and to enforce the enactment of proper penalties." We think the same can be said of the ordinance under consideration, the sole purpose being to so control the retail liquor trade of the village as to best preserve the quiet and peace of the citizens. If a restaurant or lunch counter were permitted to be conducted in the room where intoxicating liquors are sold, it would be an excuse for parties to frequent such places on Sunday, and in this way the officers of the village would be hampered in the enforcement of the ordinance providing for closing all such places on Sunday. Music, singing, or dancing in such places is not calculated to bring about peace and quiet for the citizens of the village who may reside in the vicinity of such places, and we can see no reason why the village authorities may not control such places in the interest of good morals and the peace and quiet of the people. The words "regulating and licensing liquor dealers," as used in the title of the ordinance, seem to be the objectionable ones used therein. The *Century Dictionary*, defining the word "regulating," says: "It means to put or keep in order, as to regulate the disordered state of a nation or its finances." In speaking of the word "license," it defines the word: "Power to license conferred on a municipality is generally understood to mean power to regulate by prescribing the conditions or compliance with which the thing shall be permitted." It is urged that this ordinance attempts to regulate other classes of business. We do not so construe its language. There is no attempt to regulate any business except that of retail liquor dealers. To say that a restaurant or lunch counter cannot be conducted in the same room where intoxicating liquors are sold to be drunk on the premises, or that music or dancing shall not be permitted in such places, is not an attempt to control such business. Either may be conducted elsewhere, and there is no prohibition in the ordinance. Only it must not be where liquors are sold to be drunk on the premises, or, in other words, a saloon. We think the title to the ordinance is sufficient to warn any one who may want to know what is contained in the ordinance. The purpose is to require all retail liquor dealers to pay a license fee to the village and keep an orderly house, keep it closed on Sunday, and not permit music, singing, or dancing to be carried on therein.

We think the judgment of the trial court should be affirmed, and it is so ordered, with costs to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

VOLLMER v. REID'S ESTATE et al.  
(Supreme Court of Idaho. June 16, 1904.)

CHATTEL MORTGAGE—RENEWAL.

1. Where it is shown that a chattel mortgage is given as security for a debt then existing, evidenced by a promissory note of even date therewith, and thereafter a new note and chattel mortgage are given to cover the same debt, even though a different rate of interest is provided for in the new note, and an additional sum for attorney's fee provided for therein, *held* not to be a new contract, where it is stated in the mortgage that the new obligation is given for the purpose of renewal of the old.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by John P. Vollmer against the estate of Jas. W. Reid, deceased, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Daniel Needham, for appellants. Geo. W. Tannahill, for respondent.

STOCKSLAGER, J. The plaintiff commenced this action in the district court of Nez Perce county, alleging that on the 21st day of March, 1896, Jas. W. Reid executed and delivered to John P. Vollmer his promissory note for \$331, due in 90 days after date, with interest at the rate of 1½ per cent. per annum from date, which note provided for payment, in event of suit or action to enforce the execution of the same, of the sum of \$30, attorney's fees. The fourth allegation is: That, to secure the payment of said note, Reid mortgaged to Vollmer on the same date the following chattels: Federal Reporter, volumes 1 to 68, and four digests; Pacific Reporter, volumes 1 to 42, and one digest; American Annual Digest, 10 volumes, 1887 to 1895, inclusive; New York Reports, Court of Appeals, volumes 1 to 147, and four digests by Brightly. "That plaintiff annexes hereto as a part hereof a copy of said mortgage, and hereby incorporates the same herein the same as if set forth at length." The sixth allegation says "that subsequent to the execution and delivery of said promissory note and of said mortgage, on, to wit, the 28th day of June, 1900, the said Jas. W. Reid renewed the said note and mortgage, and on the said 28th day of June, 1900, the said Jas. W. Reid, for the purpose of renewing the said note and mortgage as aforesaid, executed and delivered to John P. Vollmer his promissory note for \$334, of date January 27, 1899, due one year after date, at the rate of 12 per cent. per annum from date, which note provided for the payment of \$50 attorney's fees in event of suit," etc. The seventh allegation is "that, for the further purpose of renewing said promissory note and mortgage as above described, the said Jas. W. Reid, as mortgagor, on the 28th day of June, 1900, executed and delivered to John P. Vollmer, as mortgagee, his certain instrument in writing,

under seal, known as a 'chattel mortgage,' a copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this complaint as fully as if here set out, which said chattel mortgage was made in good faith for the purpose aforesaid, without intent to defraud creditors and purchasers, and was verified, acknowledged, and filed pursuant to statutes in such case made and provided, and was duly filed for record on the 30th day of June, 1900." The eighth allegation is that "the property mentioned and described in said chattel mortgage and the schedule annexed consisted of the following lawbooks, constituting a part of his library, to wit:" (Here follows a description of the same books described in the mortgage of March 21, 1896, and an allegation that this mortgage was a renewal of said first mortgage.) The ninth allegation is that the last-described note and mortgage were made, executed, and delivered for the purpose of renewing the said note and mortgage, dated March 21, 1896, together with the accrued interest thereon, which said promissory note last above described is the identical note first above described, with the interest included therein, and is a renewal thereof. The tenth allegation is that default has been made in the said chattel mortgage and the said notes, in this: that the said notes have long since matured, and remain wholly and entirely unpaid. The eleventh allegation is that, prior to the institution of this proceeding, plaintiff presented to the administrator of the estate of Jas. W. Reid his claim based upon said note, and, at the time of presenting the same, based his claim upon a copy of the note and mortgage referred to, and that the same was duly allowed as a secured claim against said estate by the administrator thereof, which allowance was approved by the probate court of Nez Perce county. The twelfth sets out that there is due on said note, as renewed and secured by said mortgage, the sum of \$504, with interest on \$344 thereof at 12 per cent. per annum from February 10, 1903. The thirteenth alleges that "the Lewiston National Bank, a corporation, and J. B. Morris have, or claim to have, some interest in the property herein described, and described in the hereto annexed exhibit, as mortgagees, incumbrancers, or purchasers, the exact nature of which is unknown to plaintiff, and which interest is subsequent, subject, prior, and junior to plaintiff's said mortgage, and said corporation and said Morris are made parties hereto by reason of such adverse interest." The prayer is: (1) That plaintiff's mortgage dated March 21, 1896, and promissory note of the same date for the sum of \$331, be revived, and that said promissory note and chattel mortgage, as renewed and revived, be foreclosed. (2) That the defendants and the estate of Jas. W. Reid, deceased, be foreclosed of all equity of redemption; that the mortgaged property be sold, and the proceeds applied to the payment of the costs and ex-

penses in this action, and of counsel fees in the sum of \$50, and the amount due on said note and mortgage, with interest from February 10, 1903, at 12 per cent. per annum; that the estate of Jas. W. Reid, deceased, be adjudged to pay any deficiency that may remain after applying all of said money as aforesaid and for costs of suit.

The answer admits the corporate existence of the First National Bank of Lewiston as alleged in the complaint; also that Jas. W. Reid died intestate, as alleged, and that Jas. R. Lydon was appointed administrator of his estate, and, as such, admits his possession of the property in controversy; that the schedule of lawbooks set forth in the complaint constitute a part of the law library of said Reid; that, prior to the commencement of this action, plaintiff presented his claim based upon said note, and that the same was duly allowed as a secured claim against the said estate by the administrator, which allowance was approved by the probate court of Nez Perce county; that J. B. Morris claims to have an interest in the property in controversy, and avers that said Morris is a preferred creditor of said estate to the amount of \$559. For a second and separate affirmative defense, the defendants aver that the right of plaintiff to maintain an action on the note and mortgage alleged to have been executed by said Reid March 21, 1896, was barred by the provisions of section 4052, Rev. St. Idaho, before the commencement of this suit. As a third and separative affirmative defense, defendants aver that the property covered by the pretended mortgage dated June 28, 1900, is exempt from execution under the laws of this state, for the reason that Reid was a married man at the time of the execution of said pretended mortgage, and that his wife did not sign said pretended mortgage, and hence it is void as to subsequent creditors.

Upon the issues thus framed the case was tried, and the court made its findings of fact and conclusions of law. The findings on the disputed issues are as follows: That on the 21st day of March, 1896, Jas. W. Reid executed and delivered to John P. Vollmer his promissory note for \$331. That, to secure the payment of said note, said Jas. W. Reid made and executed the mortgage dated March 21, 1896, mortgaging the property described in said mortgage. Then follows a description of the property as it appears in the complaint. That subsequently, to wit, the 28th day of June, 1900, said Reid renewed said note and mortgage, and, for the purpose of renewing said note and mortgage, said Reid on same day executed and delivered to said Vollmer his promissory note for \$344, and his certain acknowledged indenture renewing said mortgage, thereby renewing the said note, and continuing in full force and effect said mortgage bearing date March 21, 1896. That default has been made

in the payment of said chattel mortgage and said note, and that said notes have long since matured, and remained wholly and entirely unpaid. That there is now due, owing, and unpaid on the said promissory note dated June 28, 1900, in principal and interest, the sum of \$481.38. That all the material allegations of plaintiff's complaint are found to be supported by the evidence and true. That all the material allegations and averments of defendant's answer in conflict with the foregoing findings are found to be unsupported by the evidence and not true. That said note dated June 28, 1900, and the note dated March 21, 1896, and said mortgage dated March 21, 1896, are found to be not barred by the statute of limitations, as alleged in defendant's answer. That the allegations contained in defendant's second and third affirmative defense are found to be unsupported by the evidence and not true. The conclusions of law follow the foregoing findings of fact.

Counsel for appellants, in his brief, says the points to be determined are as follows: (1) Is the note of June 28, 1900, a renewal of the chattel mortgage of March 21, 1896? (2) Is the chattel mortgage of June 28th executed in accordance with the laws of the state of Idaho? (3) Was the right of action based on the note and chattel mortgage executed on the 21st day of March, 1896, at the time of the commencement of this action, under the laws of this state? (4) Can lien of the note and mortgage be extended by the contract of the parties, to the prejudice of the intervening rights of third persons, without their concurrence?

There does not seem to be any question, but that the deceased, Reid, executed and delivered the note and chattel mortgage dated March 23, 1896. Neither is the execution and delivery of the note and chattel mortgage of date June 28, 1900, by deceased, Reid, to John P. Vollmer, questioned, as shown by the record. The good faith and honesty of purpose of neither deceased nor Vollmer is called in question in either transaction. It is also beyond question that deceased, at the time of the execution and delivery of the notes and mortgages in both transactions, and for a number of years prior thereto, had resided in the city of Lewiston, this state, and his wife during all this time had resided in the state of North Carolina, never at any time claiming her residence in Idaho. It is further shown by the record that she is not in court, claiming any relief under the exemption laws of this state.

The contention of counsel for appellant is based upon the theory that the note and mortgage of June 28, 1900, is not in any sense a renewal of the note and mortgage of date March 21, 1896; hence a new contract, and subject to the terms and conditions of the statute then in force relative to chattel mortgages. The statute referred to is found in Sess. Laws 1899, p. 202, and is as follows:

"No personal property of either husband or wife that is exempt by law from execution, shall be mortgaged by either husband or wife without a joint concurrence of both." And in support of this position we are cited to *Kindall v. Lincoln Hardware & Imp. Co.* (Idaho) 70 Pac. 1056. This was an action to foreclose a chattel mortgage on a certain growing crop on the land of defendant Kindall and his wife, who were residing together in the state of Idaho; the action being a joint one of husband and wife to enjoin the sale of the crop under the exemption laws of the state. This case is not decisive of the one at bar, for the reason that the real parties in interest invoked the exemption laws of the state, and for the further reason that there is no question of renewal of the note and mortgage; the entire transaction being under the laws as they now exist relative to exemption of chattel property. Our attention is also called to *Willows v. Rosenstein* (Idaho) 48 Pac. 1067. The syllabus says: "The plaintiff gave to defendant a chattel mortgage to secure an indebtedness of some \$341. Subsequently, plaintiff and his copartner becoming indebted to defendant, they jointly executed to the defendant a chattel mortgage upon property belonging to the firm for the sum of \$1,215, in which was included the amount of said first mortgage of \$341. The mortgage for \$1,215 was subsequently paid in full. By an agreement between plaintiff and defendant, the latter was, however, to hold said first mortgage as security for an individual indebtedness existing, and to arise from future advances to be made by defendant to plaintiff. Such agreement is contrary to the provisions of section 3551, Rev. St. Idaho." The contention of learned counsel for appellant is not supported by this case. In the opinion, which was written by Mr. Justice Huston, and concurred in by his associates, Justices Sullivan and Quarles, we find the following language: "The taking of new or additional security for the same debt does not always operate as a release or cancellation of the original security. A new mortgage and note are payment of the old security when such is the agreement or understanding of the parties." Citing *Jones on Mortgages*, § 645; *Brown v. Dunckel*, 46 Mich. 20, 8 N. W. 537; 2 *Jones, Mortg.* § 926. If we are to follow this case—and we can see no reason why we should not—it is decisive of the question before us for consideration. In the mortgage of June 28, 1900, following the description of the property, we find the following language: "And the same books heretofore mortgaged by said first party to John P. Vollmer on the 21st day of March, 1896, this mortgage being a renewal of said mortgage given on the 21st day of March, 1896." Can there be any misapprehension of the intention of the parties to this transaction?

It is next urged by counsel for appellant

that, owing to the fact that the second mortgage covered all the books of the first, and seven additional volumes, and that the consideration was \$331 in the first note, and \$344 in the second, and also that the rate of interest was different, as stipulated in the notes, and the amount provided for as attorney's fees in case of foreclosure was not the same in the two notes, the second note and mortgage became a new contract, and in no sense a renewal of the old. Under the facts in this case, we cannot give our assent to this contention. The entire record shows honest dealing and the best of faith on the part of Mr. Vollmer and the deceased, Reid, to keep the original security alive. When the new note and mortgage were given, the legal rate of interest as then provided for by law was incorporated into the notes. The difference between \$331, the original note, and \$344, the new one, was doubtless the interest due on the old note as agreed upon. The \$20 additional attorney's fee provided for in the new note was evidently agreed upon. See *Kelley et al. v. Leachman* (Idaho) 33 Pac. 44. It might be well to suggest that the deceased, Reid, was a lawyer of known ability all over the state. Hence it cannot be said that he did not fully understand the transaction, and did not intend to do just what he stated in the mortgage—to renew the original debt.

Other errors are assigned, but, in our view of the case, it is unnecessary to pass upon them.

The judgment is affirmed, with costs to respondent.

SULLIVAN, C. J., concurs in conclusion reached.

AILSHIE, J. (concurring). I desire to place my concurrence entirely upon the proposition that the transaction of June 28, 1900, was a renewal of the contract and obligation of March 21, 1896. This renewal kept the original contract alive and in force, and entitled the plaintiff to the relief granted.

#### PIONEER IRR. DIST. v. CAMPBELL.

(Supreme Court of Idaho. June 9, 1904.)

IRRIGATION BONDS—SURVEYS, MAPS, AND PLANS—BOND ELECTION.

1. Where an irrigation district has been regularly organized, and has had surveys, maps, plans, and estimates made in accordance with the requirements of section 15 of the irrigation act (Sess. Laws 1903, p. 165), and a bond issue has been made, and the money raised thereon is not sufficient for the completion of the works planned, it is unnecessary to make a new survey, and additional maps and plans, as a prerequisite to ordering and holding another election authorizing a further bond issue for completion of the works.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Geo. H. Stewart, Judge.

Action by the Pioneer Irrigation District against D. D. Campbell. From a judgment confirming proceedings of the district for voting additional bonds, and an order denying a motion for new trial, Campbell appeals. Affirmed.

Smith & Plowhead, for appellant. Rice & Thompson, for respondent.

AILSHIE, J. This action was commenced by the directors of the Pioneer Irrigation District for the approval and confirmation of their proceedings for an issue and sale of the bonds of the district in the sum of \$40,000. The action was brought under section 18 of an act of the Legislature approved March 9, 1903, entitled "An act relating to irrigation districts and to provide for the organization thereof and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes and for other and similar purposes." Sess. Laws 1903, p. 167. The petition alleges the organization of the district, and all the subsequent proceedings had in pursuance thereof, and the making of surveys, plans, maps, and estimates as provided by law, and the voting of bonds in the sum of \$207,535, and approval and confirmation thereof by the district court, and the affirmation of such judgment by the Supreme Court, as reported in *Pioneer Irrigation District v. Bradburry*, 68 Pac. 295. It is averred in the petition that the directors, in constructing the works as laid out by the surveys, maps, plans, and specifications previously adopted, have exhausted the receipts from the sale of bonds originally issued, and that the works are not yet completed, and that the board of directors have made their estimate of the amount necessary for the completion of the works and system as planned, and that it will require the further sum of \$40,000 for such purpose; that after making such estimate they ordered and directed an election on the question of issuance of such additional bonds; and that upon such election the bond issue was authorized, and they thereupon prayed the court for an order confirming their proceedings and approving the issuance of such additional bonds. As authority for this bond issue and the proceedings herein, the directors rely upon that portion of section 15 of the act supra which provides, "And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount or any other amount shall be submitted to the electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election." Sess. Laws 1903, p. 165. The appellant, Campbell, demurred to the petition in the trial court, and, after his demurrer was overruled, answered; denying, on information and belief, most of the allegations as to the necessity for an additional bond

issue, and the regularity of the election thereon. After a trial the court found in favor of the district, and entered its judgment approving and confirming the proceedings. From this judgment, and an order denying motion for a new trial, this appeal has been prosecuted.

The only point made by appellant is that, before an additional bond issue can be voted or authorized under the statute as above quoted, additional plans, maps, and estimates must be made, and all the proceedings taken under section 15 of the act that are required to be originally taken by a newly organized district. An examination of that portion of the act referring to the construction of canals and irrigation works, and the issuance of bonds therefor, satisfies us that appellant's contention would be correct if the additional bond issue was for the construction of additional works. But where the money to be raised is for the completion of the works already planned, and for which the surveys, maps, and plans have been made, then there can be no necessity for again doing such work, and it would be a useless thing to require the district to go to the additional expense and trouble which would be entailed in so doing.

We see no reason for disturbing the judgment of the trial court as entered in this proceeding. Judgment affirmed, and costs awarded to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

### PERKINS v. BRIDGE.

(Supreme Court of Idaho. June 14, 1904.)

UNDERTAKING ON APPEAL—SURETIES—JUSTIFICATION—FAILURE OF SURETIES TO JUSTIFY—NEW UNDERTAKING—FILING TRANSCRIPT—RULE OF COURT.

1. Under the provisions of section 4838, Rev. St. 1887, an appeal may be taken within 30 days after the rendition of a judgment by a probate judge or justice of the peace, and the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party.

2. Under the provisions of section 4842, Rev. St. 1887, such appeal is ineffectual for any purpose unless an undertaking be filed, with two or more sureties; and the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they, or other sureties, justify within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal must be regarded as if no undertaking had been given.

3. In case such sureties fail to appear and justify, the undertaking signed by them is void, but the appellant may file a new undertaking at any time prior to the expiration of the 30-day period given in which to take the appeal, but notice of the filing of such undertaking ought to be given to the adverse party.

4. The rule of the district court requiring the transcript on appeal in all cases appealed from a justice's court to be filed in the district court within 10 days after such appeal is perfected, and, if not so filed, the appeal may be dismissed

on motion, is not jurisdictional, and should be applied with discretion.

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Action in justice court by M. F. Perkins against John Bridge, in which plaintiff had judgment. From an order of the district court dismissing defendant's appeal, defendant again appeals. Reversed.

Allen Miller and W. N. Scales, for appellant. W. H. Cassady and Fogg & Nugent, for respondent.

SULLIVAN, C. J. This is an action in forcible entry and detainer commenced in a justice's court of Idaho county. The judgment of that court was for the plaintiff, and was entered on the 10th day of June, 1903. On June 22, 1903, the defendant filed and served his notice of appeal, and on the same day filed an undertaking on appeal. On June 25th plaintiff filed and served exception to sureties on said undertaking. On July 1, 1903, the defendant, who is appellant here, served notice that the sureties would appear and justify at 5 o'clock on that evening. The sureties failed to appear and justify. On July 2, 1903, appellant filed a new undertaking on appeal, and on July 3, 1903, he served notice on the respondent that he had filed a new undertaking on appeal in lieu of the original one. On August 3, 1903, the transcript in the case was filed in the district court. On the 11th day of September, 1903, the plaintiff served his motion to dismiss the appeal on the ground, among others, that the sureties on the original undertaking had not appeared and justified according to notice, nor had any sureties justified thereon, nor on any undertaking on said appeal. There is no dispute as to the facts. The motion to dismiss the appeal was sustained by the court.

It appears from the record that the motion to dismiss was made on two specific grounds, to wit: (1) The failure of the sureties to justify on exception to their sufficiency; (2) that the transcript on appeal to the district court was not filed within 10 days after such appeal was perfected, as provided by the rules of said court.

There is but one question presented by the record for determination, and that is whether the court erred in sustaining said motion to dismiss. Section 4838, Rev. St. 1887, provides that an appeal may be taken from a judgment in a civil action in a probate or justice's court at any time within 30 days after the rendition of the judgment, and that the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. Section 4842, Rev. St. 1887, provides, among other things, that an appeal from a probate or justice's court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, etc. Said last-cited section further

provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge from whom the appeal is taken within five days thereafter, upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given. It will be observed from the above-stated facts that on July 1, 1903, defendant served a notice that the sureties would appear and justify at 5 o'clock that evening. They failed to appear, and on the next day, July 2, 1903, defendant filed a new undertaking on appeal, and on the 3d day of July notified counsel for respondent of that fact. Neither of said sections provides the time within which the undertaking on appeal must be filed after the service of the notice of the appeal. The judgment was rendered on the 10th day of June, 1903, and the second undertaking was filed on the 2d day of July following. Thus it appears that the second undertaking was filed within 22 days after the rendition of the judgment—8 days prior to the expiration of the 30 days allowed for taking the appeal. In taking an appeal from a judgment of the district court to the Supreme Court of the state, the statute provides that the appeal is ineffectual for any purpose unless within 5 days after the service of the notice of appeal an undertaking be filed. Section 4808, Rev. St. 1887. But the time within which the undertaking must be filed after the notice of appeal has been served is not prescribed by statute in appeals from a justice's court, and, if the undertaking is filed within the time in which an appeal may be taken, which is 30 days after the rendition of the judgment, it is filed in time. The language used in the latter part of said section 4842, Rev. St. 1887, clearly indicates that the failure of the sureties to justify after their sufficiency has been excepted to destroys the bond for the purpose of the appeal, and not the appeal. The statute provides that an appeal is taken by filing and serving notice thereof. As stated by counsel for appellant, "The appeal is a living entity, separate and apart from the bond." It lives 30 days after the rendition of judgment. At the end of that time it dies, unless a proper undertaking has been filed. The words of the statute are, "The appeal must be regarded as if no such undertaking had been given;" that is, if the sureties excepted to fail to justify. If no such undertaking had been given, then, while there was life in the appeal, appellant had the right to file the proper undertaking. The first attempt to give a bond was a nullity—a void act. And we think it is clear, under the provisions of our statute, that a sufficient undertaking may be filed at any time

before the 30-day period above referred to has expired. In case the sureties fail to appear and justify when required to do so, of course, the undertaking that they have signed is void—is of no force or effect. As the statute gives the full 30 days in which to perfect an appeal if a second undertaking is filed within that time, and on proper notice to the opposing party, that is sufficient.

In *Starling v. Burdette*, 68 Pac. 723, the Supreme Court of Washington held that the bond in that case became void because the sureties failed to justify. The trial court granted the appellant the right to file a new bond, which he failed to do. In the case of *Spurlock v. Port Townsend S. R. Co.* (Wash.) 40 Pac. 420, the sureties on the appeal bond failed to appear and justify, and the appellant filed a new bond within the statutory time, and that was held a sufficient compliance with the statute. Where the sureties fail to appear and justify, and a new bond is filed by the appellant, notice of the filing of such bond ought to be given to the opposing party.

As touching upon the question under consideration, see *Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019; *Numbers v. R. Mt. Co.* (Idaho) 63 Pac. 381.

Counsel for appellant does not discuss the second ground of respondent's motion to dismiss, which was to the effect that the transcript was not signed in the district court within the time required by rule 15 of said court, but states that the district judge dismissed the appeal solely and entirely on the ground that a new undertaking was not a sufficient compliance with the statute, though filed within the time allowed by law for taking an appeal, and notice of filing given. The record would indicate that the evil intended to be avoided by such rule never arose in this case, as the transcript on appeal was filed August 3, 1903, and the district court did not convene until September 7, 1903. Thus more than 30 days intervened between the filing of the transcript and the opening of the term of court at which said action was to have been tried. That rule of the court is not jurisdictional, and should be applied with discretion. *Stevenson v. Caldwell* (Mont.) 36 Pac. 185.

It does not appear that any prejudice resulted to the respondent because of the failure to file said transcript within the time required by said rule. The judgment of dismissal must be set aside, and it is so ordered, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Costs of this appeal are awarded to the appellant.

STOCKSLAGER and AILSHIE, JJ. concur.

## COEY v. CLEGHORN.

(Supreme Court of Idaho. June 10, 1904.)

## APPEALABLE ORDER—ATTACHED PROPERTY—REFUSAL TO RELEASE—APPEAL—DISMISSAL.

1. An order, after final judgment, refusing to release attached property, is appealable under the statute of this state.

2. Where it is shown by the certificate of the judge and clerk of the court in the transcript that such transcript contains all the papers, pleadings, etc., used on the hearing of a motion to release certain property from attachment after final judgment in the lower court, and thereafter the judge and deputy clerk furnish certificates or affidavits that other papers were used on the hearing, this court will not dismiss the appeal, especially when it is shown that the missing paper was a part of the record evidence of the respondent. A certified copy should have been furnished for the record by the moving party.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by Charles P. Coey against George F. Cleghorn. From an order refusing to release attached property after final judgment, defendant appeals. Motion to dismiss denied.

Edwin McBee, for appellant. Charles L. Heitman, for respondent.

STOCKSLAGER, J. This action was commenced in the district court of Kootenai county. An attachment issued and was levied upon certain personal property alleged to belong to the defendant, who was at the time residing on the "Indian Reservation" in Kootenai county. A trial was had, and on the 23d day of October, 1903, the jury returned a verdict in favor of the plaintiff, and thereafter, and on the 27th day of October, 1903, judgment was entered on the verdict. On the 23d day of October, 1903, counsel for defendant filed a motion notifying the plaintiff and his counsel that on the 27th day of October, 1903, they would request the court for an order releasing from attachment certain property, attached in the above-entitled action, which defendant claimed as exempt under the provisions of the statutes, etc. The notice also provided that the motion would be made and based on the records and files in the action, and upon the affidavit attached, which was the affidavit of defendant. This motion was heard on the 4th day of November, 1903, and the court ordered that the motion be overruled and denied, and further ordered that the stay of execution theretofore granted be vacated and set aside as to certain of the attached property, etc. On the 31st day of December, 1903, defendant served counsel for plaintiff with his notice of appeal to this court from the above order. March 30, 1904, respondent filed his motion to dismiss the appeal on the grounds: "(1) That the order of the district court appealed from herein is not an appealable order. (2) That no good and sufficient record on appeal has

been filed herein. (3) That the pretended record herein is not authenticated by a bill of exceptions, or by the district judge who heard and determined said motion, or by the clerk of the said district court. (4) That the pretended record on appeal does not contain all of the documents, evidence, and matters and things which were heard and considered by the district judge on the hearing of said motion. (5) The said motion will be made upon the transcript on appeal herein, and upon the certificate of Hon. R. T. Morgan, judge of the district court of the First Judicial District of the state of Idaho in and for the county of Kootenai, the affidavit of T. L. Quarles, and the affidavit of James A. Foster, which certificate and affidavits are attached to this motion and made a part hereof."

Taking up this motion in the order named, we will first dispose of the first ground urged by respondent; that is, "that the order of the district court is not an appealable one." Subdivision 3 of section 4807 of the Revised Statutes of 1887 provides that "an appeal may be taken from any special order made after final judgment." This provision of the statute disposes of this ground of the motion. It is shown by the record that final judgment was entered October 27, 1903, and the order appealed from was entered November 4, 1903.

The question upon which counsel for respondent relies for a dismissal of this appeal as shown by the brief is based upon the insufficiency of the record as shown by the transcript, insisting that the certificate of Judge Morgan, and the affidavit of Deputy Clerk Foster attached to his motion, show that all the papers used on the motion in the lower court are not brought to this court on the appeal. This presents a somewhat novel situation, and we are at a loss to know how to arrive at a true solution of the facts. It is shown by the transcript that the learned judge on the 7th day of March, 1904, made a certificate on the motion of defendant to have certain property levied upon herein released as exempt property: "The following pleadings, and none other, were considered by me in rendering a decision upon said motion, namely: The writ of attachment issued herein October 1, 1903, and the sheriff's return thereto, which said writ was filed on return October 5, 1903; the order made by me October 21, 1903, dissolving said attachment; writ of attachment issued herein October 21, 1903, together with sheriff's return thereto, which said writ was filed on return October 23, 1903; the notice of motion and affidavit in support of said motion for release of said property, filed herein October 24, 1903; the affidavit of Edwin Doust in opposition to said motion, filed herein November 3, 1903; the affidavit of J. B. Gilbert in opposition to said motion, filed herein November 2, 1903; the affidavit of W. E. Noe

in opposition to said motion, filed herein November 2, 1903; the affidavit of R. T. Walls in opposition to said motion, filed herein November 2, 1903." The clerk of the court, through his deputy, James A. Foster, certifies to the same state of facts. On the 25th day of March, 1904, Judge Morgan made a certificate, which is attached to respondent's motion to dismiss, in which he certifies that, on the hearing of the motion in the lower court above referred to, he took into consideration the evidence which had been theretofore introduced on the trial of the cause upon the merits in said action in said court, in which action the judgment was made and rendered in favor of the respondent herein, and against the appellant herein, on the 27th day of October, 1903. He further certifies that on such hearing there was introduced and read in evidence and considered the bill of sale from the appellant, George F. Cleghorn, to the Loy Hardware Company, a certified copy of which bill of sale is annexed to this certificate, marked "Exhibit A," and made a part hereof. The certified copy of the bill of sale above referred to is dated March 24, 1904, and hence was not used in evidence on the hearing of the motion in the lower court, as that hearing was on the 4th day of November, 1903, as shown by the certificate of the judge. If this bill of sale was a part of the evidence on the hearing in the lower court, it was the duty of the party introducing it to furnish a certified copy for the record; it was certainly no part of the duty of counsel representing defendant below, appellant here, to procure at his expense the evidence that should have been introduced in proper form in the court below; and, under the circumstances in this case, a motion for diminution of the record would have a better standing in this court than one to dismiss the appeal on this ground, urged by counsel for respondent. The deputy clerk who made the certificate shown in the record also furnishes an affidavit, which is attached to the motion, contradicting his certificate as deputy clerk.

We think, under all the circumstances in this case, this motion should be denied, and the case heard on its merits at the next Lewiston term, and the cause continued, and it is so ordered.

SULLIVAN, C. J., and AILSHIE, J., concur.

#### FELTHAM et al. v. BOARD OF COUNTY COM'RS.

(Supreme Court of Idaho. June 13, 1904.)

##### BOARD OF EQUALIZATION—APPEAL FROM ORDER OF.

1. Section 1776, Rev. St. 1887, as amended at the 1899 session (Laws 1899, p. 248), providing for appeals from the orders of boards of county

commissioners, does not authorize an appeal from an order of a board of equalization.

2. The county board of equalization is a constitutional board, exercising powers and duties separate and distinct from those exercised by the board of county commissioners.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Geo. H. Steward, Judge.

Action by Lot L. Feltham and others against the board of county commissioners. From an order made by the board of equalization directing the assessment of the capital stock of the Washington County Abstract Company, Limited, against the stockholders thereof, the stockholders appealed to the district court. The district court ordered the assessment canceled, and directed that the property (abstract books) of the corporation be assessed to the corporation. From the judgment of the district court, the abstract company appealed. Reversed.

Lot L. Feltham, for appellant. John A. Bagley, Atty. Gen., for respondent.

AILSHIE, J. This appeal is prosecuted by the Washington County Abstract Company, Limited, a corporation organized and existing under the laws of this state. On the 18th day of July, 1903, the appellant, through its attorney, appeared before the board of commissioners of Washington county, then sitting as a board of equalization, and made application to the board to strike from the assessment roll of the county for the year 1903 the assessment of the abstract books belonging to the appellant, and assessed at the sum of \$1,000. After a hearing the board granted the petition, and ordered the assessment stricken from the roll. On the same day the board of commissioners, sitting as a board of equalization, ordered that the individual stockholders of the capital stock of the appellant corporation be assessed according to the number of shares held by each, in the aggregate sum of \$1,000, which was the valuation placed upon the abstract books, and thereupon ordered that notice of such action be given by the clerk to each of the stockholders. After the service of notice, and on the 27th day of July, 1903, the stockholders appeared before the board and filed their written application, asking the board to strike from the assessment roll the assessment made against them on their stock held in said corporation. This application was refused and denied, and the stockholders—five in number—appealed to the district court. When the matter was called for hearing in the district court, the county attorney moved to dismiss the appeal upon two grounds, the second of which is "that the court has no jurisdiction in said pretended matter of appeal, for the reason that no appeal is allowed by law in the state of Idaho in any matter coming before, and passed upon by, the board of equalization." This motion was overruled by the court, to which



ruling the county attorney took his exception. The court thereafter proceeded to hear the appeal upon its merits, and on the 4th day of November, 1903, made and filed his findings of fact and conclusions of law, and entered a judgment directing that the order of the board of equalization assessing the stock of the corporation to the stockholders be vacated and set aside, and that the original assessment of \$1,000 against the Washington County Abstract Company be reinstated as the assessment against said corporation. From that part of the judgment reinstating the assessment against the abstract company, the corporation has appealed.

On this appeal it is contended by the appellant that the district court entered its judgment, as against the appellant, without jurisdiction, and that the judgment is therefore void in so far as it ordered the reinstatement of the assessment against the corporation. It will be observed that the county did not appeal from the order of the board of equalization directing the cancellation of the assessment against the abstract company. On the other hand, the stockholders, in their individual capacity, did appeal from the order of the board directing an assessment against them to the amount of the stock held by each in the corporation. On the appeal to this court, the county, through the Attorney General, has again raised the question that the district court was without jurisdiction to enter any judgment or order of any kind in the premises, except to dismiss the appeal in the first instance, for the reason that, under the laws of this state, no appeal will lie from an order or proceeding of a board of equalization.

The appeal from the order of the board of equalization taken in this case was taken under the provisions of sections 1776-1779, Rev. St. 1887, as amended by act of February 14, 1899 (Sess. Laws 1899, p. 248). By section 1776 it is provided that "an appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any tax payer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interests." The section to which the foregoing is an amendment is found in chapter 2 of title 11 of the Political Code of 1887, and it should be observed that that chapter is devoted exclusively to the duties and powers of the board of county commissioners when acting as such a board, and does not undertake to prescribe their powers and duties as a board of equalization. Section 25 of the county commissioners' act of the Compiled Laws of 1874, p. 529, provided for appeals from orders of the board of commissioners as follows: "Appeals may be taken from orders of the board of county commissioners as follows: First. From an order by any person aggrieved thereby. Second. From an or-

der allowing any account or demand against the county by any elector or tax payer of the county, on the ground of improper or excessive allowance. Third. From any order prejudicially affecting the public interest, by either the district attorney or probate judge of the county on behalf of the county." Under that provision it was held by the territorial Supreme Court in *General Custer Mining Company v. Van Camp*, 2 Idaho (Hasb.) 40, 3 Pac. 22, that an appeal would not lie from an order of the board of commissioners when acting as a board of equalization. Judge Prickett discussed the matter, and set forth the conclusion of the court thereon very ably and clearly, as follows: "It seems quite clear that the board of county commissioners and the board of equalization are two separate and distinct bodies, created by different acts of the Legislature; that, by section 22 of the revenue law (Comp. Laws 1874, p. 487), persons holding the office of county commissioners by election or appointment are invested with another distinct office, having a different name. The revenue act, complete in itself, provides what duties the board of equalization shall perform. It requires them to meet and discharge those duties at a time not fixed by law for a meeting of the board of commissioners. It provides them with a clerk, and designates him as the clerk of the board of equalization; and, although the two boards are composed of the same persons, they are as completely different, in respect to organization, powers, and duties, as if composed of different individuals. There being two separate boards, the right of appeal given by statute from orders of the board of commissioners does not imply the same right from the orders and decisions of the board of equalization." That decision has never been questioned in this state, and has stood as the law of the state on the subject ever since.

The constitutional convention of 1889, by section 12 of article 7 of the Constitution, provided that "the board of county commissioners for the several counties of the state shall constitute boards of equalization for their respective counties, whose duties shall be to equalize the valuation of the taxable property in the county, under such rules and regulations as shall be prescribed by law." By section 6 of article 18 of the same instrument they provided for a board of county commissioners. Since the adoption of the Constitution, but few amendments have been made to the Revised Statutes relative to the duties of a board of county commissioners, as it existed under the territorial form of government. One of the principal amendments thereto has been sections 1759 and 1776 to 1779, inclusive. On the other hand, since the adoption of the Constitution the Legislatures have repeatedly passed revenue acts, and in each act have provided for the equalization of assessments by the board of county commissioners. At no time, however,

has the Legislature ever provided for an appeal from any action or proceeding taken by the board of county commissioners when sitting as a board of equalization. It is also worthy of observation that the board of county commissioners, as such, meet at stated periods for the transaction of the regular county business, but at none of these meetings are they authorized to equalize assessments or to sit as a board of equalization. On the other hand, it is provided by law that they shall meet at a specified time each year as a board of equalization, and examine the assessment roll, and equalize the assessments of property within their respective counties. It seems to us that there are even more potent reasons now than when the General Custer Mining Company Case was decided, why an appeal will not lie from an order of the board of equalization. Since that decision was announced, the Constitution has been adopted, and by that instrument the board of equalization has become a constitutional board, recognized as such, with constitutional powers and duties prescribed; and the allowance of an appeal from an order of the board of county commissioners cannot reasonably be construed to extend to the allowance of an appeal from an order of the board of equalization. It is true that the board of county commissioners and the board of equalization are each composed of the same officials, but that fact can make no difference as to the distinct duties and functions of each board. While those officials are performing the duties and functions of the one board, they are a distinct and separate organization from the other, and cannot discharge any of the duties of such other board at such time or in such meeting. The allowance of an appeal from the orders of one specified board does not extend to the orders of any other board. And the fact that the same individuals constitute the personnel of two or more distinct boards affords no reason for an exception to the rule. Under the law as it formerly existed in this state, the probate judge was ex officio superintendent of schools for his county. An appeal was allowed from the orders and judgments of the probate judge, and still no one ever seriously contended that this right of appeal extended to his orders and decisions when made as superintendent of schools.

The same question here considered was discussed extensively by the Supreme Court of Washington in *Olympia Waterworks v. Board of Equalization*, 44 Pac. 267, and the court arrived at the conclusion that an act authorizing appeals from orders and proceedings of the board of commissioners does not authorize an appeal from an order of the board of equalization.

We are of the opinion that the judgment appealed from is void for want of jurisdiction in the district court entering the same. The cause will therefore be remanded, with di-

rection to the district court to vacate and set aside the judgment and order so made and entered. Costs of this appeal awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

MEYER et al. v. FIRST NAT. BANK OF COEUR D'ALENE et al.

(Supreme Court of Idaho. June 11, 1904.)

INJUNCTIONS—DISSOLUTION WITHOUT NOTICE  
—WILL NOT ISSUE AGAINST NATIONAL  
BANKS—SUFFICIENCY OF SHOWING.

1. When the adverse party moves to dissolve a temporary injunction upon the papers on which it was granted, no notice is required to be given to the party who obtained the injunction. *Thayer v. Bellamy* (Idaho) 71 Pac. 544, approved and followed.

2. That portion of section 5242, Rev. St. U. S. (3 U. S. Comp. St. 1901, p. 3517), which provides that "no attachment, injunction, or execution shall be issued against such association [national bank] or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," is a complete bar to the issuance of any such writ or order from a state court against a national banking association.

3. Complaint and affidavits examined, and held sufficient to authorize issuance of injunction against all defendants except one named as a national bank.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by M. M. Meyer and Edward N. La Veine against the First National Bank of Coeur d'Alene and others. Plaintiffs filed their complaint and affidavits praying a temporary injunction. On this showing a temporary injunction was issued without notice to defendants. Upon application of defendants, without a counter showing and without notice to the plaintiffs, the injunction was dissolved, from which order plaintiffs appealed. Order modified.

Charles L. Heitman and E. N. La Veine, for appellants. Fred L. Burgau, for respondents.

AILSHIE, J. This action was commenced against the First National Bank of Coeur d'Alene and S. A. Varnam. Plaintiffs filed their complaint, and supported the allegations thereof by five separate affidavits, and on the showing so made the district judge issued an injunction against defendants enjoining and restraining them from further commission of the acts threatened, and of which the plaintiffs complained. The injunction was served upon the defendants on the 11th day of January, 1904, and thereafter, and on the 13th day of the same month, the defendants applied to the judge who ordered the writ for a dissolution thereof. This mo-

¶ 1. See *Injunction*, vol. 27, Cent. Dig. § 355.

tion was made without notice to the plaintiffs, and upon the papers used in obtaining the injunction in the first instance. After hearing the application of the defendants, the district judge made an order dissolving the injunction upon the grounds that it had been issued "without sufficient ground, and that no sufficient ground to warrant interposition of the court of equity is alleged in the complaint and moving papers of the plaintiff herein, and plaintiffs have a plain, speedy, and adequate remedy at law." From the order thus made dissolving the injunction this appeal has been taken.

Plaintiffs' first assignment of error is "that the court erred in dissolving the injunction without notice to the plaintiffs, and without giving plaintiffs an opportunity to be heard in opposition to said motion." There is no merit in this assignment. We disposed of this question in *Thayer v. Bellamy*, 71 Pac. 544, where it was said: "When the adverse party moves to dissolve a temporary injunction upon the papers upon which it was granted, no notice is required to be given to the party who obtained the injunction, and no further showing can be made in opposition to such motion." See section 4295, Rev. St. 1887.

The other assignments made by appellants go to the merits of the case. The respondents, however, have presented a valid and sufficient reason for the dissolution of the injunction as to the defendant bank at least. They rely upon section 5242, Rev. St. U. S. (3 U. S. Comp. St. 1901, p. 3517), which, after making certain provisions against preferences in favor of creditors of national banks, concludes with the following prohibition: "And no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county, or municipal court." This statute is a complete bar to the issuance of an injunction by a state court against a national banking association. This view has been held by the courts so generally and uniformly that it requires no discussion here. See *Pacific National Bank of Boston v. Mixer*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865; *Dennis v. First National Bank of Seattle*, 127 Cal. 453, 59 Pac. 777, 78 Am. St. Rep. 79; *Garner v. Second National Bank of Providence (C. C.)* 66 Fed. 869; *Chesapeake Bank v. First National Bank of Baltimore*, 40 Md. 289, 17 Am. Rep. 601; *Nat. S. Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281, 32 L. Ed. 682.

For the foregoing reason alone the injunction was properly dissolved as against the bank. The same reason, however, could not be urged for dissolving the injunction as to the defendant Varnam. The complaint, after alleging the corporate existence of the bank, shows that in June, 1903, the plaintiff Edwin N. La Veine entered into an agreement

of lease with one P. J. Scallon, who was then the owner of the leased premises, whereby La Veine leased from the said Scallon three office rooms in Coeur d'Alene City for the period of one year, with the option of continuing the lease for the further period of one year upon the same terms and conditions. Thereafter, and on the 10th of July, 1903, La Veine sublet two of the office rooms to the plaintiff M. M. Meyer, subletting of the premises having been authorized by the lease. The rents were paid from time to time as they became due, and the plaintiffs had installed their furniture and opened up business in the offices. Thereafter, and prior to the commencement of this action, the defendant First National Bank purchased from Scallon the property leased to and occupied by plaintiffs. It is then charged that the defendant Varnam, under contract with, and employment by, the defendant bank, on or about the 19th day of December, 1903, began to make changes and repairs about the building, and in doing so tore down and destroyed the partition between those rooms and adjoining rooms, and injured and damaged some of the plaintiff's personal property and office furniture, and made excavations in front of the offices so that the patrons and clients of the plaintiffs could not reach their offices and place of business, and that in pursuance of the purposes and designs of the defendants Varnam had commenced the construction of a large brick wall, which he threatened to build into and through the offices and rooms occupied by the plaintiffs, and thereby render the offices unfit for use and occupation. It is also alleged that the defendant bank had threatened to oust and eject the plaintiffs from the rooms occupied by them, and that they were maliciously and willfully committing various trespasses for the purpose of annoying and disturbing the plaintiffs and of eventually driving them from the offices and rooms rented by them. It is also charged that these acts were done in pursuance of a conspiracy entered into between the bank and Varnam. It also appears that either Varnam or the bank officials had caused the water hydrants to be disconnected, thereby shutting off the plaintiff's water supply.

The willful commission of trespasses is outside of and beyond the authority and scope of powers granted to national banks, and becomes the personal and individual act of the officers or persons who commit or threaten to commit the same. We cannot see how a national bank, as such, can threaten to commit a trespass, but we can understand how its officers might do so, and for such acts they would be personally liable. It was evidently the purpose of Congress to prohibit attachments and injunctions issuing from state courts against national banks, and it is equally certain that the purpose was not to protect them in the commission of torts and trespasses, but rather to prevent any inter-

ference with the legitimate business for which such banks are organized.

The complaint states a cause of action, and upon its face entitled plaintiffs to a temporary injunction against the defendant Varnam. The contention of defendants that plaintiffs have an adequate remedy by an action at law, and cannot, therefore, resort to an equitable remedy, is not well founded. It is true that they have their remedy for damages, but under our statute (section 4288, Rev. St.) a party is not under the necessity of waiting till his property has been damaged and destroyed, and his business disorganized, and his premises encroached upon to the extent of his own ouster, and then resorting to an action at law for redress. In *Staples v. Ross*, 65 Pac. 67, this court laid down the rule under our statute as follows: "Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff."

The order appealed from will be affirmed as to the defendant bank and reversed as to defendant Varnam. Costs awarded to appellants.

SULLIVAN, C. J., and STOCKSLAGER, J., concur

#### LEWIS, COOPER & HANCOCK v. UTAH CONST. CO.

(Supreme Court of Idaho. June, 1904.)

CONTRACT—RAILROAD CONSTRUCTION—COMPLAINT—DEMURRER—ESTIMATES—CLASSIFICATION—EVIDENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF—INSTRUCTIONS.

1. Complaint states a cause of action.
2. The question of whether the estimates had become an account stated was left to the jury under proper instructions.
3. Where a motion is made to compel the plaintiffs to elect upon which of several causes of action or counts they would proceed to trial, it was not error for the court to reserve its decision, and thereafter try the case upon the theory that said motion had been sustained, and try the case upon the first and third causes of action stated in the complaint.
4. Where the parties to an action testify to an express contract, but differ as to the amount to be paid or the contract price for the services rendered, evidence of the actual cost of the performance of the work is properly admitted, as it may afford some reasonable ground for believing that the contract was for the price nearest the cost.
5. No variance between the allegations and the proof is deemed to be material unless it had actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.
6. Where certain material evidence is rejected, but the record shows that the evidence rejected was given by another witness, the error is immaterial, and not prejudicial.
7. Instructions examined, and held to properly state the law applicable to the evidence introduced on the trial.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by Lewis, Cooper & Hancock against the Utah Construction Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. S. Dietrich and Henderson & McMillan, for appellant. Thos. F. Terrell, for respondents.

SULLIVAN, C. J. This is an action brought by the respondents, as copartners, against the appellant, the Utah Construction Company, upon a verbal contract, to recover an alleged balance due for work and labor performed by the respondents upon the Oregon Short Line Railroad between mileposts 280 and 290 in the state of Montana. The complaint contains four separate counts or causes of action, but the trial proceeded upon the first and third causes stated in the complaint. Said contract was entered into on or about the 15th day of May, 1900, and the work to be performed thereunder consisted in the construction of grades, fills, and embankments on the right of way of said railroad according to certain plans, and under the supervision and direction of engineers of the railroad company. The respondents were to be paid for said work from time to time as the work so done by them should be ascertained from estimates to be made by engineers, and 10 per cent. of the value of all work done was to be withheld until the work was completed, and any balance remaining unpaid at that time was to be paid to the respondents. It is alleged in the complaint that the appellant agreed in said contract to pay to the respondents the sum of 10 cents per cubic yard for all earthwork done in pursuance of said contract, which allegation is denied by the answer, and it is averred therein that only 9½ cents per cubic yard was to be paid for the earthwork. It is also alleged in the complaint that the respondents were to receive 25 cents per cubic yard for all loose rock work done by them, and that, by the terms of said contract, all work done by the respondents of a similar character to the work done on the south end of the side track at Dell Station, in the state of Montana, should be classed as loose rock work, and paid for at the rate of 25 cents per cubic yard, and that, in pursuance of said contract, the loose rock work so done under said contract amounted to 11,331½ cubic yards, and that said number of yards should have been classed as loose rock work, and paid for at the rate of 25 cents per cubic yard. The answer of appellant denies that it was agreed that all or any of the work to be performed under said contract of a similar character to the work on the south end of said track at Dell Station should be classed as loose rock work, or to be paid for at the rate of 25 cents per cubic yard, and denies that there was any agreement that

¶ 5. See Pleading, vol. 39, Cent. Dig. § 1338.

such work should be so classified and paid for at the rate of 25 cents per cubic yard, and also denies that the respondents handled, moved, carried, or deposited, in the construction and repair of the roadbed of said railroad, or at all, for the appellant, more than 22,373 cubic yards, and denies that they did any rock work at all, but admits that the engineers of said railroad, in making their estimates, classified and allowed as loose rock work 298 cubic yards of the work done by the respondents, and paid them therefor at the rate of 25 cents per cubic yard. The pleadings put in issue the amount of work done by the respondents, the classification of the work, and the sum to be paid per cubic yard for the earth work. A general demurrer to each cause of action was filed, and, without argument, was submitted to the court, and overruled pro forma. The cause was tried by the court with a jury, and, on a verdict, judgment was rendered in favor of the respondents for the sum of \$1,454 and costs of suit. This appeal is from the judgment and order denying a new trial, and is presented on a statement of the case.

Numerous errors are assigned, and are discussed by counsel for appellant under seven different heads. The first is that the court erred in overruling the demurrer, the ground of the demurrer being that the complaint failed to state a cause of action. One of the main contentions is that there is no allegation that there was any error, mistake, or fraud in the estimates furnished by the engineer, and for that reason the complaint does not state a cause of action. The complaint alleges that by the terms of said contract all work of a similar character to the work done on the south end of the side track at Dell Station, Mont., should be classed as loose rock work, and paid for at the rate of 25 cents per cubic yard; that, under said contract, plaintiffs handled, moved, carried, and deposited in the construction and repair of the roadbed of said railroad 22,663 cubic yards of earth and loose rock, and that one-half of said 22,663 or 11,331½ cubic yards, should have been, and is entitled to be, classed as loose rock work, and paid for at the rate of 25 cents per cubic yard. While the latter allegation is not a direct allegation that said 11,331½ cubic yards of rock work was similar in character to the work on the south end of the side track at Dell Station, and does not directly aver that there was a mistake in the estimates of the engineer, they are equivalent to such allegations, and the necessary inference is that the plaintiffs had done that amount of work, which was similar to that at the south end of the side track at said station, that ought to have been classed as loose rock work, and paid for at the rate of 25 cents per cubic yard, and that it had not been so classified and paid for. We think the allegations of the complaint are sufficient on said points, and

state a cause of action; and, under the answer of the defendant, it is clear that appellant was not misled on the trial of the case. It is contended that respondents did not object to the correctness of the estimates furnished them within a reasonable time after they were delivered to them, and for that reason they became an account stated, and are estopped from objecting to them at this time. There was evidence introduced on the question, and the court instructed the jury thereon as follows: "The jury are instructed that where a party sends by mail a statement of account to another, with whom he had dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated; and what is a reasonable time, in this connection, is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them." That instruction correctly states the law, and the jury found from the evidence in favor of the respondents, and we are not disposed to set aside their verdict on the ground that it is not supported by the evidence.

Counsel for appellant contends that the failure of the court to compel the respondents to elect whether they would go to trial upon the first or second cause of action was error. There is nothing in this contention, for the case was tried all the way through upon the first cause of action; that is, upon the theory that the action was upon an express contract, and not upon a quantum meruit, that being the theory of the second cause of action. The court instructed the jury that this action was brought upon a verbal contract. The appellant admits that it was brought upon a verbal contract, and it was tried upon the theory that it was based upon an express contract. We do not lose sight of the fact that there was a third cause of action stated in the complaint and tried in this action, but that was in regard to a small sum of money that had been transferred from one account to another. While the court did not sustain, in terms, appellant's motion to compel the respondents to elect, it did that in effect, by confining the trial to the first and third causes of action stated in the complaint.

Assigned errors 3, 4, 8, 9, 11, 14, 15, 17, 18, and 20 will be considered together. They are in regard to the action of the court in permitting certain witnesses for the respondent to testify as to the difficulty and reasonable value of the work performed by them, in response to such questions as: "How many men did it require to break the soil which you have described?" "What effect, if any, did the ground which you have described have upon the horses and teams which you

used?" "How was the plow manned and operated?"—and questions of similar import. It is contended that those questions were improper, the question being not the reasonable value of the services performed, but the contract price thereof. It was in dispute whether the respondents were to receive  $9\frac{1}{2}$  or 10 cents per cubic yard for the dirt work, and also as to the classification of the work done. Respondents claimed that all work done by them that required more than six horses to break the ground was to be classified as loose rock work, and it was under that claim that the court permitted that evidence to be introduced that that material was the same as that in the south end of the side track at Dell Station, and should be classified as loose rock work, under that contract; there being a difference of 15 cents per cubic yard, at least, between dirt work and loose rock work, and a dispute between the parties as to whether the work referred to should be classed as loose rock work or dirt work. We think it was proper for the court to admit evidence of real value of that class of work under the facts of this case. It was held in *Richardson v. McGoldrick* (Mich.) 5 N. W. 672, that where, in an action for services, both parties testified to an express contract, but differed as to the amount to be paid, evidence as to the value of such services was properly allowed. And in *Misner v. Darling* (Mich.) 7 N. W. 77, which was a case where the contract price for sawing lumber was in dispute—one party testifying that it was to be \$4 per M, and the other that it was to be \$3.50—as bearing upon the probabilities that he was correct, rather than the plaintiff, the defendant offered to show what the sawing of the lumber was fairly worth, but the offer was ruled out. The appellate court held that such evidence was admissible. In *Valley Lumber Company v. Smith* (Wis.) 37 N. W. 412, 5 Am. St. Rep. 216, it was held that where the evidence adduced on both sides is in direct conflict, and pretty evenly balanced as to the contract price, evidence that the cost of performance was greatly in excess or greatly below such contract price might afford some reasonable ground for believing that the contract was for the price nearest the cost. *Campau v. Moran*, 31 Mich. 280; *Kirk v. Wolf Mfg. Co.* (Ill.) 8 N. E. 815; *Allison v. Horning*, 22 Ohio St. 138. We think the evidence objected to was properly admitted.

Counsel for appellant discusses assignments 5, 7, 12, 13, 16, 19, 20, 21, and 22 together. Those assignments refer to the testimony of certain witnesses, and the following question will indicate the kind of evidence referred to: "What per cent. of the work performed by plaintiffs under their contract was similar in character to the work done upon the south end of the Dell side track?" It is contended that that question and others of similar import were asked of plaintiffs'

witnesses, and were objected to on the part of the appellant on the ground that said questions were immaterial, and were not embraced in any issue presented by the complaint. Since we have above held that the allegations of the complaint were sufficient to put in issue the fact whether any of the work performed by respondents was of a similar character to the work done on the south end of the side track at Dell Station, that disposes of the question here involved. The court having held that that fact was put in issue, it was proper to admit evidence to show the amount of work done by the respondents of similar character to the work done on south end of said side track. Under the provisions of section 4225, Rev. St. 1887, no variance between the allegations and the proof is deemed to be material unless it had actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. If the allegations of the complaint were defective or uncertain on the point referred to, the denials and averments of the answer on that point are amply sufficient to put that question in issue, and show that the appellant was not misled in making its defense.

Under the fifth head, five assignments are discussed, and refer to certain evidence excluded by the court. It appears that there was a slight discrepancy between some of the monthly estimates and the final estimates as to the number of cubic yards of loose rock work, and counsel for appellant desired to have their witnesses explain such discrepancy, and several questions were asked of witness Krebs for that purpose. Such evidence was objected to by counsel for respondents. The witness was not permitted to answer those questions. The court should have permitted the witness to explain that discrepancy. However, it appears from the record that the witness Green, on behalf of the appellant, testified that he gave the monthly estimates of the work being done, and stated: "Monthly estimates were arrived at by going over the work and estimating what had been done. These estimates are not accurate, and are liable to be corrected on the final estimates." This was an explanation of the variance between the monthly estimates and the final estimates, and clearly stated to the jury that the monthly estimates were not accurate—only approximate—and subject to correction by the final estimate. While we think the court should have permitted witness Krebs to explain the variance between those estimates, we do not think it was reversible error not to permit him to do so, as such discrepancies were explained by another witness on behalf of the appellant.

We have examined the assignments of error in regard to certain instructions given by the court, and we think they state the law as applied to the evidence and theory of the

case upon which it was tried, and conclude, on a review of the entire evidence, that the verdict is sustained by it.

The judgment of the trial court is affirmed, with costs in favor of the respondents.

STOCKSLAGER and AILSHIE, JJ., concur.

### HOLLISTER v. STATE et al.

(Supreme Court of Idaho. Feb. 18, 1904.)

CONDEMNATION PROCEEDINGS—DESCRIPTION OF PREMISES—UNCERTAINTY OF COMPLAINT—UNCERTAINTY WAIVED BY DEFAULT.

1. In a condemnation proceeding the allegations of the complaint must be in substantial compliance with the requirements of section 5216, Rev. St. 1887.

2. Held, further, that in ascertaining whether or not such requirements have been substantially met by the pleader, the same rules, methods, and manner of inquiry applicable in considering the sufficiency of any other pleading will be followed.

3. It is only where there is a failure to make a necessary or material allegation in the complaint that a defendant is justified in suffering a default and raising its insufficiency upon appeal; but where the allegation has been made, and he desires to attack it for uncertainty or ambiguity or the manner of making the allegation or language thereof, he must do so by a proper demurrer.

4. By default a defendant admits all the allegations of the complaint. He thereby admits equally the facts shown by a map annexed to and made a part of the complaint by reference as well as the allegations found in the respective paragraphs of the complaint.

Sullivan, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Lincoln County; Kirtland L. Perky, Judge.

Condemnation proceedings by H. L. Hollister against the state of Idaho, W. A. Clark, and others. From a judgment by default against defendant Clark and certain other defendants, Clark appeals. Modified.

N. M. Ruick and Sullivan & Sullivan, for appellant. S. H. Hays, for respondent.

AILSHIE, J. This is an appeal by the defendant W. A. Clark from a judgment made and entered on the 4th day of June, 1902, in an action wherein H. L. Hollister was plaintiff and the state of Idaho and W. A. Clark and others were defendants. From the judgment in that case and in another case the state of Idaho appealed to this court (Hollister v. State, 71 Pac. 541), and the judgments of the lower court were affirmed. The appellant Clark allowed judgment by default to be entered against him, and this appeal is from such judgment, and brings up the judgment roll for our consideration.

That portion of the judgment of which the appellant here complains is as follows: "And that plaintiff be, and he is hereby, permitted to build dams as shown on Exhibit A, attached to the complaint, a duplicate

whereof is attached to this judgment, and hereby referred to and made a part hereof; and also to remove rocks from the bed of Snake river at a point marked 'Rapids to be Blown Out' on said Exhibit A." Counsel for appellant contend that the allegations of the complaint were not sufficient to authorize the entry of this portion of the judgment. In order to fully illustrate the position taken by the respective parties to this appeal, it will be necessary to set forth the greater portion of the complaint, together with an exhibit attached thereto and by reference made a part thereof. All the allegations contained in the complaint which in any way refer to the lands and premises to be condemned and sought to be taken by the plaintiffs are contained in paragraphs 3, 4, 5, and 7 and Exhibit A of plaintiff's complaint, and they are each respectively as follows:

"(3) That the premises hereinafter described and sought to be taken for public use are claimed by the state of Idaho, and by said State Board of Land Commissioners and the members thereof, as a portion of section thirty-six, township seventeen east, of range nine south of Boise meridian. That said section thirty-six was included in and is a portion of the lands granted to the state of Idaho by the act of Congress of July 3, 1890 [26 Stat. 215, c. 656]. That plaintiff is informed and believes, and therefore alleges, that the lands hereinafter described and sought to be taken for public use are within the limits of, and are a portion of, said section thirty-six, and that said state of Idaho is the owner thereof.

"(4) That the defendants, W. A. Clark, Mrs. Dewey (a widow), E. L. Stone, and J. A. Creighton, claim to be the owners of said lands hereinafter described and sought to be taken for public use, but plaintiff alleges that said defendants are not the owners thereof, and have no right thereto.

"(5) That the premises sought to be taken for public use are situate in Lincoln county, state of Idaho, and are bounded and described as follows, to wit: Commencing at a point north, twelve degrees fifteen minutes west, from the southeast corner of section 26, Tp. 9 south, of range 17 east, Boise meridian, 1,847 feet, running thence north, twelve degrees fifteen minutes west, one hundred and ninety-one and one-half feet; thence south, sixty-three degrees and forty-eight minutes east, two hundred fifty-two feet, to Snake river; thence south, thirty-two degrees thirty-six minutes west, along the river, seventy and two-tenths feet; thence south, fifteen degrees west, along the river, fifty feet; thence south, twenty-three degrees forty-five minutes east, along the river, fifty feet; thence north, sixty-three degrees and forty-eight minutes west, one hundred and seventy-five feet, to the place of beginning—as more fully shown on the plat of said premises hereto attached and marked 'Exhibit A,' and made a part hereof.

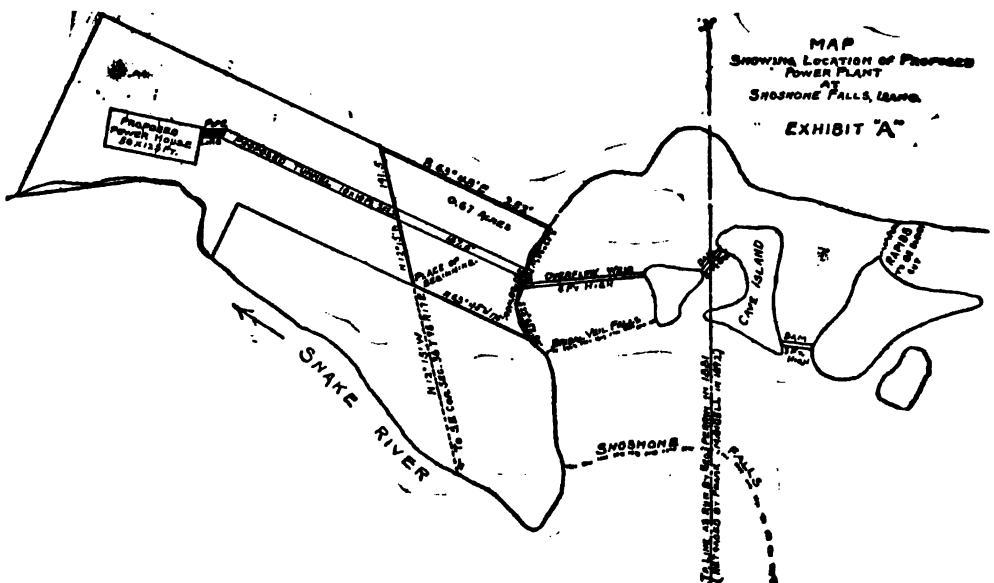
"That plaintiff also desires and proposes to construct the dams shown on said plat Exhibit A, and to remove the rocks from Snake river at the point indicated thereon."

"(7) That the lands sought to be taken for public use are situated in the immediate vicinity of Shoshone Falls, on Snake river, as shown on Exhibit A. That it is the purpose and object of plaintiff to utilize the waters of Snake river for the purpose of creating and manufacturing electricity for public use, as hereinbefore set forth. That said lands sought to be condemned are necessary for use in diverting the waters of said Snake river and in constructing tunnels, canals, and conduits from said river to the buildings and structures used in creating and manufacturing electricity. That it is also necessary to place the dams in said Snake river as designated on Exhibit A, and to remove the rocks from said river at the point thereon designated. That it is the purpose and object of plaintiff to divert the waters of said Snake river by removing rocks therefrom and placing dams therein, and by constructing a tunnel ten feet high and ten feet wide, as designated on Exhibit A, and by means of pipes and conduits therefrom to the power house of plaintiff, to be located as shown on said Exhibit A, and to equip said power house with such machinery and appliances as may be necessary to create or manufacture electricity for the purposes hereinbefore set forth. That defendants have refused to grant plaintiff the use of the premises sought to be taken."

The complaint closes with a prayer that the premises described therein and also indicated on Exhibit A be condemned to a public use, and that the damages therefor be assessed, etc. There is no question raised in

this appeal as to any of the premises either described in the complaint or shown on the map which are situated in section 36, but it is contended that the description, both as set forth in the respective paragraphs of the complaint and shown on the map, confine the plaintiff's right of recovery exclusively to the lands situated within section 36; and that, although the map shows certain dams to be constructed in the bed of Snake river across the township line, and beyond the limit of section 36, the court was without jurisdiction as against a defaulting defendant to enter a decree covering the dams shown by the map. As will be seen from an examination of this map, it is drawn to a scale representing 40 feet to the inch, as shown by it. It is also drawn to a north and south line as shown thereon, thus giving not only the scale, but the angle, to which the map is drawn. While the bearing of each line is not marked on the map, nor is the length of the lines marked thereon, it is a simple matter for a practical surveyor or engineer to take this map, and ascertain therefrom both the length and bearing of each line, as shown on the exhibit. Every line and point designated upon this map is capable of being definitely and certainly ascertained, and we must therefore conclude that the description and location of the premises as found upon this map falls within the maxim, "Id certum est quod certum reddi potest."

The most serious contention made by appellant is based upon the allegations of paragraph 3, wherein the plaintiff alleges that the premises sought to be condemned are located in section 36, and that, therefore, the allegations of the complaint as found in these respective paragraphs are at variance and in





conflict with the description found upon the map, and that the description is therefore so uncertain as to amount to no description at all. We cannot agree with this contention. Uncertainty and ambiguity in a pleading can only be taken advantage of upon demurrer. It is only where there is a total lack of a necessary or material allegation that the defendant is justified in suffering a default and raising its insufficiency upon appeal, but where the allegation has been made, and he attacks it upon its uncertainty or ambiguity, or the manner of making the allegation or language thereof, he must do so by proper demurrer. In *Bates v. Babcock*, 93 Cal. 482, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133, the Supreme Court of California, in passing upon a question of this character, said: "It is only where there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof." The Supreme Court of California announced the same doctrine in *San Francisco v. Pennie*, 93 Cal. 468, 29 Pac. 66, *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659, and *Garner v. Marshall*, 9 Cal. 269. The foregoing authorities are all cited with approval in *San Joaquin Lumber Company v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057, where the court holds that this rule is clearly applicable to a defaulting defendant; saying: "The line of distinction between an uncertain or defective averment of a material fact and a total want of such averment is well defined by the authorities, especially in this state; and it has been uniformly held that, if the defect in the averment be merely that of uncertainty, it will be waived by failure to demur especially on the ground of uncertainty, and, of course, by default." See, also, *Fudickar v. East Riverside I. Dist.*, 109 Cal. 34, 41 Pac. 1024. This court, in *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322, said: "If the complaint was ambiguous, unintelligible, or uncertain, the defendant should have demurred on those grounds. Having failed to do that, he waived all right that he may have had on those grounds."

But we are told that section 5216, Rev. St. 1887, is mandatory in its terms, and special reliance seems to be placed on the provisions of subdivisions 2 and 5 thereof. This section of the statute provides what a complaint in condemnation proceedings must contain, and the subdivisions cited as applicable in this case are as follows: "(2) The

names of all owners and claimants of the property if known, or a statement that they are unknown, who must be styled defendants." "(5) A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them, to suit the convenience of parties." A complaint in such cases must be in substantial compliance with the terms of these statutory requirements, but in ascertaining whether or not such requirements have been substantially met by the pleader we apply the same rules and follow the same methods and manner of inquiry applicable in the consideration of the sufficiency of any other pleading. Applying those rules and principles, we therefore conclude that this complaint could not have withstood the assault of a special demurrer upon the grounds urged by appellant here, but, appellant having allowed judgment to pass by default, and thereby admitting all the allegations of the complaint to be true, he cannot be heard to urge this uncertainty for the first time in this court. By his default he admitted the description contained upon the map, and the allegation that he owned no interest in the properties described on such map as fully and completely as he admitted the allegations of the respective paragraphs contained in the complaint. 6 Ency. P. & P. 115, and cases there cited.

Considerable argument has been made upon this appeal as to whether or not the Snake river is a navigable stream, and whether the court will take judicial notice of such fact, or if the same must be alleged and proven in the same manner as any other fact in the case. And following this argument the question has also arisen as to where the title to the bed of the stream rests, in case it should be held that the Snake river is a navigable stream. These are questions of very serious import, and concerning which the plaintiff may hereafter be called upon to meet; but they do not properly arise upon this appeal, and we therefore express no opinion concerning them. Suffice it to say that, if it should be conceded that the Snake river is a navigable stream, and that the title to the bed thereof is in the state, that fact could not concern the appellant, and he could not be heard to complain of the same here.

For the foregoing reasons, the judgment is affirmed, with costs to respondent.

STOCKSLAGER, J., concurs. SULLIVAN, C. J., dissents.

SULLIVAN, C. J. (dissenting). I am unable to concur with my associates in the conclusion reached in this case. I am unable

to find any allegation whatever in the complaint where section 31, Tp. 10 south, of range 17 east of Boise meridian, is mentioned. It is on that section that the court, by its judgment, grants the right to construct dams and remove rocks. In paragraph 3 of the complaint, as quoted in the opinion of my associates, section 36 is mentioned three times, and it is mentioned the last time therein as follows: "That plaintiff is informed and believes, and therefore alleges, that the lands hereinafter described and sought to be taken for public use are within the limits of and are a portion of said section thirty-six, and that said state of Idaho is the owner thereof." Could language be plainer? We think not. It is there alleged "that the lands hereinafter described and sought to be taken for a public use are within the limits of and are a portion of said section thirty-six, and that the state of Idaho is the owner thereof." There is no mention there of section 31. Paragraph 5 of the complaint contains the following allegation, to wit: "That the premises sought to be taken for public use are situate in Lincoln county, state of Idaho, and are bounded and described as follows, to wit." Then follows a description by metes and bounds of a tract of land in said section 36 containing .67 of an acre, and after the description it is alleged as follows: "As more fully shown on the plat of said premises hereto attached and marked 'Exhibit A,' and made a part hereof." It is there alleged "that the premises sought to be taken for a public use are situate in Lincoln county, state of Idaho, and bounded and described as follows." No other land is "bounded and described" therein except land situated in said section 36. It is true that in a separate and distinct subparagraph of said fifth paragraph of the complaint, and after the particular description of the land as given above, it is alleged as follows: "That plaintiff also desires and proposes to construct the dams shown on said plat Exhibit A, and to remove the rocks from Snake river at the point indicated thereon." It will be observed from that allegation that the respondent alleges that he desires and proposes to construct the dams shown on said plat Exhibit A, and remove rocks from Snake river at the point indicated thereon. No allegation is made that respondent desires to take for "a public use" the land on which said dams are to be constructed, or from whence the rocks are to be removed. No description is given whatever of the amount or area of land desired on which to locate said dams or the area of land from whence he desires to remove the rocks. It was just as necessary for respondent to describe the area of land desired for the dams and the area from whence he desired to remove the rocks as it was for him to describe the .67 of an acre of land on which he desired to place his power house or other machinery. But the majority of the court would have us believe that

only a line is needed on which to build a dam. I have always understood that it required some width of ground, as well as length, on which to erect a dam. Referring to the sufficiency of the description of the land on which it was desired to build dams as it appears on Exhibit A, the opinion of the majority of the court says: "It [Exhibit A] is also drawn to a north and south line as shown thereon, thus giving not only the scale, but the angle, to which the map is drawn. While the bearing of each line is not marked on the plat, nor is the length of the lines marked thereon, it is a simple matter for a practical surveyor or engineer to take this map and ascertain therefrom both the length and bearing of each line shown on this exhibit. Every line and point designated upon the map is capable of being definitely and certainly ascertained, and we must therefore conclude that the description and location of the premises as found upon this map falls within the maxim, 'Id certum est quod certum reddi potest.'" I have no fault to find with that maxim, and concede that the length and bearing of each line marked on said map may be definitely ascertained by a competent engineer. But I do deny that an engineer, be he ever so competent, can from that map ascertain how many square feet or square yards or rods of land the respondent desires to use for the foundations of said dams.

Under the provisions of section 5216, Rev. St. 1887, the description of the land sought to be taken for a public use must be such that the number of square feet, yards, or rods, or the number of acres, may be ascertained therefrom. Those dams are to be built near the brink of Great Shoshone Falls, where immense volumes of water make a perpendicular leap of about 210 feet, and must have broad and strong foundations, and can they be built to withstand the mighty pressure thrown against them by a volume of water several feet deep and about 1,000 feet in width (which is the volume of water passing there at the high stage of said river) without a broad foundation? Could those dams be successfully built on a line? I think not. A dam is now being put in said river some 20 or 25 miles above said falls. The foundation thereof is, I am informed, more than 350 feet wide, and said dam is many hundred feet long. Now, if we had the length of said dam, could we ascertain from that the area of land covered by that dam? I think not. Both in the findings of fact and judgment the court refers to the land on which dams are to be erected, but nowhere is the amount of land mentioned, nor a description thereof given. In all probability no two engineers would agree on the amount of land required for said dams. Even if they did, the complaint must contain a description of the land to be taken for a public use.

As to the uncertainty of the description.

There is no uncertainty in regard to the width said dams are to be built, or the area of land required for them, as no allegation whatever of the width of said dams or of the area of land sought to be condemned for the foundations are contained in the complaint or indicated on said Exhibit A. So, as I view it, the question of uncertainty or ambiguity of description does not arise in this case. There is a total lack of allegation, not a defective one, and for that reason the authorities cited on that point in the opinion of the majority have no application whatever. In the opinion of the majority it is stated as follows: "The complaint closes with a prayer that the premises described therein and also indicated on Exhibit A be condemned to a public use," etc. The prayer is as follows: "Wherefore plaintiff prays that it be ordered, adjudged, and decreed herein that the premises described in paragraph 5 hereof may be taken for public use, as claimed by plaintiff." (It will be observed from a reading of said paragraph 5 that the only premises described therein is .67 of an acre, and it is described by metes and bounds, and is in said section 36.) Following the last word of the prayer above quoted, to wit, the word "plaintiff," is a semicolon, and after that the prayer is as follows, to wit: "That plaintiff may place dams as indicated on Exhibit A, and may remove the rocks from said Snake river as indicated thereon; that the damages for the taking of property herein be assessed; that the conflicting claims of defendants herein be determined; and plaintiff prays for all proper relief." It is clear to me from the language used there that the only land sought to be taken for a public use under the allegations and prayer of the complaint is the .67 of an acre in said section 36. It is significant that wherever the "dams" are referred to in the complaint it is alleged that plaintiff also "desires and proposes" to construct dams as shown on said plat, and remove rocks as shown thereon, giving no description of the area of land desired for that purpose, and does not state that he desires such land for a public use. The verdict of the jury clearly shows that in assessing the value of the area of land to be taken for a public use all the land assessed by them was in said section 36.

The third and other finding of facts made by the court clearly indicate that there were three parcels of land referred to, and only one of the three were sought to be taken for a public use. The third finding of fact is as follows: "That defendant [here naming them] have no right, title, or interest in the premises sought to be taken for a public use," (here follows a comma), and the finding then proceeds, "in the land on which the dams are sought to be placed or in the land at the point where the rocks are to be removed from the bed of the river," etc. If, by the allegations of the complaint, all of said land was

sought to be taken for a public use, why was it necessary to refer to the lands on which it was proposed to place the dams and from which the rocks were to be removed separately and distinctly from those lands to be taken for a public use, as the first sentence of that finding declares "that the defendants have no right, title, or interest in the premises sought to be taken for a public use." I ask, why follow that with the sentence "nor in the lands on which the dams are to be placed or from whence the rocks are to be removed," if it was intended to take that for a public use? The judgment itself clearly indicates to me that it was only intended to condemn for a public use the .67 of an acre of land in said section 36. After the formal part of the judgment, it proceeds as follows: "It is therefore ordered, adjudged, and decreed that plaintiff, H. L. Hollister, is entitled to take for a public use, as specified in the complaint herein, the following bounded and described premises, situate in Lincoln county, state of Idaho, to wit." Here follows a description by metes and bounds of the said .67 of an acre of land in said section 36. After that description, and in a subparagraph, is the following, to wit: "And that plaintiff be, and he is hereby, permitted to build dams as shown on Exhibit A attached to the complaint, a duplicate whereof is attached to this judgment and hereby referred to, and made a part hereof, and also to remove rocks from the bed of Snake river at the point marked 'Rapids to be Blown Out,' on said Exhibit A." If it were intended to condemn for a public use sufficient area of land on which to place said dams, why did the court use the language last above quoted, to wit: "He is hereby permitted to build dams as shown on Exhibit A," instead of the language used in condemning the .67 acres, to wit, "that the plaintiff is entitled to take for a public use" the land "bounded and described," etc., and then bound and describe it? The three distinctions referred to have been carried all through the pleadings, finding of facts, and judgment, to wit, the .67 of an acre in section 36 was to be taken for a public use, condemned, and the other land referred to as that on which plaintiff "desires and proposes" to build dams, and the land or bed of the river from which rocks are to be removed. The judgment, as I view it, only authorizes the taking for a public use the land described as being in section 36, and a permission to build dams on and remove rocks from portions of section 31, without describing the amount of land on which a desire was expressed to build dams and from which respondent desired to remove rocks.

Section 5211, Rev. St. 1887, contains a classification of the estates and rights in lands subject to be taken for a public use. The first subdivision is as follows: "(1) A fee simple, when taken for public buildings or public grounds, or for permanent buildings,

for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine." That subdivision provides that a fee-simple title is taken when lands are taken for "dams," and on the oral argument counsel for respondent contended that the dams referred to in the complaint were not for the purposes of the dams mentioned in said subdivision of said section, thereby implying, at least, that the land or title described for the construction of said dams was more in the nature of an easement than a fee simple. And in my view of the matter the complaint was drawn upon that theory, and not upon the theory that a fee-simple title was desired except for the said .67 of an acre of land particularly described in the complaint. A dam being a permanent structure, a fee-simple title must be taken to the land on which it is to be located. This fact further emphasizes the construction that I have placed upon the allegations of said complaint, and the prayer thereof, and the finding of facts made by the court and the judgment.

Section 5216, Rev. St. 1887, provides what facts must be stated in the complaint in a proceeding like that at bar: (1) Must be stated the name of the one "in charge of the public use" as the plaintiff. "(2) The names of all owners and claimants of the property if known, or a statement that they are unknown," and such parties are to be made defendants. "(5) A description of each piece of property sought to be taken, and whether the same includes the whole or only a part of an entire tract or parcel," etc. It is alleged in the fourth paragraph of the complaint that appellants claim to be the owners of the lands thereafter described "and sought to be taken for a public use," and the only description of any land in the complaint is that of .67 of an acre, situated in section 36; and, of course, as appellants claimed no land in section 36, they did not appear. It is nowhere alleged that any land whatever in section 31 is sought to be taken for a public use; and as said appellants are the owners of lands in section 31, and not in section 36, they failed to appear, as they had a right to do. It is not alleged in said complaint that appellants are the owners of section 31, or that the names of the owners are unknown. There is a total absence of allegation on that point. The complaint is fatally defective for that reason.

As to the provisions of the fifth subdivision of said section, there is no description whatever of the land sought to be taken for a public use for dams, nor does the complaint allege whether the land desired to be taken "includes the whole or any part of the entire tract." As before shown herein, the area of land required for said dams cannot be ascertained from Exhibit A, nor is there any allegation in said complaint that said plat is a correct plat, or that it is drawn on

a scale of 1 inch to 40 feet. While there is a note of that kind on the map, is that a sufficient allegation that said map correctly describes the lands sought to be taken as section 31, and that it is drawn on a scale of 1 inch to 40 feet? If all such allegations can be supplied by an exhibit, we had as well make all material allegations by exhibits, and let the opposing party employ an expert to figure them out. The complaint is totally lacking in the allegations referred to.

In regard to Snake river being a navigable stream. I understand the doctrine in this country is that streams are navigable in law which are navigable in fact, and that actual navigability is a question of fact. If that be true, and the question of navigability is necessarily an issue in this case (and it was so treated by the court in its findings of facts), it must be alleged in the complaint, and it was not. Certain facts (of which the court may take judicial notice under the law), if necessary to a recovery in an action, must be alleged in the complaint; and after making such allegations the party making them need not prove them, but the court will take judicial notice thereof. The question arises whether Snake river is a navigable stream at the point where said dams are to be placed and rock to be removed. The said Exhibit A indicates that that point is just above the brink of the Great Shoshone Falls, where Snake river is about 900 feet wide. At said falls the waters of said stream have a perpendicular drop of about 210 feet, and about three miles above and up the river from them are situated Twin Falls, where the waters of said stream have a perpendicular drop of about 160 feet. Thus within about three miles Snake river has a fall of about 370 feet. Then will it be contended that that river is navigable at that point, or would ever be made so? I think not. If it is not navigable, the appellants own the land in section 31 to the point where the township line passes between said sections 36 and 31, and they should have been named as such owners in the complaint.

The facts above stated are a part of the history of this state, and are significant in this case, and for that reason I refer to them.

It is admitted by my associates that this complaint could not have withstood the assault of a special demurrer and apply the same rules of construction as are applicable to pleadings in ordinary actions. I do not concede the latter proposition. The statute (section 5216) provides what a complaint in a proceeding of this kind must contain, and unless it contains substantially every fact required the court acquires no jurisdiction over a defaulting defendant. And as the complaint failed to state the names of the owners of the land on which it was proposed to place dams and from which rocks may be removed, and failed to describe those

lands, the court acquired no jurisdiction over the defaulting defendants, and the judgment so far as all land is concerned in section 31, is absolutely void. In *Canyon County v. Toole*, 75 Pac. 609 (decided by this court at this term, and not yet officially reported), which was a proceeding to condemn land for a public road, this court held that, where the nonconsenting landowner failed to appear at the hearing, the board of county commissioners had no jurisdiction to hear the same unless the petition contained substantially a statement of all of the facts required by the statute in such cases. So, in the case at bar, as the statute declares what facts must be alleged in the complaint, and it fails to contain them, the court acquires no jurisdiction of defaulting defendants, and in such case a judgment rendered therein is absolutely void. Facts required, and not pleaded, ought not to be placed therein by construction.

The judgment should be reversed.

On Rehearing.

(June 17, 1904.)

STOCKSLAGER, J. This cause was decided by this court and the opinion filed on the 18th day of February, 1904. At the same time Chief Justice SULLIVAN filed a dissenting opinion. On the 8th and 9th days of March thereafter petitions for rehearing were filed, which were granted, and at a former day of the present term of this court briefs were submitted and oral arguments heard. Counsel for appellant Clark earnestly insist that the complaint is not sufficiently definite in the description of the ground sought to be condemned for the foundation of the weirs or dams. This question was argued both orally and in the briefs on the original hearing. The majority and minority opinions deal quite liberally with it, and we find no authorities cited or arguments submitted that changes our view as expressed in the opinions heretofore filed. It may be well to suggest that an inspection of the map (which is copied in the opinion) answers the objections of counsel urged to its sufficiency of description. It will be observed that the locations of the dams or weirs are distinctly set out on the map drawn to a scale of 1 inch to 40 feet. Two of them are to be 4 feet high, the third one 3 feet high. The width of each one is shown by two parallel lines drawn between the points to be connected, the space as shown between such lines being the amount of land condemned. As we view it, this map clearly and distinctly calls attention to just what plaintiff wants for the purposes set out fully in his complaint. Mr. Mills, in his excellent work on *Eminent Domain*, under the head of "Description of Property to be Taken," at section 115, says: "Statutes vary greatly as to requirements of

maps, plats, and surveys and of the descriptions deemed necessary in petitions. Plans must be intelligible, and give angles, distances, etc., sufficient so as not to require parol testimony to explain the plan and scale of distances." In what respect is this map deficient measured by this rule? We think it complies fully and completely with every requirement. Again, in the same section Mr. Mills says: "The actual contents of the tract taken need not be shown or set forth, if that is a matter of calculation from the length, breadth, and course given." In what respect is this map deficient viewed in the light of this rule? In section 117, the author says: "Maps should be plain enough to be understood by a plain, ordinary man. A map means not only a delineation giving a general idea of the land taken, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part, with courses and distances so that every part can be found." This last section is cited by counsel for appellant, and, if it is to be accepted as the law to govern this case, we think is conclusive against appellant's contention.

It is urged that the court should fix the amount to be taken for the dams or weirs. We do not think it necessary, as the exact amount can be easily ascertained by a measurement of the space between the parallel lines as shown by the map.

Much is said in the brief of counsel for appellant, and numerous authorities are cited bearing on the question as to whether Snake river is a navigable stream. The dissenting opinion also devotes some attention to the question. We are at a loss to know why this question should be urged at this time. The opinion distinctly states that the court does not consider that question at issue in the pleadings, and hence refuses to pass upon it, with the suggestion that it will be left for future litigation in case the parties should see fit to do so.

The question of locating on the map the place where the rocks are to be blown out and removed presents a more serious question. A more careful consideration of this question convinces us that the map is not sufficiently definite and certain in location and description in this particular to permit the blowing out of any rocks or the condemnation of any land for such purpose, and we think the judgment should be modified to this extent. Beyond this we see no reason for changing our views heretofore expressed in the opinion, except the costs of this appeal should be equally paid by the parties to the action; and it is so ordered.

AILSHIE, J., concurs. SULLIVAN, C. J., dissents.

**WOODS, Sheriff, et al. v. FAUROT.**

(Supreme Court of Oklahoma. June 11, 1904.)

**SALE — DELIVERY—WITNESS—CROSS-EXAMINATION—TITLE—DECLARATIONS OF VENDOR.**

1. Where range stock is the subject of a contract of sale, a gathering together of the stock, and turning it out of the inclosed pasture of the seller into the inclosed pasture of the purchaser, for the purpose of perfecting such sale, is a sufficient delivery and change of possession to satisfy the statute requiring an immediate delivery followed by an actual and continued change of possession.

2. On cross-examination of a witness, the party cross-examining should be confined to the matters concerning which the witness has been examined in chief.

3. After a party has parted with the title and possession of personal property, his declarations made subsequently respecting the ownership or title to the property, as a general rule, cannot be introduced in evidence by a third party to defeat the title of his vendee.

(Syllabus by the Court.)

Error from District Court, Woodward County; before Justice Pancoast.

Action by Harry Faurot against A. S. Woods, sheriff, and the Woods County Bank. Judgment for plaintiff. Defendants bring error. Affirmed.

H. A. Noah, for plaintiffs in error. D. P. Marum, for defendant in error.

**BURFORD, C. J.** It appears from the record that in 1901 one Sam Hames was the owner of a large number of cattle and several head of horses, which he kept in a pasture in Woodward county. He was at the same time indebted to the Woods County Bank upon a promissory note in the sum of \$100 and interest. In December, 1901, the bank brought suit in the district court of Woodward county against Hames to recover judgment on said note, and procured a writ of attachment to issue against the property of Hames. This writ was delivered to the plaintiff in error Woods, as sheriff of Woodward county, and was on the 10th day of December, 1901, levied upon the horses in controversy in this action. Some months prior to the bringing of this action, Hames had sold the cattle and horses to James McGurn, and agreed to keep them for him without cost or expense until January, 1902. On December 7, 1901, McGurn sold the horses to Faurot, the defendant in error, and the next day the horses were moved out of Hames' pasture and placed in the Faurot pasture by an employé of Faurot, and at the direction of McGurn and Faurot. After this change, on December 10th, the sheriff of Woodward county levied the writ of attachment against Hames, and took possession of the horses, and Faurot brought replevin to recover the horses. On motion the bank was substituted for the sheriff, and defended the replevin action. The cause was tried to a jury, and verdict returned and judgment rendered in fa-

vor of Faurot for the value of the horses, and damages for the detention of the same. The bank appeals, and the only alleged error properly saved, assigned in the motion for new trial, and embodied in the petition in error, is the fifth cause assigned as grounds for a new trial, viz., "Errors of law occurring at the trial, and excepted to by the defendants."

The attachment was attempted to be sustained upon the theory that there had been no actual delivery of the horses from Hames to McGurn, followed by actual and continued change of possession, nor was any such delivery and change of possession made from McGurn to Faurot. The evidence does not support this theory as to the sale of McGurn to Faurot. The proof shows that, when Hames sold to McGurn, the stock was in the pasture occupied by Hames, and by mutual agreement they were permitted to remain there. This would not have been a sufficient change of possession to have held against the creditors of Hames, but the contract of sale was good as between Hames and McGurn, and, before any proceedings were brought by the creditors of Hames to subject said stock to their claims, McGurn had made the sale to Faurot, and the horses had been gathered up and driven out of the pasture of Hames, and placed in the pasture of Faurot for the purpose of perfecting the same. This did in fact constitute an actual delivery of the property, and the change of possession was sufficient to comply with the law in this class of property. Where range stock is the subject of the sale, every requirement of the law is complied with when the stock is taken charge of by the purchaser, or his agents or employes, and driven from the pasture of the seller and placed in the pasture of the purchaser; and, if some of the stock shall afterwards escape and stray back to its former range without the knowledge or connivance of the purchaser, such fact will not defeat his title. The change of possession in this case had been actual, absolute, and complete prior to the levy of the writ of attachment, and it does not appear from the evidence that there was any actual fraud in the sale.

The plaintiffs in error complain of the ruling of the court upon the admission of testimony during the trial of the cause. The plaintiff below put Hames on as a witness to prove that he sold the horses to McGurn, and that he had possession of the pasture in which they were kept up to the time Faurot's agent removed them and placed them in Faurot's pasture. On cross-examination the counsel for plaintiffs in error attempted to show that the witness was present at the time the sheriff levied the writ of attachment, and made claim to the horses. This was excluded by the court. There was no error in this ruling. The general rule is that, on cross-examination, the party cross-examining is only entitled to examine the witness upon

¶ 2. See Evidence, vol. 20, Cent. Dig. § 855.

such matters as he has been examined about in chief, and it is the duty of the court, upon proper objection, to confine the cross-examination within these limits. The plaintiff, who produced the witness, had not interrogated him about what took place at the time of the levy, or as to any statements made by him to the sheriff; and, if the counsel for defendants desired to use the witness to make such proof, they should have called him as their own witness at the proper time, and made the proof by him as their own witness on the defense.

On the defense the defendants offered the deputy sheriff, Combs, as a witness in their own behalf, and offered to prove by him that, at the time of the levy of the writ of attachment, Hames claimed the horses as his property. This was objected to by Faurot, and excluded by the court. There was no error in this ruling. Hames was not a party to the action. His declarations after he had parted title with the property, received the purchase price, and delivered possession, could not be used to defeat the title of a subsequent purchaser from his vendee. He would not be permitted to disparage the title of his vendee after sale and delivery. There may be cases, where conspiracy to defraud is relied upon, where such declarations might be admitted and limited to a specific issue, but in this case the facts did not warrant the reception of such evidence.

We have examined the evidence, and think the verdict and judgment are right upon the whole case, and that no error is apparent, and the judgment is affirmed at the costs of the Woods County Bank. All the Justices concur, except PANCOAST, J., who tried the case below, not sitting.

## MEYERS v. HIGHLAND BOY GOLD MIN. CO.

(Supreme Court of Utah. June 20, 1904.)

### MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—OPINIONS OF WITNESSES—SUBSEQUENT CONDITIONS—QUESTIONS FOR JURY.

1. In an action for injuries to a servant, where one of the principal grounds of negligence alleged was that the place of work was insufficiently and improperly lighted, and this allegation was denied by the answer, the question of the sufficiency of the light was for the jury, and conclusions of witnesses that the light was insufficient were inadmissible.

2. In an action for injuries to a servant, where plaintiff testified that there was no plank at a place where it was necessary that there should be one, testimony that about three hours after the accident an employé noticed that there was a plank there, where it appeared that no one was working at or about the place in the meantime, and it was not shown that there was any change from the conditions existing at the time of the accident, was competent, as showing that shortly after the accident the same conditions existed.

3. The questions of the truth of offered evidence and the weight to be given to it are for the jury, and not for the court, to determine.

McCarty, J., dissenting.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by John W. Meyers against the Highland Boy Gold Mining Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sutherland, Van Cott & Allison, for appellant. Geo. M. Sullivan and A. R. Barnes, for respondent.

BARTCH, J. This action was brought to recover damages for personal injuries, which the plaintiff claims he received because of the negligence of the defendant. In the complaint, so far as material to this decision, it is alleged that on January 28, 1902, the plaintiff was in the employ of the defendant company at its smelting works, and while so in its employ was ordered by defendant to assist in passing crushed ore from a certain ore bin, through chutes, into an ore car; that previously the plaintiff had been employed as a helper in the roasting department, but had not until that day assisted in passing ore through the bins; that it was necessary for him, in performing such work, to stand or sit on a narrow plank or platform, about six inches wide, extending around the top of the bin; that the same was not a reasonably safe place, or sufficient for him to perform the work; that defendant had negligently permitted crushed ore to collect and remain upon the platform, thereby increasing the unsafeness thereof, and had negligently failed to provide any other place for plaintiff to stand or sit; that the place and premises were insufficiently and improperly lighted; that by reason of the neglect of defendant to provide a safe place for plaintiff to perform the work, and to sufficiently and properly light said place and premises, the plaintiff fell from the platform into the bin; that, after falling into the bin, his right limb extended about five inches below the lower end of the chute, and he was unable to move or extricate himself; that defendant discovered his helpless condition, and it became its duty to use every precaution and all possible means to extricate him without injury, but that it negligently and carelessly moved the ore car, which was then immediately beneath the bin, against plaintiff's right leg, which was broken in consequence, and plaintiff otherwise injured; that the injuries so received are permanent and lasting; and that plaintiff will be unable to do any physical labor during his life. The answer denies these allegations of the complaint, and affirmatively pleads contributory negligence on the part of the plaintiff and an assumption of risk.

From the evidence it appears that the plaintiff was employed by the defendant to work in the roasting department of its smelt-

¶ 1. Black v. Telephone Co., 73 Pac. 514, 26 Utah, 451; Stoll v. Daly Min. Co., 57 Pac. 295, 19 Utah, 271; Hayes v. Southern Pac. Co., 53 Pac. 1001, 17 Utah, 99.

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 917.

er, about the middle of October, 1901, and continued in the employment until the date of the accident, January 23, 1902; that generally he was employed in a building separate from that in which the accident occurred; that on the day of the injury, and on one previous occasion, he was, by order of the foreman, working in the crusher building, assisting in passing ore through a certain ore bin, known as "bin No. 4," into a car standing on the track underneath the ore chute; that the bin, which was in the second story of the building, was about 8½ feet wide, 11½ feet long, and 12 feet deep; that the timber around the top of the bin is 12 inches square, and one piece of the same size extends across the top of the bin east and west; that across the top of the bin there extends north and south also a tramway track, from 2 to 3 feet wide; that this arrangement of the timber and track leaves the openings into the bin about 3½ by 8½ feet in the clear; that the timber and the track were the only places upon which the plaintiff could stand or sit in the performance of his work; that there are a number of bins in the same room, the room being lighted with electricity, and bin No. 3 being next to No. 4; that the ore, after being crushed, was dropped from above, first into bin No. 3, and, when that was full to above the top, the ore would run thence over into bin No. 4; that the ore collected on the timbers, and, in cold weather, would freeze on the timbers and in the bins, forming a crust over the surface thereof; that when the ore was so frozen it was necessary to push it with an iron rod to keep it moving through the chute into the car; that at the time of the accident the plaintiff was sitting upon one of the timbers of bin No. 4, and was pushing into the ore below him with an iron rod to keep the ore moving; that, while so engaged, he lost his balance, fell into the bin, and was immediately covered up with ore; that upon falling into the bin his right leg extended from the chute into the ore from a point about the knee; and that the foreman and another employé discovered him in this condition, and fearing that the ore would smother him, and believing themselves unable to extricate him in time to save his life with the car where it was, ran the car north, so as to clear the chute, and thereby broke the plaintiff's leg and caused the injuries of which he complains.

At the trial a verdict was returned, and judgment entered thereon, in favor of the plaintiff. The record contains numerous assignments of error, but they present only a few questions necessary to be determined upon this appeal.

The appellant, in the first instance, insists that the court erred in the admission in evidence of the opinions of witnesses respecting the sufficiency of light and the necessity of additional light at the ore bin in question when the accident occurred. The witness

Wright, called by the plaintiff, in his examination in chief, and after having testified respecting the location and character of the lights in the vicinity of the bin where the injured man had been at work, was asked a question, as follows: "Would that be sufficient light for the bin to enable one punching ore down to see anything about what was in the bottom of the bin?" This question was objected to as being one for the jury to determine, and not for the witness. The objection was overruled, and the witness answered: "It would not." Thereafter, upon cross-examination, the witness Crellin, who in his direct testimony had described the location and character of the different lights with reference to the ore bin, and had stated as a fact that there was a light over bin No. 4, which fact was disputed by witnesses for the plaintiff, was asked: "Do you say a light over bin No. 4 was necessary for the safety of the men or a man working by it?" This was objected to as calling for a conclusion, and as being one of the questions which the jury was called upon to determine. The objection was overruled, and the witness answered: "It would not be perfectly necessary, but it would be more safe to have two lights there than it would be to have one."

It is clear that the objections to this testimony ought to have been sustained. Both questions were improper, under the circumstances, and the answers thereto inadmissible, under the familiar rules of evidence. As may be observed, one of the principal grounds of negligence alleged in the complaint is that the "place of work" and premises were "insufficiently and improperly lighted," and that, by reason of the neglect of the defendant "to sufficiently and properly light said place and premises," the plaintiff "fell from the platform into said bin" and was injured. This was denied by the answer, and by such denial the sufficiency of light to render the place safe became an issue in the case, to be determined by the jury from the facts and not from opinions of witnesses; the subject of inquiry being one not requiring such opinions to enable the jury to comprehend the real situation and draw correct conclusions. Where, as here, the subject-matter concerning which inquiry is being made is within the comprehension of persons of ordinary intelligence, witnesses must state the facts, and the jury must draw its deductions from those facts. When the condition of a thing is such that language is inadequate to so describe it as to enable the jury to obtain a correct conception, or a proper realization and comprehension of it, witnesses may state their opinions in relation to it, or describe it by its effects upon their minds; but, if their opinions are founded upon facts which can be weighed and comprehended by the jurors, as well as by the witnesses, those facts, and not opinions based thereon, should be laid before the jury.



To permit a witness, under the pleadings in this case, to state that the lights were insufficient, or that an additional light was necessary to render the place safe, would be an invasion of the province of the jury. In answering the questions asked, the witnesses necessarily decided a material issue, which the jury could readily have determined from the facts laid before them, and from facts which could have been laid before them. The cases where opinions of witnesses are received in evidence are exceptions to the general and elementary rule that witnesses must state facts, and not give their opinions. "The law does not look with favor upon the introduction of opinions in evidence. As a rule witnesses are expected to testify to facts, and it is for the court or jury to draw conclusions and form opinions from the facts thus brought before them. Even when opinions are admitted, the ostensible purpose is to inform the jurors concerning some fact, and evidence which is sometimes received from necessity has been said to be less an opinion than a conclusion of fact." 12 Am. & Eng. Enc. Law (2d Ed.) 421.

In *Smead v. L. S. & M. S. Ry. Co.*, 58 Mich. 200, 24 N. W. 761, where it was held error to permit a witness to give his opinion as to whether or not a certain "cattle guard was sufficient to prevent animals from getting on the right of way under circumstances ordinarily arising at those places," it was said: "It is quite elementary that a witness can only give his opinion in exceptional cases, and then only when his knowledge is such as to qualify him to some extent as an expert. I think the rule is best stated in *Best on Evidence*, where he says: 'This rule is necessary to prevent the other rules of evidence being practically nullified. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury.'"

In *Brunker v. Cummins*, 183 Ind. 443, 32 N. E. 732, a witness was asked to state "whether there was sufficient room, between where that barrel was and the wall, for a man to walk with safety." The Supreme Court, holding the question improper, because calling for an expression of opinion as to negligence of the parties, said: "Even in cases where necessity justifies the expression of an opinion, the opinion cannot go to the principal points which the law requires the jury to decide."

So, in *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. 986, 31 Am. St. Rep. 275, it was held error to overrule an objection to a question, as follows: "From your experience as a farmer, and in irrigation in connection with it, is there water enough in that ditch now, or has there been for the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?" The court said: "The question was not merely introductory.

It embraced the very substance of the issue which the court was then trying; and a categorical answer, such as the question called for, would, if accepted by the court, have been a complete determination of the issue. It is an elementary rule that such questions are inadmissible."

In *Hamilton v. Mining Co.*, 108 Mo. 364, 18 S. W. 977, where the plaintiff was injured by a coal car running over his leg, the railroad being a spur owned and operated by the defendant to its mine, the court held that the defendant could not, on cross-examination of a witness, ask him whether it was negligence for a person who had business to attend to on a railroad to be standing on the rails immediately in front of a moving car, since it was for the jury to say whether such facts constituted negligence.

In *Black v. Telephone Company*, 26 Utah, 451, 456, 73 Pac. 514, a question was propounded to a witness, as follows: "Now, as a practical man, experienced for years in this work, as you say you have been, what would you say would be the proper thing for a man under these conditions to do—attach himself, or not?" In upholding the action of the lower court, sustaining an objection that this question called for an opinion of the witness upon the merits, this court, speaking through Mr. Chief Justice Baskin, said: "As the question objected to called for the opinion of the witness, based upon conditions [what these conditions were was not disclosed by the question] on a matter which it was the exclusive province of the jury to decide, the objection was properly sustained."

Likewise, in *Stoll v. Daly Min. Co.*, 19 Utah, 271, 284, 285, 57 Pac. 295, this court held that it was error to permit witnesses to state their opinions upon the question of the competency or carelessness of an engineer. McCarty, District Judge, delivering the opinion of the court, said: "The alleged incompetency and carelessness of Adamson being issues in the case, they were questions for the jury to determine. It was error to permit the witnesses, over appellant's objections, to state their conclusions and give their opinions on these issues. 'The opinion of witnesses on the substance of an issue should never be resorted to, except when the subject is beyond the knowledge and experience of ordinary men.'" 2 Labatt, Mast. & Servt. § 830; 1 Whart. Ev. § 440; 12 Am. & Eng. Enc. Law (2d Ed.) 422; *Mining Co. v. Broderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; *Mellor v. Utica*, 48 Wis. 457, 4 N. W. 655; *Guttridge v. Railway Co. (Mo.)* 7 S. W. 476, 4 Am. St. Rep. 392; *Bohr v. Neuenschwander*, 120 Ind. 450, 22 N. E. 416; *Harley v. B. C. M. Co.*, 142 N. Y. 31, 36 N. E. 813; *Railroad Co. v. Jackson (Ind. App.)* 32 N. E. 793; *Sowers v. Dukes*, 8 Minn. 6 (Gil. 6); *Railway Co. v. Moranda*, 108 Ill. 576; *Railway Co. v. Eng-*

lsh (Tex. Civ. App.) 59 S. W. 626; *Hayes v. Southern Pac. Co.*, 17 Utah, 99, 53 Pac. 1001; *Tuttle v. Lawrence*, 119 Mass. 276.

The appellant also insists that the testimony as to the condition of the No. 4 bin, and as to the position of a certain plank and ore thereon several hours after the accident, was proper, and that the court erred in excluding it. The testimony referred to was to be given by the witness Avery, an employé at the smelter, who had testified that he went on the night shift at 11 o'clock the night of the accident, the accident having occurred about 9 o'clock, and noticed No. 4 bin as to whether there was a plank thereon. After having so testified, it was sought to show that at that time he observed a plank lying across the bin, and held in place with the ore on the north end of it, in substantially the same position as had been testified to by two other witnesses on the part of the defense; their evidence tending to show that the plank was in the same position and held there in the same way at the time of the accident, and there being no evidence tending to show a change of conditions in the meantime. The offer was ruled out, and thereafter, a witness having been called, who testified that he knew there was no change made in the conditions there from the time of the accident to 11 o'clock, an effort was again made to introduce the evidence, but it was again ruled out upon the same ground—that it was incompetent to show the conditions of the bin three hours after the accident.

In view of the fact that the plaintiff's evidence tended to show that there was no plank there, and that one was necessary to brace himself to keep from overbalancing and falling into the bin, the evidence in dispute was competent, and ought to have been admitted. The lapse of time, under the circumstances, was not so great as to justify the court in excluding the evidence offered; it appearing that no one was working at or about the bin during such time, and it not appearing that there was any change from the conditions existing at the time of the accident. Under the circumstances, there was a presumption, more or less strong, that the conditions, whatever they in fact were, remained the same. It was competent to show that shortly after the accident the same conditions existed. Whether or not the evidence offered was true, and what weight ought to be given it, were matters for the jury and not for the court to determine.

In *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578, where it was claimed a defect in a sidewalk was the cause of the injury, it was held that the condition of the sidewalk shortly before and shortly after the accident might be admitted in evidence as tending to prove its condition at the time of the accident. In the opinion it was said: "It is plain that the liability of the city is to be determined by the condition of the sidewalk at the time the injury was received. If the sidewalk was

then in a good and safe condition for persons to travel over, the city would not be liable; but if, on the other hand, the sidewalk was then out of repair and dangerous to travel upon, the city might be liable. But in passing upon the relevancy of the evidence it is not required that it should, of itself, absolutely prove a case; but the question is whether it tends to prove the fact or facts for which it is offered. If it does, then the evidence may be competent for the consideration of the jury. Here the question at issue was the condition of the sidewalk when the plaintiff was injured, and the best evidence would be proof of its condition immediately preceding the accident; but at the same time it was competent to prove the condition of the sidewalk a few days before and a few days after the accident, as tending to establish its condition at the time of the accident."

So, in *Mackie v. Railroad*, 54 Iowa, 540, 6 N. W. 723, the court held that evidence of the condition of a defective gate, two or three days after the accident, was not improper. It was said: "A witness was permitted, against defendant's objection, to show the condition of the gate two or three days after the accident. It was not shown that its condition was different as to security from what it was at the time of the accident. Its condition, in the absence of such proof, would be presumed to have remained unchanged." *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Laplane v. Cotton Mills*, 165 Mass. 487, 43 N. E. 294; *Railroad Co. v. Eubanks* (Ark.) 3 S. W. 808; *Nisbet v. Town of Garner* (Iowa) 1 L. R. A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; *Erickson v. Barber*, 83 Iowa, 367, 49 N. W. 838.

We do not regard it important to decide the other questions presented on this appeal, since upon another trial they may not again arise.

The judgment must be reversed, with costs, and the cause remanded, with directions to the court below to grant a new trial. It is so ordered.

BASKIN, C. J., concurs.

McCARTY, J. (dissenting). I am unable to concur with my Brethren in the conclusions reached in the foregoing opinion. One of the grounds upon which plaintiff bases his right to recover in this action is the alleged negligence of the defendant company in failing "to provide for said place of work and for said premises proper and sufficient light, or for the purpose of said work and for the safety of the plaintiff in the performance of his work; that by reason of such neglect to provide a reasonably safe place for plaintiff in which to perform his work, and by reason of the failure and neglect to sufficiently and properly light said place and premises, plaintiff, while in the performance of his duties, fell from said platform into said bin, and into one of the chutes thereof." In support

of this allegation plaintiff introduced testimony which tended to show that the bin in which he was working, on the evening of the accident, "punching down ore," was lighted by two stationary lamps only, one of which was attached to a post about nine feet east from the southeast corner of bin No. 4, and was elevated so that it stood about five or six feet higher than the top of said bin, and that about nine or ten feet north from this light was the other lamp, the light of which was partially obstructed by a post which stood between it and the bin. Plaintiff himself testified in part as follows respecting the condition of the lights: "In the daytime a man could see, but this night the lights were not bright. They were dim and dark, and down in the bottom, where I had to put my rod this time, I couldn't see the ore at all. There was no light at all down there." The witness Wright testified that at the time of the accident he was, and for 14 months prior thereto had been, at work for defendant company in its electrical department; that on the evening referred to he was directed to examine and repair the lamp in the vicinity of where plaintiff was at work; that he remembered seeing two lamps, and that the one about nine or ten feet from the southeast corner of the bin was out of repair; that the light it was producing was only about one-half of its capacity; and that he applied to the foreman for material with which to repair it, but was told by him to let it go. His testimony with reference to the two lamps mentioned, and the extent and quantity of light they were furnishing at the time, is in part as follows: "Q. You may state whether or not there was any light that would throw light upon the bottom of the bin that would come from the north lamp on that night. A. Not the one I just described. Q. Now you may state what, if any, light would come to the bottom or lower part of this bin on that night from this defective light on the south. A. Well, there would be some light to the bin, but not much." Thereupon the following question, the one referred to in the opinion of Mr. Justice BARTCH, was asked the witness: "Would that be sufficient light to the bin to enable one punching ore down to see anything about what was in the bottom or middle of the bin? A. It would not."

The evidence introduced by defendant company tended to show that the room in which the ore bins were situated was lighted by "a series of five electrical lights arranged in a circuit, from 10 to 60 feet apart"; that one of these lights was adjustable, and was mainly used for the purpose of furnishing additional light at the bins when the work of "punching down ore" was in progress, and was placed at the particular bin in which the work was being performed; and that, at the time of the accident, was hanging in the vicinity of bin No. 4, the one at which plaintiff was at work, and was so adjusted as to light up the entire bin. Defendant, at the time of the trial, did not claim that the two

stationary lamps referred to by Wright in his testimony were so arranged as to produce sufficient light at the point where plaintiff was at work to enable him to see the ore in the bottom or middle of the bin, nor did it try the case on that theory. This is evident from the character of the questions asked, and the facts elicited from Wright by defendant's counsel, on cross-examination, respecting the location and condition of the lamp described by Wright as being near the southeast corner of the bin. The following is a fair sample of the cross-examination referred to: "Q. Now, don't you know that that light could not by any possibility reach the bottom of that bin; that it would strike the side of the bin here, and would be deflected, or would be prevented from reaching the bottom of the bin by this north side of that, even if it were burning full candle power? That is true, isn't it? A. That is my judgment. Q. That light was never intended to light up the bottom of the bin, was it? (Objected to as not cross-examination.) Court: He may answer the question. Q. I say a light, the light you have described, never was intended to light the bottom of the bin? A. That is a question I can't answer, because I don't know. Q. It wouldn't light it, would it? A. Don't look as though it would. Q. Not if it were burning full candle power? A. No, sir. Q. If you had been undertaking to light the bottom of that bin, you would have suspended a lamp over it, wouldn't you? How would you have lighted the bottom of the bin without suspending a lamp over it? A. I don't see how you could light the bottom of the bin with this track over here. I should have put a light up here; somewhere over here. Q. At any rate, it is true, is it not, that with those various things, with the beam, and the railroad track, and the side of this ore bin presented to the light, that light never by any possibility could light up the bottom of that bin, unless it was put in the place you have indicated? A. It might be put \* \* \* somewhere else."

In regard to the effect the light from the lamp described by Wright as being north from the one referred to in the foregoing cross-examination had upon the bin where the plaintiff was at work, it was shown by the testimony of defendant's witnesses that because of certain obstructions between the bin and lamp the light produced could not reach the bin. James Crellin, the foreman under whom plaintiff was working at the time he was injured, was called as a witness by defendant, and on cross-examination was asked the following question on this point: "Q. It is true that that light would be in such a position that this bank of ore would practically obscure it from No. 4 [referring to bin at which plaintiff was at work]? A. Yes, sir." Joseph Alsop, another of defendant's witnesses, testified respecting this same matter as follows: "Q. I will say, did this arrangement here that has been, I

think, denominated a 'lime rock bin,' and the pile of ore that was on the outside of it, come within—between the bin 4 and this light here, between 10 and 11 [referring to bins Nos. 10 and 11]? A. Yes, sir. Q. It interfered with it? A. Yes, sir. Q. And it didn't light up bin 4 at all, did it? A. That light didn't light up bin 4."

Now the testimony of Wright to which objection is made referred only to the extent and effect of the light furnished by the two last-mentioned lamps, and the record shows that these lamps were so situated with reference to the location of the bin that they did not and could not light the interior of it. Upon this point there is absolutely no conflict in the evidence, and the cross-examination of Wright shows on its face that its object was not for the purpose of discrediting his testimony, wherein he stated that these two lamps did not of themselves furnish "sufficient light to the bin to enable one punching down ore to see anything about what was in the bottom or middle of the bin," but was for the purpose of emphasizing and affirming what he had stated on this point. That such was the intent is apparent from the fact that defendant's counsel, in the cross-examination referred to, intentionally drew out much additional matter, for the purpose, as shown by the form and phraseology of the questions asked, of showing that the physical conditions around about the bin were such that there was no possibility of Wright being mistaken as to the effect the light referred to in his testimony had upon the bottom of the bin. The defendant, having thus in effect admitted the truth of the testimony upon which error is predicated, ought not to be heard to complain of its admission on the ground that it was "a question for the jury to determine," especially so in view of the fact that defendant did not claim during the trial of the case, and does not contend here, that the two lamps described by Wright were so located as to light up the bin in which plaintiff was at work. As hereinbefore stated, the theory of defendant, as shown by the record, was that there were five lighted lamps in the room (including the two mentioned in Wright's testimony), one of which was adjustable, and at the time of the accident was hanging immediately over bin No. 4, and that this lamp, in connection with the others, furnished an abundance of light on the night in question.

Even though it be conceded that the testimony under consideration was upon one of the controverted questions in the case, yet under the great weight of authority it was admissible. Wright was sent there to examine, and if need be repair, the lamps. He "walked over the surface of the bin," and had every opportunity of understanding the situation. His attention was necessarily directed to the condition of the lamps and the amount of light furnished by them, because he was sent there expressly for that purpose. He testified that the lamp which furnished

the greater amount of light to the bin was out of repair, and that the quantity or power of the light was not more than one-half of the capacity of the lamp, and that because of this "there would be some light to the bin, but not much." It is plain that the witness could not, by a mere recital of the conditions as he observed them, explain to the jury just how much light the lamps mentioned in his testimony produced at the bin, or how light or how dark it was in the interior thereof. Therefore, under the well-settled rule that a witness may state the result of his observations when the subject-matter about which he is testifying is of such a character that it cannot be accurately communicated by words to others, the testimony was admissible.

In the case of *Commonwealth v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401, the rule which is elaborately discussed in the body of the opinion is tersely stated and summed up in the syllabus as follows: "Common observers, having special opportunities for observation, may testify to their opinions or conclusions of fact, although they are not experts, if the subject-matter to which the testimony related cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending." In *Abbott's Trial Ev.* (2d Ed.) p. 729, the author says: "Facts discernible by judgment or estimate, but not requiring special knowledge or skill, are not regarded as matters of opinion within these rules. Hence any person of ordinary knowledge and experience may testify to his judgment of the speed of a train or vehicle, or whether a person looked sick or well, and the like." *Gillett on Indirect and Collateral Ev.* § 213; *Case v. Perew*, 46 Hun, 57. In *Jones on Evidence*, vol. 2, p. 362, the author says: "It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without the opinion of the witness. Indeed, the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself. From many of the illustrations given below it will appear that, from necessity of the case, the opinions of ordinary witnesses must often be received. For example, the opinion of those not experts may be received as to the disposition and temper of animals, as to matters of color, weight, quantity, light, darkness, the state of the weather, and similar facts." *Snyder v. Witwer* (Iowa) 48 N. W. 1046; *Brown v. Sioux City & P. R. Co.* (Iowa) 62 N. W. 737; *Innis v. The Senator*, 4 Cal. 725, 6 Am. Dec. 577; *Hardy v. Merrill*, 22 Am. Rep. 441.

James Crellin, one of defendant's witnesses, having testified on his direct examination respecting the number and efficiency of the lights in the vicinity of bin No. 4, one of which lights he testified was adjustable, and

which "we [referring to himself and plaintiff] took where they were going to do work," and that "the extension light was extended right over bin No. 4," was cross-examined in part by plaintiff as follows: "Q. What was that light [referring to the extension light] brought to No. 4 bin for? A. Just to have more light to work thereby. Q. Now, Mr. Crellin, again, you recognized at that time that the light was necessary for this bin, did you? A. Not perfectly necessary. No, sir. I took it over there because two lights are better than one, and you know that. Q. Didn't take it over because you recognized it was necessary? A. We needed it if we had to go into the bin, and certainly it is necessary—two lights are better than one. \* \* \* Q. Do you say a light over bin No. 4 was necessary for the safety of the men or a man working there? A. It would not be perfectly necessary, but it would be more safe to have two lights than it would be to have one." This last question was objected to on the ground that it called for the conclusion of the witness, and was one of the questions for the jury to determine. Defendant introduced evidence which showed that the work in question was attended with some danger. James Nelson, one of defendant's witnesses, who was also foreman in defendant's sampling mill, where plaintiff was at work when injured, testified in part as follows: "Of course, a fellow wouldn't do to have his eyes shut around there. It was more dangerous than it is walking around on the bare floor, walking over those beams."

Crellin was the foreman and representative of defendant company, and as such had the control and management of the work in which plaintiff was engaged, and as such foreman it was not only his duty, or rather that of defendant company acting through him, to provide plaintiff a reasonably safe place in which to perform the work required of him, but to use ordinary care in keeping it in a reasonably safe condition. The situation there being one of danger, as shown by defendant's evidence, and Crellin having testified on direct examination respecting the number, location, and efficiency of the lamps, and that he had taken the extension or adjustable light from the bin in which he and the plaintiff had been at work that same afternoon, and hung it over bin No. 4, it was not only plaintiff's right to cross-examine him respecting the things he actually did, but it was within the discretionary power of the court to permit plaintiff to interrogate him respecting his object and reason for doing certain things, especially in view of the fact that he was a "willing witness" for defendant and adverse to plaintiff. Jones on Evidence, § 826.

There is another reason why this testimony was admissible. The acts of Crellin in the premises, on principle and in law, were the acts of defendant company, and the plaintiff was entitled to this evidence for the purpose

of showing that the place was one of danger, and that the defendant company, through its foreman, Crellin, knew of such danger, and understood and appreciated the necessity of more than one lamp in the immediate vicinity of bin No. 4, in order that the work might be performed without exposing plaintiff to extraordinary and unnecessary hazards and dangers. In other words, the knowledge of Crellin in reference to these matters was knowledge to his principal. And again, as I have already stated and pointed out, the theory upon which the case was tried, both by plaintiff and defendant, was that the stationary lamp hereinbefore mentioned did not light up the interior of bin No. 4 after dark, and that additional light to that furnished by this stationary lamp was necessary at that point; the defendant claiming that on the evening in question the adjustable lamp was hanging over bin No. 4 and furnished an abundance of light, whereas the claim and theory of plaintiff was that the only light at said bin was that produced by the two stationary lamps mentioned in Wright's testimony. Hence, under this theory of the case, the testimony was unimportant, except only so far as it tended to bring home to defendant knowledge of the conditions as they existed at that time, and the necessity of additional light to that furnished by the stationary lamps.

The next error alleged is the exclusion of Avery's testimony with reference to the plank which other witnesses for defendant had testified to having seen lying across bin No. 4 just prior to the accident. It appears from the record that the plank in question was not a part of the bin; that is, it was not a fixture of or permanently attached to the bin. Crellin, defendant's principal witness, testified on his direct examination with reference to its character as follows: "Q. Now, do you know whether or not, in addition to this plank and ladder, there were any other loose material about the floor? A. You mean plank? Q. I mean plank. A. Yes, sir; there were several pieces of plank lying around there." In fact, the record shows that there was but little more permanency respecting the location of the plank than there was to the pick, shovels, and other tools with which the work there was performed.

Under these circumstances, in order to entitle appellant to Avery's testimony that he saw a plank lying across bin No. 4 two or three hours after the accident occurred, it was incumbent upon it to show that the conditions at the bin were the same when Avery went to work as they were when plaintiff was hurt. True, Crellin made the sweeping statement that in the meantime no changes had taken place; but the record shows that he left the premises immediately after the accident, and accompanied the plaintiff to his home, a distance of about two miles from the mill, stayed with him from one-half to three-quarters of an hour, and returned to the

smelter about 10 minutes before the 11 o'clock shift went to work. Therefore, according to his own testimony, he was not in a position to know what took place at the bin between the time he left with Meyers at 8 or 9 o'clock and his return at 11 o'clock p. m. And the record shows that in the meantime ore was run into bin No. 4, and that the conditions to some extent had changed. Under these circumstances and conditions I do not think it was an abuse of discretion for the court to exclude Avery's testimony. If the plank had been a fixture and attached to the bin, an entirely different rule would govern, but the record shows that it and other loose plank were used, among other things, for foot boards, and were frequently moved from one bin to another.

I am of the opinion that the judgment of the trial court should be affirmed.

**HORTON, County Treasurer, v. DRISKELL.**  
(Supreme Court of Wyoming. June 27, 1904.)

**TAXATION—INJUNCTION—FAILURE TO VERIFY ASSESSMENT—ADDITION OF OMITTED PROPERTY.**

1. Under Rev. St. 1899, § 3575, providing that answers to interrogatories may be enforced by nonsuit, judgment by default, or attachment, as the justice of the case may require, the nonsuiting of a plaintiff for failure to answer interrogatories is discretionary.

2. In a suit to enjoin a county collector from collecting taxes on a certain number of cattle on the ground that they were kept on plaintiff's range in another county, where he paid taxes on them, defendant answered that the range was in both counties, and that plaintiff did not pay taxes on them in the other county, and, as a separate defense, that the cattle were brought into the county after the regular annual assessment, and, not having been listed or assessed, were added to the assessment roll pursuant to Rev. St. 1899, §§ 1798, 1799. *Held*, that the defenses were not inconsistent, and the court erred in compelling defendant to elect on which he would rely.

3. For the purpose of determining whether error in requiring defendant to elect between defenses was prejudicial, it cannot be presumed that he had no evidence to support one of them.

4. The collection of taxes cannot be enjoined merely for failure of the assessor to attach the oath required by statute to the assessment, where it does not appear that the tax is for some reason inequitable; and Rev. St. 1899, authorizing injunction to restrain the illegal collection of taxes, does not alter this rule, but merely confers an equitable jurisdiction, and relieves a party complaining thereunder from showing a threatened irreparable injury and an absence of legal remedy.

5. Under the statute providing that the county board of equalization shall add to the assessment roll any taxable property in the county not included in the assessment as returned by the assessor, the board has power to add omitted property, though no property was assessed to the owner by the assessor, and his name does not appear at all on the assessment roll.

6. The collection of taxes may be enjoined on the ground that the plaintiff had no taxable property in the county, without first making

application to the board of equalization to correct the assessment.

Error to District Court, Weston County; Joseph L. Stotts, Judge.

Suit by J. W. Driskell against Fred Horton, as county treasurer of the county of Weston, etc. From a decree granting an injunction, defendant brings error. Reversed.

D. A. Fakler and E. E. Enterline, for plaintiff in error. Nichols & Adams, for defendant in error.

CORN, C. J. This was a suit to enjoin the collection, by the county of Weston, of taxes upon 1,500 head of range cattle. A temporary injunction was allowed, and upon the hearing the court found in favor of the plaintiff, and rendered judgment making the injunction perpetual. The plaintiff (defendant in error here) alleged in his petition that he paid taxes upon all his cattle in Crook county, where his home range was located, and that he had no cattle in Weston except such as had drifted there off their home range, and were not subject to taxation in the latter county. The defendant, after a general denial, answered that the home range of plaintiff was in both Crook and Weston; that the 1,500 head in question were ranging, kept, herded, and located in Weston, and plaintiff did not pay taxes upon them in Crook; that he did not list them to the assessor of Weston, and the latter failed to assess them, but they were added to the assessment roll by the board of equalization. A third defense set out, in substance, that the 1,500 head upon which the tax in controversy was levied were brought into the county of Weston by defendant in error after the regular annual assessment, and, not having been listed by him, or assessed by the assessor, were added to the assessment roll by the board of equalization; the claim of plaintiff in error being that they were subject to taxation under sections 1798, 1799, Rev. St. 1899. Plaintiff in error also annexed to his answer a list of interrogatories, which he prayed that the plaintiff be required to answer. The defendant presented a motion that the plaintiff be nonsuited in the action because of his failure to answer the interrogatories annexed to the answer of the defendant, which motion the court denied. This ruling is assigned as error.

The statute (section 3575, Rev. St. 1899) provides that "answers to interrogatories may be enforced by nonsuit, judgment by default or by attachment, as the justice of the case may require." There is nothing in the statute which requires that a plaintiff be nonsuited for a failure to answer interrogatories, but the provision is that they may be enforced by nonsuit or otherwise, "as the justice of the case may require." This commits the matter to the sound discretion of the court. The record in no way discloses by what facts or circumstances the court was

¶ 6. See Taxation, vol. 45, Cent. Dig. § 1243.

guided in the exercise of its discretion, and we are therefore unable to say that it was abused. *Longstreth v. Halsey*, 4 Ohio Cir. Ct. R. 307; *Newburg v. Wearre*, 44 Ohio St. 604, 9 N. E. 845; *Railway Co. v. Construction Co.*, 49 Ohio St. 631, 32 N. E. 961.

Upon the motion of the plaintiff, the court required the defendant, over his objection, to elect whether he would rely upon the first and second defenses or upon the first and third defenses stated in his answer. The defendant thereupon elected to rely upon his first and second defenses. This ruling is also assigned as error. Upon what principle the defendant was required to elect is not very clear. The defenses were not inconsistent, even if that would justify the court in requiring an election between them. It might be that the plaintiff had that number of cattle ranging in the county on April 1st, and also that he brought into the county an equal number after that date, and prior to the assessment by the board of equalization in June. Or it might well be that a portion of the number assessed were in the county, and subject to taxation, at the time of the annual assessment on April 1st, and that the remainder were brought in and became taxable subsequent to that date, and prior to the assessment. In either case he had the right to plead the facts, and he had the right to so plead them as to cover whatever state of circumstances might be developed by the evidence. The ruling, in effect, struck out the third defense, and deprived the defendant of that right, and we think it was clearly erroneous. As the evidence is not brought up in the bill of exceptions, we are unable to determine how far it operated to the prejudice of the defendant, but we are not at liberty to presume that he had no evidence to support the allegations.

But at the conclusion of the hearing the court found as conclusions of fact that the plaintiff, on and after the 1st of April, had some cattle ranging in Weston county; that they were not listed for taxation by him nor assessed by the assessor; that the assessor returned an assessment roll, but entirely failed to attach to it the oath required by statute, and the board of equalization added the cattle in question to such roll. The court further found as conclusions of law, first, that the failure of the assessor to attach the statutory oath rendered the assessment roll and the levy of taxes thereunder wholly invalid; second, that the assessment made by the board of equalization was invalid for the reason that no property whatever was assessed by the assessor against the plaintiff; and, third, that the plaintiff was entitled to a perpetual injunction as prayed. There was no finding whether the property in question was subject to taxation in Weston county, and the effect of the decision of the court, as we understand it, is that the remedy by injunction is available, upon a failure of the assessing officers to comply with the require-

ments of the statute, without regard to the question whether the property was legally subject to taxation in the particular jurisdiction or not. We do not understand this to be the law. It is true that, where it is sought to sustain tax titles or sales for taxes, it is generally held that the requirements of the statute must be substantially complied with, and not only the sale, but the levy and assessment, must be made in the manner required; and when the oath of the assessor is required to be attached to the assessment roll, and the assessor fails in this duty, the omission renders the assessment roll void as a basis for the proceedings of sale, and invalidates the sale. But when equitable relief is sought the maxim is applied that he who seeks equity must do equity, and an injunction will not be allowed on account of the mere failure of the taxing officers to fulfill the requirements of the statute in the levy and assessment, but it must appear that the tax itself is inequitable for the reason that the property was not taxable, or that it was not the property of the complainant, or the like. The Supreme Court of Illinois early laid down the rule that it is only in extraordinary cases that the writ of injunction is properly invoked, and that the exceptions are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or, if the tax itself is authorized, it is assessed upon property which is not subject to the tax. *Chicago, B. & Q. R. R. Co. v. Frary*, 22 Ill. 37. The doctrine announced by the Wisconsin court is that a court of equity will not interfere to declare a tax invalid, and restrain its collection, unless the objections to the proceeding are such as to go to the very groundwork of the tax, and necessarily affect materially its principle, and show that it must necessarily be unjust and unequal; that it is not enough to show that the tax proceedings are irregular or void, but it must also appear that they are inequitable, and that it will be against conscience to let them go on. *Hixon v. Oneida County*, 82 Wis. 531, 52 N. W. 445. When a taxpayer undertakes to stop the officers of the law from collecting a tax charged against his property by a proceeding in equity, he should be required to demonstrate by his complaint that his property is not legally or equitably chargeable therewith. *Kaehler v. Dobberpuhl*, 56 Wis. 486, 14 N. W. 644; *Hayes v. Douglas County*, 92 Wis. 444, 65 N. W. 482, 31 L. R. A. 213, 53 Am. St. Rep. 926. In *Fifield v. Marinette County*, 62 Wis. 534, 22 N. W. 706, it was urged that the allegation that the assessment roll was not verified by the assessor was equivalent to an allegation that the taxes levied upon plaintiff's lands were not only illegal, but unequal and unjust, and that a court of equity should therefore restrain their collection. But the court say: "It may be admitted that the allegation mentioned is equivalent to an allegation that the taxes levied and extended upon such an assessment are illegal in the sense

that no valid title could be made under the tax proceedings by a sale of the plaintiff's lands for the nonpayment of such taxes, if such sale was attacked in proper time by an action at law; but certainly such allegation does not demonstrate that the taxes extended upon such assessment are unequal, inequitable, or unjust." The Kansas court say that it is well settled in that state that injunction cannot be maintained to restrain the collection of taxes, which the plaintiff justly ought to pay, because of errors or irregularities in the proceedings of the taxing officers (*Life Association v. Hill*, 51 Kan. 644, 33 Pac. 300); that it can only be maintained for the purpose of restraining an illegal tax, no matter what the irregularity in the mode of assessment may have been (*Dutton v. Nat. Bank*, 53 Kan. 462, 36 Pac. 724). When the defect does not impeach the justice of the tax, equity will not interfere. *Dill. Mun. Corp.* 924; *Miller v. Vollmer*, 153 Ind. 30, 53 Pac. 949; *Reynolds v. Bowen*, 138 Ind. 444, 37 N. E. 962.

The fact that our statute (section 4172, Rev. St. 1899) provides for the remedy by injunction to restrain the illegal levy or collection of taxes does not affect the principle involved. The section is copied from the Ohio statute, and, as explained by the Supreme Court of that state, "the jurisdiction thus conferred is an equitable jurisdiction, and is to be exercised upon equitable principles. Proceeding under the statute, the party complaining is not required to show a case of threatened irreparable injury, or the absence of a remedy by ordinary legal proceedings; but he must exhibit a case in which, upon the merits, he is entitled to the equitable relief demanded." *Steeze v. Oviatt*, 24 Ohio St. 253; *Stephan v. Daniels*, 27 Ohio St. 536; *Tone v. Columbus*, 39 Ohio St. 302, 48 Am. Rep. 438.

The findings in this case are special, and the court does not find that the property was not subject to taxation in Weston county, or that the tax was for any reason unequal, unjust, or inequitable. There is no finding that the tax is illegal except in the sense that the assessment is held to be void, or at least so irregular that it is insufficient to support a valid levy. And, as we have pointed out, this kind of illegality will not support an application for equitable relief. We are therefore of the opinion that the assignment by plaintiff in error that the judgment of the court decreeing an injunction is not supported by the findings must be sustained.

Counsel for plaintiff in error contend, as we understand, that the county board of equalization has no power or authority to add omitted taxable property to the assessment roll and assess its value, and the case of *Union Pacific R. Co. v. Donnellan*, 2 Wyo. 478, is cited as authority. That was a suit to enjoin an alleged district school tax, and the court found that the clerk of the district did not, as required by law, file with the

county clerk any certificate, or notify the county assessor, of any amount voted by the district, that the assessor did not make, or attempt to make, any assessment of the property of the district, and did not return any separate assessment roll of the district, or make any attempt to do so, and that it did not even appear that any sum of money was voted by the district; that the board did not pretend to add to the complainant's tax list any taxable property not included in the assessment, but undertook to make an original assessment of the district, and blend it with the general county tax, the county clerk making the assessment from his own general personal knowledge, and not from a separate assessment roll returned by the assessor. The court held that under these facts there was no assessment at all, and that the acts of the county commissioners and county clerk were of no validity whatever. The purport of the decision, therefore, seems to have been that the sum claimed was not a tax at all, but a mere pretended tax; and the case is not authority for the proposition that the board is not authorized to assess property as was done in the case before us. Whether the board would have power to make an assessment of the property of the county in the absence of any assessment roll returned by the assessor, we need not consider, as in this case they had before them an assessment roll regular in all respects except that it was not verified as required by law.

If it is the claim of counsel that the board had no such authority for the reason that the plaintiff was not assessed for any property by the assessor, and his name did not appear at all upon the assessment roll until entered thereon by the board, it is sufficient to say that there is no warrant or basis for such claim in the language of the statute. It expressly provides that "said board shall at its first meeting add to said assessment roll any taxable property in their county not included in the assessment as returned by the assessor and assess the value thereof." This confers full authority. The other authorities cited are from states where the statutes do not confer such authority, and are not applicable here. Being purely statutory boards, they have only such powers as the statutes confer. In some of the states the boards are held to have this authority under statutes less plain and explicit than ours. *Parker v. Van Steenburg*, 68 Iowa, 176, 26 N. W. 60; *Robb v. Robinson*, 66 Iowa, 500, 24 N. W. 15; *King v. Parker*, 73 Iowa, 757, 34 N. W. 451; *Poppleton v. Yamhill County*, 8 Or. 337.

It was not necessary for the plaintiff to allege or prove that he had first made application to the board to correct the assessment, for, if he had no property in the county subject to taxation, it was not a mere overassessment, but the tax was illegal, and the defect was jurisdictional. *Board v. Searlight Cattle Co.*, 3 Wyo. 784, 31 Pac. 268; *Cooley on Taxation* (3d Ed.) 1382; *Barber v. Farr*,



54 Iowa, 58, 6 N. W. 134; Illinois Cent. R. Co. v. Hodges, 113 Ill. 323.

We do not find that the court abused its discretion in permitting the filing of an amended petition after the evidence was all in.

The judgment will be reversed, and, the issues presented by the pleadings not being covered by the findings, the case will be remanded for a new trial in accordance with the views expressed in this opinion.

KNIGHT and POTTER, JJ., concur.

(32 Colo. 472)

**GURNEY v. BROWN.\***

**SMALL v. SAME.**

(Supreme Court of Colorado. June 6, 1904.)

**MINES AND MINING—LODE CLAIMS—LOCATION—INTERIOR DEPARTMENT—DECISIONS—COLLATERAL ATTACK—EFFECT—CONFLICTING CLAIMS—ELECTION—RELOCATION—RIGHT OF LOCATORS.**

1. Where, in a suit to determine adverse claims to a mining location, the only question submitted for trial, and the only one which the parties intended to litigate, was the time when the premises in controversy reverted to the public domain and thereupon became subject to relocation, and both parties assumed at the trial that the stipulation of facts presented such question, an objection that the stipulated facts were insufficient to present it was not available when made for the first time on appeal.

2. Where, on an application for a patent to a mining claim, the Interior Department held that a lode vein had not been shown to exist and pass through conflicting patented placer ground at the time the holder of the patent to the placer applied for such patent, and therefore the claimant of the lode claim was not entitled to the conflicting placer ground, such determination did not constitute a judgment that the lode vein did not pass through the conflicting placer location.

3. A judgment of the Land Department in determining whether an applicant for a patent to a lode mining claim is entitled to acquire the fee from the United States cannot be collaterally attacked.

4. On an application for a patent to a lode claim which conflicted with a patented placer location, the Land Department, on May 28, 1896, required the applicant to elect which of two disconnected tracts he should receive a patent for, and provided that, in default of election or appeal within 60 days from the date of the order, the entry to the land in controversy should be canceled without further notice. No appeal was taken from this decision, but the claimant instituted proceedings against the conflicting claimant, which resulted in an adverse decree rendered May 7, 1898, after which, on June 14, 1898, the claimant filed an election to retain the part of the claim adjoining the placer location, and waived his right to review the decision of May 7, 1898, after which, on July 15, 1898, the General Land Office Commissioner canceled the entry as to that part of the claim including the land in controversy. Held that, the Land Department having taken no steps to enforce that part of the decree providing an election at the end of 60 days, the land in controversy did not revert to the United States until the filing of the entryman's election on June 14, 1898, and was therefore again subject to location immediately subsequent to such filing, but not prior thereto.

5. Where the certificate of location of a mining claim was not suspended or canceled, but an order was entered by the Interior Department that the entry itself should be suspended until certain directions were complied with, such suspension did not destroy the force of the certificate evidencing such entry, nor entitle third persons to attack its validity.

6. Where, on an application for a patent to a lode claim, the Interior Department suspended the entry, and required the entryman within 60 days to elect which of two disconnected tracts included in the entry he would receive a patent for, and, in case of his failure to elect, the entry as to a portion of the claim in controversy should be canceled without notice, the failure of the entryman to appeal from such holding did not operate to cancel the entry at the expiration of the time allowed to appeal, no election having been filed, and the Land Department not having taken any steps to enforce such election or cancel the entry.

7. Where, at the time B. located a mining claim on the ground in controversy, it was not subject to location, and after it became subject to location, and before B. filed an amended location thereon, the ground was located by G., B. acquired no rights by virtue of his original or amended location.

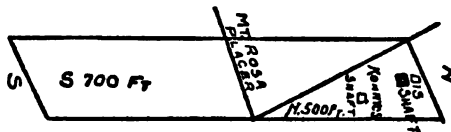
Appeals from District Court, Teller County; Louis A. Cunningham, Judge.

Actions by Charles Duncan Gurney and by J. A. Small against F. C. Brown. From a decree in favor of defendant in each case, plaintiffs appeal. Judgment in the suit of Small against Brown vacated, and judgment in the suit of Gurney against Brown reversed.

John Knowles and Chas. Rand, for appellant Small. J. C. Helm and Chas. C. Butler, for appellant Gurney. Potter & McCarthy, for appellee.

GABBERT, C. J. The main question presented for determination in both of these causes is the same, and the mining premises in controversy embrace practically the same tract. For these reasons the two cases will be disposed of in one opinion.

Appellee, Brown, applied for patent on a mining claim known as the "Scorpion." Appellant Gurney adverse this application as the owner and claimant of the Hobson's Choice, and the appellant Small as the owner and claimant of the P. G. Thereafter each brought suit in support of his adverse claim. The causes were tried on an agreed statement of facts, whereby the main question presented is, when, with respect to the three locations, did the premises in controversy become subject to location? The following diagram will aid in understanding this question:



The facts presenting it are as follows: From this diagram it will be observed that the Kohnyo was segregated into two disconnected tracts by the Mt. Rose, a patented

\* Rehearing denied June 27, 1904.

placer claim. The north end of the Kohnyo, approximately 500 feet in length, embraced the discovery shaft. The south end was some 700 feet in length, and was without development work of any kind. The local land office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Land Department ultimately refused to issue a patent for such tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim separated by a patented placer could not be included under one location within the same patent. The Land Office, however, gave the applicant the privilege of proceeding to patent upon either of the segregated tracts, and directed that, in default of an election or appeal by the claimant within 60 days from the date of the order, the entry of that portion of the claim lying south of the Mt. Rosa placer should be canceled without further notice. This decision was rendered May 28, 1895. No appeal was taken from this decision, but the claimant of the Kohnyo instituted proceedings against the claimants of the Mt. Rosa placer, the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer conflicting with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimants' contention of a known vein in the placer conflict. June 14, 1898, the claimant of the Kohnyo filed in the local land office a written instrument, whereby election was made to retain and patent the north end of the Kohnyo claim, and in which the right to further question or review the decision of the Land Department of May 7, 1898, was waived. July 15, 1898, the Commissioner of the General Land Office canceled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer. May 13, 1898, appellee, Brown, located this 700 feet as the Scorpion lode claim. June 23, 1898, appellant Gurney located the same premises as the Hobson's Choice lode, and July 16, 1898, appellant Small located the same ground as the P. G. lode claim. July 15 and 16, 1898, the claimant of the Scorpion filed amended and second amended location certificates. On these facts judgment was rendered for defendant in each case, from which the plaintiffs appeal.

Other facts were stipulated, which have not been summarized because they are of that character, and cover such questions, that the rights of the respective claimants to the premises in controversy are wholly dependent upon the legal conclusions deducible from those stated. Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim, do not establish the validity of that location, nor affirmatively show

that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the briefs of counsel that the only question submitted for trial, and the only one which the parties intended to litigate and have determined by the trial court, was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow the conclusion of law on this question; or, in other words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question the decision as to which of the respective locations was valid depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was subject to location. As to each claim this question was reserved for the decision of the trial court by the following proviso: "Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

Counsel for appellee concede that the tract in controversy is substantially identical with the south tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief: "Upon the trial in the court below the stipulation of facts was not read by either party. \* \* \* It was upon taking up the record before this court for the preparation of appellee's brief that the question of the relevancy of the exhibits attached to the stipulation of facts first presented itself. \* \* \* From an examination of the record it would appear to be a certainty that the case was tried in the lower court upon assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. \* \* \* The truth of the matter is that after the preparation, execution, and filing of the agreed facts the stipulation containing such facts was never again read or digested by any of the parties in interest. The

trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find." Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal. 2 Cyc. 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipulation or testimony. One of the cardinal principles of appellate procedure is that questions sought to be reviewed shall first be brought before the trial court for decision; otherwise a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine. Elliott's Appellate Procedure, § 489.

We shall next notice the contention of counsel for appellee that the premises in controversy were not segregated by the Kohnyo location. In support of this claim two propositions are relied upon: (1) The decision of the Land Department of May 7, 1898, to the effect that the Kohnyo vein was not known to exist within the boundaries of the Mt. Rosa placer at the time application for the patent therefor was made; and (2) that the rights of the Kohnyo claimant terminated at the point where the north end of the Kohnyo claim intersected the exterior boundaries of the Mt. Rosa placer. The first proposition is clearly untenable. The proceedings before the Land Department with respect to the Kohnyo vein passing through the conflicting patented placer were for the purpose of determining whether or not such vein was known to exist at the time patent for the placer was applied for. On the evidence submitted the department held that it was not known when the claimants of the Mt. Rosa applied for a patent, and therefore could not be held by the Kohnyo lode. This is radically different from a judgment to the effect that the vein did not pass through the conflicting placer location. The second proposition is equally untenable. The Land Department is a special tribunal, created for the purpose of supervising the various proceedings whereby title from the government to portions of the public domain may be obtained. Its judgment respecting these matters which it must determine in ascertaining whether or not an applicant is entitled to acquire the fee title or patent from the United States is unassailable, except by direct proceedings. In other words, its judgment respecting these matters cannot be attacked collaterally. *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Smelting*

*Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875. In this instance the Land Department had determined that the applicant for patent on the Kohnyo was entitled to a conveyance of one or the other of the two tracts. Whether or not this conclusion was right or wrong cannot be questioned collaterally. If wrong, it was an error which the Land Department committed in the exercise of its jurisdiction over those matters specially intrusted to its supervision and control, and hence could only be corrected in a direct proceeding instituted for that purpose.

This brings us to a discussion and determination of what we have designated as the main question, namely, at what date, with respect to the three locations now asserting rights to the premises in dispute, did such premises become subject to location? No case is cited by counsel where the propositions presented by the facts narrated and bearing upon this question have been determined, and we must therefore analyze the facts and their effect for the purpose of ascertaining when, according to these facts, the subject-matter of the actions reverted to the public domain. This is the important point, because a location of a mining claim can only be made upon unappropriated mineral land. *Armstrong v. Lower*, 6 Colo. 393. The decision of May 28, 1895, did not cancel the entry made by the applicant for patent on the Kohnyo. Thereby the Kohnyo claimant was given the right to elect which of the two tracts would be selected for patent. In case of failure to make such election, the government reserved the right to cancel the entry on the south tract. The judgment of the Land Department was to be enforced in one of two ways, whereby one or the other of the tracts would be restored to the public domain, namely, by the election of the Kohnyo claimant, or the affirmative action of the department. The proceedings instituted by the Kohnyo claimant for the purpose of establishing the existence of a known vein through the Mt. Rosa placer at the time the patent for the latter was applied for cut no figure, for, independent of these proceedings, the fact remains that the judgment of the Land Department of May 28, 1895, was not enforced or given effect until the Kohnyo claimant, by its written declaration filed in the local land office, indicated its intention to proceed to patent on the north tract. This act on the part of the Kohnyo claimant was an express surrender of all rights to the south tract. It operated as an abandonment of any right thereto, and took effect the very moment the declaration of election was filed in the local land office. *Derry v. Ross*, 5 Colo. 295. Up to that time the Land Department, having taken no affirmative action to cancel the Kohnyo entry on the south tract, the claimant might have selected that instead of the north one. Certainly, had such election been made, it could not be successfully claimed on the record before us

that the Scorpion could have established any rights against such selection. This conclusion is inevitable, because, so long as the Kohnyo claimant had rights in the south tract, it was not subject to location by third parties. If, then, this tract could not be located as against the rights of the Kohnyo claimant, an attempted location during the existence of such rights could be of no force or effect, because made at a time when it was not subject to location. The subsequent formal cancellation of the entry on the south tract by the action of the Land Department could add nothing to that which had already taken place by the action of the Kohnyo claimant in surrendering and abandoning all rights to the south tract. Such action on the part of the department only evidenced in another form the fact that the Kohnyo claimant had surrendered title to this tract so far as evidenced by the receiver's receipt, and that all rights thereunder were formally canceled so far as the government was concerned. This action, however, was not necessary in order to restore the south tract to the public domain, because by the judgment of the Land Department that occurred the moment the Kohnyo claimant complied with that judgment. The action of the department in formally canceling the entry of the south tract of the Kohnyo claim is only important in view of the fact that counsel for appellee contend that the judgment of May 28, 1895, was self-executing, and that it did not appear from the agreed statement that the Kohnyo entry had not been canceled in accordance with that judgment (or another, which we have not noticed because we do not deem it material) at the time of the Scorpion location. The Land Department certainly did not treat the judgment of May 28, 1895, as self-executing, because the commissioner expressly stated, under date of July 15, 1898, that "it now devolves upon this office to execute the same." This action also establishes the fact that, so far as any affirmative act of the government was concerned, the south tract of the Kohnyo entry was not canceled until the last-mentioned date. It is therefore apparent that the contention of counsel for appellee that the statement of facts does not establish the validity of the Kohnyo location, nor affirmatively show that on the date of the Scorpion location the premises so claimed were not subject to location, is not tenable, because the premises did not revert to the public domain until the Kohnyo claimant filed its election in the local land office, and up to that time the entry of the south tract of the Kohnyo had not been vacated by any affirmative act on the part of the Land Department. We must therefore conclude that the premises in controversy were not subject to location until after the date when the Kohnyo claimant filed in the local land office its election to patent the north tract. This being the conclusion, a brief summary of the facts will in-

dicate which of the three claims constitutes a valid location of the south tract. The election of the Kohnyo claimant was filed in the local land office June 14, 1898. The Scorpion was attempted to be located May 18, 1898. June 23, 1898, the Hobson's Choice lode was located, and July 16th following the P. G. was located. It thus appears that the Scorpion was attempted to be located at a time when the premises were not subject to location, that the Hobson's Choice lode was located when they had reverted to the public domain, and that the location of the P. G. was made after that date; so that the only valid location was the Hobson's Choice.

Counsel for appellee have argued that the suspension of a receiver's receipt operates to render it incompetent as evidence of the validity of the claim upon which it is issued. This proposition may be correct, but the facts do not justify its application. The certificate on the Kohnyo was not suspended or canceled, but the order of the department was to the effect that the entry itself should be suspended until certain directions were complied with. The mere suspension of a mineral entry for the purpose of requiring compliance with departmental regulations does not destroy the force of the certificate evidencing such entry, or enable third parties to attack its validity. Section 772, 2 Lindley on Mines; *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed. 537, 9 C. C. A. 613. Counsel for appellee, as we understand their brief, have also advanced the proposition that the judgment of the Land Department of May 28, 1895, not having been appealed from, operated to cancel the entry at the expiration of the date when the time allowed for appeal expired. We think this contention has already been answered, but the authorities they cite to support their claim are not in point.\* In *U. S. v. Steenerson*, 50 Fed. 504, 1 C. C. A. 552, as well as in *Murray v. Polglase* (Mont.) 43 Pac. 505, it was held that, according to the judgment of the Land Department, the respective entries had been canceled; and so in the *Cases of Reed*, 6 Land Dec. Dep. Int. 563; *Gauger*, 10 Land Dec. Dep. Int. 221, and *Perrott v. Connick*, 13 Land Dec. Dep. Int. 598. As we have already shown, a judgment of absolute cancellation is entirely different from one where the entry is merely suspended for the purpose of enabling the applicant to comply with some specific requirement.

But one further matter requires notice, namely, the filing on the part of the Scorpion claimant of amended and second amended location certificates July 15 and 16, 1898, or, as it is claimed on behalf of his counsel, he made amended locations of his claim on these dates. These acts in no manner changed or enlarged his rights, for prior thereto the premises had been claimed and located as the Hobson's Choice, at a time when the premises thereby included were open to location.

As these cases were tried in the court below on an agreed statement of facts, which definitely determines the rights of the respective parties, judgments in each case will be directed here under the authority of section 398 of the Civil Code. The judgment in *Small v. Brown* is vacated, and judgment will be entered in this court that neither party has established any right to the premises in controversy, and that each pay his own costs in this court as well as in the court below. In *Gurney v. Brown* it appears from the facts stipulated (in considering those not specially noticed in the opinion) that the location of the Hobson's Choice is in all respects regular; that appellant Gurney is the owner of, and has established his right to the possession and occupancy of the premises embraced in, such location, and is entitled to recover the same from the appellee by virtue of a full compliance with the statutes of the United States and the state of Colorado in the discovery and location of the Hobson's Choice lode mining claim. Wherefore judgment is now here directed to be entered in this court that he do recover the premises included in the Hobson's Choice location of and from the appellee, Brown, and that he also recover his costs in this court, as well as in the court below.

Judgments vacated, and judgments entered in this court.

20 Colo.A. 159

MITCHELL v. WHEELER.\*

(Court of Appeals of Colorado. June 13, 1904.)

OFFICERS — COUNTY TREASURERS — FEES — REDEMPTION MONEY — TAX CERTIFICATES — ASSIGNMENT — ENTRY — STATUTES — CONSTRUCTION — ACTION — PLEADING.

1. Mills' Ann. St. § 3914, provides that the county treasurer shall, on demand of any person entitled to redemption money in his hands, pay the same to such person on his surrendering tax certificates to such land or lots as have been redeemed; and Act 1891, p. 211, § 6, as amended by Sess. Laws 1897, p. 159, c. 52, prescribes the fees and commissions which may be charged by the county treasurer, and authorizes them to charge 1 per cent. for receiving all moneys other than taxes in counties of every class. *Held*, that such latter section applied to moneys received by the treasurer on account of licenses and other sources of revenue, but did not apply to moneys paid to the treasurer on account of redemption from tax sales.

2. Act 1891, p. 211, § 6, as amended by Sess. Laws 1897, p. 159, c. 52, prescribing the fees and commissions which may be charged by county treasurers, does not authorize them to charge any fee for entering on their books an assignment of the certificate of purchase of land at a tax sale, nor to make any charge against the party entitled to the redemption money on account of such assignment.

3. Sess. Laws 1891, p. 220, § 17, provides that if any officer whomsoever, whose fees are expressly limited, shall take greater fees for any service than are provided for any service to be done by him in his office, or if he shall demand and take any of the fees specified where the service for which such fees are charged shall not be actually performed, such officer shall pay to the party injured \$50, to be recovered in

an action at law. *Held*, that a complaint in an action against a county treasurer for charging illegal fees, which failed to allege that the officer charged a greater fee than that provided by statute, or that he had charged, demanded, or taken a fee for a service not rendered, was fatally defective.

4. Where a county treasurer was charged with taking commissions and fees to which he was not entitled, plaintiff's action against him was to recover three times the value of the fee or compensation taken, as authorized by Mills' Ann. St. § 1301, and not an action to recover a penalty for the charging of a greater fee than that provided by statute, or for the charging of a fee for services not rendered, as authorized by Sess. Laws 1891, p. 220, § 17.

Appeal from District Court, Arapahoe County.

Action by Walter C. Mitchell against Mortimer C. Wheeler. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. E. Schlosser, for appellant. Goudy & Twitchell and George F. Dunklee, for appellee.

MAXWELL, J. This is an appeal from a judgment of dismissal entered on an order sustaining a demurrer to an amended complaint. The amended complaint set forth 38 causes of action. The first 37 causes of action, which were identical except as to dates and amounts, alleged that the defendant was county treasurer of Arapahoe county during the years 1898 and 1899; that plaintiff was a large purchaser of tax-sale certificates at the annual sales of property on account of delinquent taxes; that portions of the property so purchased by him were redeemed, and the redemption money paid to the defendant in his capacity as county treasurer, to be held by him subject to the order of plaintiff; that plaintiff surrendered to the defendant the tax-sale certificates upon property so redeemed, and demanded of defendant the moneys which had been received by him on account of such redemption; that the defendant deducted from the moneys so received by him on account of redemptions 1 per cent. thereof, claiming that he had a right so to do under and by virtue of the statute; that such deductions were and are illegal fees; that the plaintiff had made frequent demands on the defendant for the payment of the same, which has been refused; that by reason of the acts of defendant he has forfeited and become liable to pay to plaintiff the sum of \$50 by virtue of section 17, p. 220, Sess. Laws 1891. The thirty-eighth cause of action alleged was for the recovery of \$50 penalty, under the same statute, for the deduction of \$7.50 from redemption moneys due the plaintiff under the pretense that the defendant was entitled to the sum of 30 cents each on account of 25 tax-sale certificates which had been assigned by the original purchaser to the plaintiff, which fee was alleged to be an illegal fee. The demurrer was upon the ground that the complaint did not set forth facts sufficient to constitute a cause of action.

\*Rehearing denied July 2, 1904.

The sections of the statute involved herein are as follows:

Section 6 of the act of 1891, p. 211, as amended by the Session Laws of 1897, p. 159, c. 52: "The county treasurer shall charge and receive the following fees and commissions: Upon all moneys received by him for town and city taxes, whether such towns or cities be incorporated under the general laws or by special charter, and anything in said charter to the contrary notwithstanding, and upon all school taxes in counties of the first class, one per cent; in counties of the second class, one per cent; in counties of every other class, one per cent on school taxes, and two per cent on town and city taxes. Upon all moneys received by him for taxes of every other kind in counties of the first class, one per cent; second class, one and one-half per cent; third class, two per cent; fourth class, three per cent; fifth class, five per cent. For receiving all moneys other than taxes in counties of every class, one per cent. For each certificate of purchase, in counties of every class, twenty-five cents; for each tract therein described in counties of every class, five cents. For each certificate of redemption in counties of every class, twenty-five cents; for each tract therein described in counties of every class, five cents. For making treasurer's deed in counties of every class, one dollar, if such deed contains one description, and for every subsequent description, five cents." The foregoing is the only statute in force fixing the fees of county treasurers.

Section 17: "If any officer whomsoever whose fees are hereinbefore expressed and limited for any service shall take greater fees than are so hereinbefore limited and expressed for any service to be done by him in his office or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited where the business for such fees are chargeable, shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law."

The last above quoted section is a penal statute, and as such must be strictly construed. It denounces a penalty of \$50 against any officer who shall take greater fees for any services to be done by him than those provided by the statute, and a like penalty against any officer who shall charge, demand, or take any of the fees provided by the statute where the services shall not be actually done or performed.

It is contended by appellee that the statute authorizes the deduction of 1 per cent. from moneys paid in redemption of property from tax sales under and by virtue of the following paragraph in the first above quoted section of the statute: "For receiving all moneys other than taxes in counties of every class, one per cent." With this contention we do not agree. This commission is not in-

tended to apply to moneys paid to the treasurer on account of redemptions from tax sales, but is intended to apply to moneys received by the treasurer on account of licenses, and from other sources of revenue. This view is supported by the fact that section 3914, Mills' Ann. St., provides: "The treasurer shall, on demand of any person entitled to redemption money in his hands, pay the same to such person on his surrendering to him the tax certificate to such land or lot as has been redeemed." As to the thirty-eighth cause of action alleged, we find nothing in the statute above quoted which authorizes the treasurer to charge any fee whatever for entering on his books an assignment of a certificate of purchase, or for making any charge against a party who is entitled to the redemption money on account of such assignment. "The compensation of an official for his official acts being regulated by statute, he is only entitled to charge for those services to which compensation by law attaches, for the rule is inflexible that an official can only demand such fees or compensation as the law has fixed and authorized for the performance of his official duties." *Garfield Co. v. Leonard*, 26 Colo. 145, 153, 57 Pac. 693, 695. We therefore conclude that appellee, as treasurer, under the statute above quoted, was not authorized to deduct a commission of 1 per cent. from the moneys paid into his hands as redemption money, before paying the same to appellant, and that he was equally unauthorized to charge appellant 30 cents on each certificate of purchase which had been assigned to the appellant. Otherwise expressed, the commissions and fees charged by appellee, as alleged in the complaint, were unauthorized by statute.

Appellee contends that *Roberts v. People*, 9 Colo. 458, 13 Pac. 630, and *Garfield Co. v. Leonard*, 3 Colo. App. 576, 34 Pac. 583, announce the doctrine that where no fee is prescribed by statute, and the officer performs a service, he may charge and receive a reasonable fee for such service. An examination of the cases cited will show that they are not in point for the reason that the question there under consideration was the authority of a board of county commissioners to allow a reasonable compensation to an officer for services rendered the county, the compensation not being fixed by statute. The adoption of the rule contended for by appellee would lead to abuses, which it is the policy of the law to avoid. However, keeping in mind that section 17 of the above-quoted statute is penal, and that the same must be strictly construed, we do not believe that the facts alleged in the complaint or in the various causes of action are sufficient to constitute a cause of action under the provisions of that section, for the reason that there is no allegation that the officer has charged a greater fee than that provided by statute, or that he has charged, demanded, or taken a fee for a service which was not rendered. Accord-

ing to the allegations of the complaint, he has taken commissions and fees which he was not entitled to, which acts are not covered by the terms of said section.

Section 1301, Mills' Ann. St., imposes upon any officer who shall willfully and knowingly demand or receive any fee or compensation where no fee or compensation is authorized or prescribed by law the penalty of imprisonment, fine, and liability to civil action for three times the value or the amount of the fee or compensation so taken. Under the facts as alleged in the complaint, the plaintiff's remedy, if he has any, must be under the last-quoted statute, and not under the one relied upon in the complaint.

The judgment upon the demurrer was correct, and will be affirmed. Affirmed.

20 Colo.A. 164

FRANK v. BONNEVIE.

(Court of Appeals of Colorado. May 9, 1904.)

BROKERS—SALE OF PROPERTY—COMMISSIONS—WHEN EARNED.

1. Defendant, the principal owner of certain property, employed plaintiff to procure a purchaser thereof. The contract of employment stipulated that plaintiff should be paid a commission of 10 per cent. of the purchase price, to be paid "at the date of the payment of the purchase price or in installments according to payment by said purchaser." Plaintiff procured a purchaser, who paid a part of the price at the date of the sale. Defendant received no part thereof. *Held*, that plaintiff was entitled to his commission on the part of the price paid; payment of commission not being dependent on the payment of the entire purchase price, nor on the fact that defendant received the part paid.

Appeal from District Court, Arapahoe County.

Action by N. O. Bonnevie against Jermone B. Frank. From a judgment for plaintiff, defendant appeals. Affirmed.

Carpenter & McBird and Adair Willson, for appellant. Wm. W. Dingman and Richard McKnight, for appellee.

MAXWELL, J. This was an action by appellee against appellant upon a written contract dated April 1, 1898, pertinent parts of which are: Frank, being the principal owner of a cyanide mill or plant, is desirous of disposing of the same. Bonnevie is willing to assist in the disposition thereof. Therefore, "in case said Bonnevie should produce or introduce a customer for said cyanide plant, to whom the same shall be disposed of on terms satisfactory" to Frank, Frank agrees to pay Bonnevie a commission of 10 per cent. of the purchase price, cash or stock; "said commission to be paid said Bonnevie at the date of the payment of the purchase price or in installments, according to payment by such purchaser." Trial to the court. Judgment for plaintiff for \$1,500.

There is no substantial conflict in the testimony, by which, and the pleadings, the fol-

lowing facts are established: The United States Economic Reduction Company built a chlorination mill at Florence, Colo., upon land the title to which stood in the name of David H. Moffatt, trustee, under a contract to build a mill which would treat successfully 100 tons of ore per day. This contract not having been complied with, the property of the United States Company passed into the hands of a receiver. The receiver leased the property to the American Reduction Company, in which latter-named company Frank was a large stockholder, he and his friends owning a majority of the stock. The American Company changed the plant to a cyanide plant. At the date when the commission contract above referred to was made, the American Company, having become embarrassed, had closed down operations at the mill, owing \$10,000 to the First National Bank of Denver, and \$5,000 or \$6,000 to the F. M. Davis Ironworks Company, which amounts were liens upon the property. April 13, 1898, Frank wrote Bonnevie a letter giving details with reference to the property. Bonnevie showed this letter to Frambach, who seems to have been looking for a mill, and, at Frambach's request, Bonnevie arranged an interview between Frank and Frambach which took place April 15, 1898, at Frambach's office, Bonnevie not being present. Subsequently Bonnevie had several interviews with Frambach regarding the matter. July 23d, Frambach made a written contract with Frank by which Frambach, acting for himself, or as agent for the Cripple Creek Beam Milling Company, agreed that, in the event that he purchased the mill at the receiver's sale, he would pay the obligations of the American Reduction Company to the First National Bank of Denver and the F. M. Davis Ironworks Company, amounting to about \$15,000 or \$16,000, and would pay Frank for his interest in said mill and machinery \$10,000, and 100,000 shares of the capital stock of the Cripple Creek Beam Milling Company. Frambach purchased the property at the receiver's sale July 26th. Subsequently either he or the Cripple Creek Beam Milling Company paid to the First National Bank of Denver and the F. M. Davis Ironworks Company \$15,000 in settlement of the obligations of the American Reduction Company above referred to.

It is contended by appellant that no recovery can be had, for the reasons that the property in which appellant was interested, viz., the right and title to the machinery of the American Reduction Company, has not been paid for; that appellant has not received one dollar of the amount which has been paid, and therefore he is not liable under the terms of the commission contract.

The commission contract does not limit appellant's liability to the payment of the commission on the purchase price of the machinery of the American Reduction Company, or to the moneys paid to appellant. Its

terms are: "That in case said Bonnevle should produce or introduce a customer for such cyanide plant to whom the same should be disposed of on terms satisfactory to said party of the first part [Frank], the said party of the first part hereby agrees to pay or cause to be paid to said Bonnevle a commission of 10 per cent. of the purchase price, if paid in cash, or such part thereof as may be paid in cash, and any remainder in shares at the rate of ten (10) per cent. of the capital stock in any new company formed, the said commission to be paid said Bonnevle at the date of the payment of the purchase price, or in installments according to payment by said purchaser." It is apparent that the subject-matter of the contract is the cyanide plant; that the agent was to produce or introduce a customer to whom said plant should be disposed of on terms satisfactory to appellant; that thereupon the agent should be entitled to a commission of 10 per cent. of the purchase price, payable in installments as the purchase price was paid. The agent introduced the customer, with whom a satisfactory contract was made. The purchaser has paid \$15,000 of the purchase price, and, under the terms of the contract, the stipulated commission on that installment of the purchase price is due. Payment of the commission was not dependent upon the payment by the purchaser of the entire purchase price, but upon the payment of any installment. Under the authorities, the agent has made out a case against the principal which would entitle him to recover. *Ross v. Smiley* (Colo. App.) 70 Pac. 766, and cases cited. The case under consideration is unlike the cases cited by appellant which hold that the agent is not entitled to a commission where he produces a purchaser who is only willing to make an option contract, and forfeits a small sum paid upon the execution of the contract, rather than accept the property, or where the agent's commission is dependent upon his producing a customer at a definite price and upon definite terms, or where the commission is dependent upon a completed sale, payment of the entire purchase price, and transfer of the property.

It is said that the sale was not made by reason of the introduction of Frambach to appellant. The trial court found that the sale was consummated by appellee's efforts. We cannot say that such finding was not supported by the evidence.

The judgment will be affirmed. Affirmed.

On Rehearing.

(July 2, 1904.)

**PER CURIAM.** It is said in the petition for rehearing that the following statement in the original opinion is erroneous, viz.: "The American Company, having become embarrassed, had closed down operations at the mill, owing \$10,000 to the First National Bank of Denver, and \$5,000 or \$6,000 to the F. M. Davis Ironworks Company, which

amounts were liens upon the property." The testimony of Mr. Frank is: "I think the obligation in the national bank was a note, and the obligation of the F. M. Davis Works was an open account, secured by receiver's certificates of the United States Economic Reduction Company." If secured by receiver's certificates, these obligations were liens upon the property. The above testimony is undisputed. The commission contract upon which this action is based did not limit the agent's right to a commission upon the sale of Frank's interest in the cyanide plant, or the payment of any portion of the purchase price to Frank, but stipulated for the payment of a commission upon the production or introduction of a customer who should purchase such cyanide plant on terms satisfactory to Frank. The agent produced a customer, to whom the sale was made. A portion of the purchase price of the cyanide plant has been paid. The agent is entitled to the agreed commission. If it was Frank's intention to limit his liability to the payment of a commission upon the purchase price of his interest in the cyanide plant, and upon such portion of the purchase price as was paid him, he should have done so in his contract. The contract does not so read. All testimony contradictory of the contract was irrelevant and immaterial, and was properly disregarded by the court in its findings.

The petition for rehearing is denied. Denied.

20 Colo.A. 135

**WOLFF et al. v. CITY OF DENVER et al.**  
(Court of Appeals of Colorado. June 13, 1904.)

**MUNICIPAL CORPORATIONS — POWERS — CONSTRUCTION OF SEWERS—DISCRETION OF COUNCIL—REVIEW BY COURTS.**

1. Under Const. art. 10, § 7, providing that the General Assembly may vest in the corporate authorities of municipalities the power to assess and collect taxes for all the purposes of such corporation, and 2 Mills' Ann. St. p. 2276, § 4403, subd. 10, empowering municipal corporations to construct culverts, drains, and sewers, and to assess the cost of the construction thereof on the lot or lots adjacent to such improvements, a city council, in establishing a sewer district, is exercising a legislative power for police purposes.

2. A city council, in establishing a sewer district and determining its boundaries, is exercising a legislative power, having its origin in the taxing power.

3. The Legislature may confer the power of special assessment upon municipalities, empowering them to determine what property, as regards its location with respect to local improvements, shall be assessed.

4. Under Const. art. 10, § 7, providing that the General Assembly may vest in the corporate authorities of municipalities the power to assess and collect taxes for all purposes of such corporation, and 2 Mills' Ann. St. p. 2276, § 4403, subd. 10, empowering municipal corporations to construct culverts, drains, and sewers, and to assess the cost of the construction thereof on the lot or lots adjacent to such improve-

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1002.



ments, the question of determining the boundaries of sewer districts is intrusted to the discretion of the city council, and any error in its judgment in that respect is not the subject of judicial review.

Appeal from District Court, Arapahoe County.

Action by Hiram G. Wolff and others against the city of Denver and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Thomas & Thomas, for appellants. H. M. Orabood, H. L. Ritter, N. B. Bachtell, and H. A. Lindsley, City and Dist. Att'y., for appellees.

GUNTER, J. The council of the city of Highlands established a sewer district, and provided for the construction of a sewer therein. This was laid, and the cost thereof apportioned among the lots of the district according to frontage on the sewer, except the cost at street intersections, which was assessed against the city. Plaintiffs owned certain lots within this district, and having failed to pay the sewer assessment thereon, the lots were advertised by the county treasurer for sale. This action, brought to restrain the sale, was, at the conclusion of the evidence, dismissed by the trial court. From the judgment consequent, the case is here.

1. It is contended that the cost of construction of the sewer was not equally apportioned among the lots benefited thereby. Parcels of land lying without the sewer district abutting on the parts of certain streets in which the sections of the sewer are laid, and which therefore abut on sections of the sewer, and which it is practicable to connect with the sewer, it is said should have been included in the district, because such inclusion would not have increased the aggregate cost of the sewer, and yet by increasing the number of lots within the district subject to assessment, would have reduced the assessment against the respective lots. It is not contended that there is any evidence tending to show that the confines of the district were fixed so as to exclude the parcels mentioned therefrom with any wrongful purpose on the part of the city council. The gist of the contention of appellants is that the city council committed an error of judgment in so defining the sewer district, and that for this reason we should annul its action creating the sewer district and the sewer assessments consequent. Why the council so defined the district does not appear. For aught that appears, the excluded parcels may be within other districts, or it may be the intention of the council to later place them in other districts; but, however this may be, the case is simply this: we are asked to annul an ordinance of the city council for the sole reason that it committed an error of judgment. The city council, in establishing the sewer district, was exercising a legislative power for police purposes, such power being conferred

upon it by the Constitution and the statutes of this state. Const. Colo. art. 10, § 7; 1 Mills' Ann. St. p. 313, § 442; 2 Mills' Ann. St. p. 2276, § 4403, subd. 10; City of Denver v. Capelli, 4 Colo. 25, 27, 84 Am. Rep. 62; City of Pueblo v. Robinson, 12 Colo. 593, 21 Pac. 899; City of Denver v. Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; Lewis v. Water Works Co., 19 Colo. 236, 84 Pac. 993, 41 Am. St. Rep. 248; Tebbetts v. People, 31 Colo. 461, 468, 73 Pac. 869. The legislative branch of the city government, in establishing this sewer district and determining its boundaries, was exercising a legislative power having its origin in the taxing power. "It is a general principle in the governmental system of this country that the judicial department has no direct control over the legislative department. Each department of the state government is independent within its appropriate sphere. \* \* \* A municipal ordinance, passed in pursuance of valid authority emanating from the State Legislature, has the same force and effect, within proper limits, as if passed by the Legislature itself. \* \* \* Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative powers." Lewis v. Water Works Company; Tebbetts v. People. "As a general rule, it is within the discretion of the Legislature to determine what property, as regards its location with respect to local improvement, shall be assessed." 25 Am. & Eng. Ency. of Law (2d Ed.) p. 1189; Lent v. Tillson, 72 Cal. 402, 427, 14 Pac. 71; Adams v. Shelbyville, 184 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484. The Legislature may confer the power of special assessment upon municipalities, empowering them to determine what property, as regards its location with respect to local improvements, shall be assessed. 25 Am. & Eng. Ency. of Law, p. 1189; 2 Dillon, Municipal Corporations, §§ 752, 761, 809. The Constitution and laws of this state have intrusted to the judgment and discretion of the council of the city of Highlands the question of determining the boundaries of the sewer district complained of. It exercised such discretion in defining the district. The only error complained of is one of judgment in fixing such boundaries. We cannot in such case review its action.

2. It is said the notice of sale under which the treasurer was proceeding to sell is defective in not properly describing the property, and in not mentioning the year for which the taxes are supposed to be due. As the time noticed for the sale has long since passed, and as the alleged defects in the old notice, if there be defects, can be readily overcome in the event of a readvertisement, the question of the correctness of the old notice is no longer of practical importance. We think, however, that the property was sufficiently described in the notice, and that

the years for which the taxes are supposed to be due are sufficiently stated.

The judgment below should be affirmed. Affirmed.

20 Colo.A. 170

**GILMAN v. MATTHEWS et al.\***

(Court of Appeals of Colorado. June 13, 1904.)

**HUSBAND AND WIFE—FAMILY EXPENSES—LIABILITY OF WIFE—STATUTES—CONSTRUCTION.**

1. In adopting the statute of another state the Legislature adopts the construction given the statute by the courts of that state.

2. In an action against a husband and wife, authorized by 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a, providing that the expenses of the family are chargeable on the property of both husband and wife, and in relation thereto they may be sued jointly, a personal judgment may be rendered against both for wearing apparel purchased by the husband.

3. The phrase "expenses of the family," as used in 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a, providing that the expenses of the family are chargeable on the property of both husband and wife, is not limited to necessities, and what shall be included in the term must be determined by the facts of each case, subject to the limitations that the articles must have been purchased for and used in or by the family or some member thereof.

4. In an action against a husband and wife for wearing apparel bought by the husband, the complaint alleged that the clothing was used as a part of the family expenses of defendants. The answer admitted that defendants were husband and wife, but denied that the clothing was used as part of the family expenses, and alleged that it was used by the husband alone. *Held*, that a judgment against the wife, authorized by 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a, making the expenses of the family a charge on the property of both husband and wife, could not be rendered in the absence of proof that husband and wife were living together as a family, and that the goods were on account of family expenses.

Appeal from Arapahoe County Court.

Action by George W. Matthews and another, copartners as George W. Matthews & Son, against Mary R. Gilman and husband. From a judgment in favor of plaintiffs, defendant Mary R. Gilman appeals. Reversed.

O'Donnell, Toney & Graham, for appellant. Samuel S. Large, for appellees.

**MAXWELL, J.** Action against husband and wife for the price and value of wearing apparel—one dress suit, one tuxedo, and one sack business suit—sold and delivered to the husband at his special instance and request. From a personal judgment against both defendants, the wife appeals.

This action is founded upon 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto, they may be sued jointly or

separately." A reversal of the judgment is urged upon the grounds: (1) Because the judgment was in personam; (2) because it was not shown that the wearing apparel furnished the husband was suitable to the degree and condition in life of the family; (3) because it was not shown that the husband and wife were living together so as to constitute a family. These propositions will be considered in their order.

At the date (1891) of the enactment of the above statute by the Legislature of Colorado a similar statute had been in force in Iowa, Illinois, and Oregon, and had been construed many times by the appellate courts of those states. It is a familiar and well-settled rule that in adopting the statute of another state the Legislature adopts the construction given such statute by the courts of that state. This statute has been under consideration by this court in two cases. In *Kelly v. Canon*, 6 Colo. App. 465, 41 Pac. 833, it was held that the statute did not have a retroactive effect, which was the only question involved and decided in the case. In *Straight v. McKay*, 15 Colo. App. 60, 60 Pac. 1106, it was attempted to hold the wife personally liable, under the statute, upon the covenants of a written lease for a term, executed by the husband alone, the premises having been vacated before the expiration of the term; and also for damages done to furniture. This court said: "A right of action is given against her for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But outside of the expenses of the family and the education of the children neither can impose an obligation upon the other. Food and clothing are family expenses, and so are luxuries purchased for the use of the family. Such expenses are not confined to necessities, but to be family expenses they must be for things received by the family, or some member of the family. The family requires a house in which to live, and the rent of the house occupied by it is part of the cost of living, and is a family expense. But the rent of a house which the family does not occupy is not a family expense. So long as the defendant and her husband lived in the plaintiff's house, the rent agreed to be paid was a portion of the family expense; but when they left it, and went elsewhere, the rent chargeable against the husband by virtue of his contract was not a family expense, because the family no longer had the benefit of the house." We might stop here, and upon the authority of the above case decide adversely to the appellant the first two propositions urged for the reversal of the judgment herein, were it not for the fact that it might be said that the points here relied on and under discussion were not in-

\*Rehearing denied July 2, 1904.

¶ 2. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 586, 664.

involved in *Straight v. McKay*, supra. With the doctrine above announced we are entirely satisfied. That it is supported by the authority will be demonstrated by reference to a few of the many cases decided in Iowa, Illinois, and Oregon.

*Smedley v. Felt*, 41 Iowa, 588, was an appeal by the wife from a judgment against her on a promissory note given by the husband for the balance of the purchase price of a piano purchased by the husband for the use of and used by the family. It appears from the statement of the case that the note sued on was not due; that the wife was disposing of her property with intent to defraud her creditors, and an attachment was prayed. The answer of the wife admitted the averments of the petition, and averred that she had no knowledge that the note was given, or that the piano was purchased on credit; that she had no part in the purchase; that plaintiff did not give her credit; that the piano was purchased on the credit of the husband alone; and that the piano was exchanged for another piano, which she owned. A demurrer to the answer was sustained, and judgment rendered against the wife. It seems clear from the above statement that the question as to whether or not a personal judgment could be rendered against the wife was necessarily involved in the case. The court said: "The only remaining question is, can a party who does in fact sell an article within the contemplation of these sections to the husband upon his individual credit, and receives his note therefor, afterwards maintain an action against the wife?" This question was answered in the affirmative by the affirmance of the judgment against the wife. It would be difficult to conceive of a case where the form of the judgment would be more directly involved. In *Jones v. Glass*, 48 Iowa, 345, the same question was involved and the same principle announced as in *Smedley v. Felt*, supra. See, also, *Polly v. Walker*, 60 Iowa, 86, 14 N. W. 137. Examination of a large number of Iowa cases based upon this statute has failed to disclose a single case which holds that a personal judgment against the wife is not within the contemplation of the statute.

*Hayden v. Rogers*, 22 Ill. App. 557, was an appeal from a judgment against a wife on account of meat and poultry sold and delivered to defendants, which were sold for and to be used in their family. The statute relied upon was: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." The court said: "The defense sought to be interposed by Mrs. Hayden was based upon the theory that this statute imposes no personal liability upon the wife for family expenses, but merely creates a charge upon her prop-

erty, which can be enforced only by proceedings in rem against such property as she was owning at the time the indebtedness was incurred. We are of the opinion that such is not the proper construction of the statute.

\* \* \* The liability, therefore, imposed upon her, is necessarily a personal liability, for upon no other principle can effect be given to this provision of the statute." In all the cases decided by the Appellate Courts of Illinois involving this question the rule stated in *Hayden v. Rogers* has been adhered to.

In *Phipps v. Kelly*, 12 Or. 213, 6 Pac. 707, the question here under consideration was squarely presented. The court said: "Section 10 of the act of 1878 [Laws 1878, p. 94] provides 'that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.' The general effect of this act was, undoubtedly, to extend and enlarge the rights and liabilities of married women much beyond previous limitations. The disability to make contracts and incur liabilities which formerly existed at law it removed, and now a married woman may do either, and her contracts and liabilities may be enforced by or against her to the same extent and in the same manner as if she were unmarried. For liabilities incurred as a family expense she may be sued at law jointly with her husband or separately, and a personal judgment may be rendered against her. This was expressly recognized by this court in *Watkins v. Mason*, 11 Or. 72, 4 Pac. 524."

All of the above cases were decided before the enactment of the statute in this state, and under the well-settled principle of statutory construction above stated we are compelled to adopt the construction of the act placed upon it by the courts of the states from which it was adopted, and rule that under the statute a personal judgment against the wife is right.

Provisions, clothing, furniture, house rent, physician's services, and many other similar items of expenses have been held clearly within the purview of the statute by the appellate courts of Iowa, Illinois, and Oregon. Illustrative of the views entertained by some of the courts, a few of the many reported cases will be briefly noticed.

As has been seen, in *Smedley v. Felt*, supra, a piano was held to be a family expense within the contemplation of the statute. In *Frost v. Parker*, 65 Iowa, 179, 21 N. W. 507, an organ, though purchased by the husband for resale, but never sold by him, but used in the family for about seven years as organs are ordinarily used, was held to be a family expense. In *Farrar v. Emery*, 52 Iowa, 725, 3 N. W. 50, it was held that a sewing machine was a family expense, and that the wife was personally liable for such

machine. A diamond shirt stud, procured for personal use and actually used and worn by a husband, was held family expense in *Neasham v. McNair*, 103 Iowa, 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202.

The Illinois courts have followed the Iowa courts in their construction of this statute, and have covered quite as wide a range of subjects. In *Hyman v. Harding*, 162 Ill. 357, 44 N. E. 754, after quoting the statute, which is substantially the same as the Colorado statute, the court said: "The statute has been construed in Iowa, from which state it was taken, and elsewhere, to embrace merely legitimate expenses of the family, as such, incurred for articles to be used in the family, and actually used or kept for use therein. *Fitzgerald v. McCarty*, 55 Iowa, 705, [8 N. W. 646]. The term 'expenses of the family' is not synonymous with 'necessaries,' which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family; but it does include expenses for many articles used by individual members of the family, if they mutually affect the members generally. It is apparent that, even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces in any substantial manner to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures, and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise, to the general well-being of all the members."

In *Dodd v. St. John*, 22 Or. 250, 29 Pac. 618, 15 L. R. A. 717, the court held that the purchase price of a buggy was a family expense, for which the wife was liable, and, after quoting the statute, which is identical with the statute of Colorado, said: "This statute is a wide departure from the common law and from the legislation of most of the states. Whether its enactment was wise, and its provisions beneficent in their operation, is not for the court to determine. That in some instances, at least, it works a great hardship on the wife in subjecting her to a liability which she did not contract for expenses of the family cannot be doubted. But the power of the court in the premises is confined to its construction and enforcement in cases as they shall arise. \* \* \* The word 'necessary' does not occur in the

statute, which relieves the case of the question whether the expense was a necessary one or not. The statute is broad enough to subject the wife to liability for articles that are purchased and used in the family, whether they were necessary or not. In fact, the articles may have been entirely unnecessary, or such as the family ought to have dispensed with, or they may have been of no utility; still, if they were purchased, and used in the family, we do not see on what ground the liability of the wife could be avoided."

While it is true that conflicting opinions may be found in the reports of Iowa, Illinois, and Oregon as to whether or not specific articles are within the statute, an exhaustive examination of the authorities has failed to show a single one under a similar statute which limits the liability of the wife to "necessaries," or which holds that it is necessary to show, in order to make the wife liable, that the articles furnished were suitable to the degree and condition in life of the family.

The Alabama and Missouri cases cited by counsel for appellant are inapplicable, as the statutes of those states are radically different from the Colorado statute. The Alabama statute is: "For all contracts for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible by common law, the separate estate of the wife is liable; to be enforced by action at law against the husband alone or against the husband and wife jointly." Code 1852, § 1987. In Missouri the statute is that her separate property "shall be subject to execution \* \* \* for any debt or liability of her husband, created for necessities for the wife or family." Rev. St. 1879, § 3296.

If the Legislature of Colorado had intended to limit the liability of a wife to "necessaries," it would have so enacted. Having failed so to do, we must conclude that such was not the intention, but rather that the construction placed upon the statute by the courts of the states from which it was adopted was intended to be the law of this state, and that what should be included in the term "family expenses" must be determined by the facts and circumstances of each case, subject to the limitation that the article or articles must have been purchased for and used in or by the family, or some member thereof.

This brings us to a consideration of the third proposition advanced by defendant. The complaint alleged that the clothing was used as a part of the "family expenses" of the defendants, who were husband and wife. The answer admitted that defendants were husband and wife, but denied that the clothing was used as part of the family expenses, and averred that it was used by the husband alone. There is no testimony whatever upon this point; nothing to show that any fam-

ily relation existed between the defendants; nothing to show that there was any family, or that defendants were living together. A family is defined to be a collective body of persons who live in one house and under one management. Webster's Dictionary. The admission that defendants were husband and wife is not an admission that they constituted a family, nor, in this day and generation, can any presumption be based upon such admission. All the authorities hold that "expenses" for which the wife is personally liable under the statute must be "family expenses." The language is too plain to admit of any question. *Schlesinger v. Keifer*, 30 Ill. App. 253, was an appeal from a judgment against plaintiffs in an action against husband and wife for apparel furnished the wife. The court said: "This was an action under section 15, c. 68, Rev. St. 1874, by appellants against appellees as husband and wife, charging them with ladies' and children's apparel, sold by appellants to her as family expenses. In this action against them jointly no other ground of recovery can be relied upon. It would seem to be a condition precedent to any family expenses that there should be a family; a family in fact, without regard to what knowledge the persons selling the goods had of the fact. If they sold, as they supposed, to a bachelor or a spinster, and it then turned out that there was a wife or a husband, who, with the purchaser, constituted a family, probably both could be held, and vice versa. In this case it appeared that the appellees had ceased to live together for some months before the purchase, though the appellants had no notice of such separation. Neither had the husband any notice that the wife was buying goods. The superior court rightly decided that appellees were not liable under the statute for family expenses, where there was no family." In *Hudson v. King*, 23 Ill. App. 120, cited by appellees, it seems to have been regarded essential to the liability of the wife that she and her husband constitute a family in fact. While this particular question was not involved in *Kelly v. Canon*, supra, this court said: "A wife, under the statute, could only be held for the original consideration on proof that the goods were furnished for the family." And in *Straight v. McKay*, supra: "The right of action is given against her for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other."

For failure of proof that there was a family, and that the indebtedness which was the subject-matter of the action was on account of family expenses, the judgment will be reversed. Reversed.

GREGORY v. FILBECK'S ESTATE.

(Court of Appeals of Colorado. June 13, 1904.)

CLAIMS AGAINST DECEDENTS—PROCEEDINGS FOR ALLOWANCE—WITNESSES—CREDIBILITY—QUESTIONS FOR TRIAL COURT—FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS.

1. A finding of fact on conflicting evidence, whether found by a jury or by the court, is conclusive on appeal.

2. On proceedings for the allowance of a claim against the estate of a decedent, proof of payments on the claim so as to avoid the bar of limitations rested solely on the testimony of the wife of the claimant. She was a sister of decedent, and decedent had deeded his property to another relative. *Held*, that whether the interest she had in the claim affected her credibility was for the trial court, sitting as a jury.

3. On proceedings for the allowance of a claim against the estate of a decedent, proof of payments on the claim so as to avoid the bar of limitations rested solely on the claimant's wife, who was a sister of decedent, who had given his property to another relative. Her testimony was contradicted on material points. *Held*, that the trial court, sitting as a jury, might entirely disregard her testimony.

4. A creditor asserting that the bar of limitations to his claim has been removed by payments on the claim has the burden of proving the payments.

Appeal from District Court, Arapahoe County.

Proceedings for the allowance of the claim of Jacob Gregory against the estate of Philip Filbeck, deceased. From a judgment of the district court disallowing the claim, rendered on appeal from a judgment of the county court disallowing the same, the claimant appeals. Affirmed.

Geo. W. Miller, Daniel Sayer, and C. C. Brown, for appellant. R. D. Thompson, for appellee.

GUNTER, J. Philip Filbeck died June, 1899, and Jacob Gregory, appellant, was appointed as administrator of his estate. In September, 1899, two claims in favor of appellant were filed against the estate: A note of date March 8, 1883; payee, appellant; principal sum, \$5,000; due two years after date; drawing interest from date at rate of 12 per cent. per annum; interest payable quarterly; and a second note dated May 20, 1884; payee, Leynette A. Collins; principal sum, \$500, bearing interest at rate of 12 per cent. per annum from date until paid. Upon hearing, the claims were disallowed by the county court, and on appeal by the district court. From the judgment of disallowance by the district court, the case is here.

To justify the allowance of the claims, it was necessary to establish the original validity of the notes, and that they were not, at the time of the hearing, barred by the statute of limitations. It was the theory of the estate that Philip Filbeck in 1883, prior to the giving of the first note, anticipated the institution against him of a suit for divorce,

¶ 4. See Limitation of Actions, vol. 33, Cent. Dig. § 716.

and, in pursuance of a conspiracy between him and his brother-in-law, appellant, to defeat any decree for alimony that might be awarded therein, gave the notes in question, secured by trust deed on substantially all of his real estate. Evidence was adduced to sustain this theory.

As we consider the question of the statute of limitations decisive of this appeal, it is unnecessary to discuss the evidence pertinent to the original validity of the notes. We confine ourselves to the question of the statute of limitations. This, under the issues, was a question of fact, and was tried to the court. The court determined it for the estate, and, if such determination was upon conflicting evidence, we are bound by it, and the judgment should be affirmed. *Minor v. Lovell*, 25 Colo. 249, 54 Pac. 623; *Barnett v. Jaynes et al.*, 26 Colo. 279, 57 Pac. 703. The same rule obtains whether the question of fact was tried to the court or to a jury. *Hazeltine v. Brockway*, 26 Colo. 291, 298, 57 Pac. 1077. "The testimony is so evenly balanced and lacks so much in directness and positiveness, we must concede the case is not free from doubt. But where the matters to be determined are wholly those of fact, and two trial courts have passed on the question in the plaintiff's favor, we must, under the general rule, accept those conclusions as a definite settlement of the disputed propositions, and the finding as conclusive." *Owen v. Hamburger*, 14 Colo. App. 334, 336, 59 Pac. 966, 967. "Claims being withheld during lifetime of an alleged debtor, and sought to be enforced after his death, should be carefully scrutinized, and only admitted upon satisfactory proof." *Kearney v. McKeon*, 85 N. Y. 136; *In re Child's Estate* (Sur.) 26 N. Y. Supp. 721. If a cause of action existed in favor of the claimant, it was on the new contract created by payments on the notes, or on an alleged contract of extension of May 29, 1889. "The cause of action is based upon the promise implied in the law perforce the payment made." *Buckingham v. Orr*, 6 Colo. 587; *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Richardson v. Bricker*, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Proof of the payments and the contract of extension rested upon the credibility of the testimony of Mrs. Gregory, the wife of appellant, the claimant. Deceased was her brother. He died leaving by deed all of his estate to another sister, Mrs. Riethmann. Whether the credibility of Mrs. Gregory's testimony was affected by this fact was for the court to determine. The claims of her husband, in the aggregate, amounted to \$10,000. Whether the interest she had in these claims, through her relations with her husband, affected the credibility of Mrs. Gregory's testimony, was for the court to determine. What weight should be attached to various circumstances tending to show the invalidity of this claim was for the court. "The mere fact that the witness is interested in the re-

sult of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnenheil v. Moerlein Brewing Co.*, 172 U. S. 401, 408, 19 Sup. Ct. 233, 43 L. Ed. 492. "The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rule laid down in the books at a time when interest absolutely disqualified a witness necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases the courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549, 554, 6 Am. Rep. 140; *Munoz v. Wilson*, 111 N. Y. 295, 300, 18 N. E. 855. Further, the testimony of Mrs. Gregory was contradicted upon material points—for example, the testimony of George Filbeck. It was for the court, sitting as a jury, to say what effect such contradiction had upon her credibility. It was within its province to entirely disregard her testimony. *Minich v. People*, 8 Colo. 440, 452, 9 Pac. 4; *Paulette v. Brown*, 40 Mo. 52, 57; *People v. Sprague*, 53 Cal. 491, 493; *Day v. Crawford*, 13 Ga. 508.

Upon these questions—the making of the payments relied upon to bar the statute of limitations, and the making of the contract of extension of May 29, 1889, as stated—the burden was with the claimant. It was for the court to say whether this requirement of the case was satisfied by the evidence furnished through the testimony of Mrs. Gregory or otherwise. In favor of the correctness of the judgment, we must presume that the court found upon such question against the claimant; and, as we are bound by the finding of the court upon conflicting evidence, so we are bound by the finding of the court in this case. We must affirm the judgment.

Judgment affirmed. Affirmed.

20 Colo.A. 153

GRIFFIN et al. v. KNOBLOCK.\*

(Court of Appeals of Colorado. May 9, 1904.)

CORPORATIONS — STOCK — OWNERSHIP — EVIDENCE — PROMISE — CONSIDERATION.

1. Plaintiff and a third person agreed to locate mining claims. This was done, and the third person sold the claims to a corporation, which issued to him a certificate of stock in payment thereof. The third person had informed plaintiff that he could have a half interest in the claims. Plaintiff made no promises in return, and there was no evidence of the terms on which he was to share in the enter-

\*Rehearing denied July 2, 1904.

prises. He contributed to the enterprises money and services. Held insufficient to show that plaintiff was the owner of a half of the stock and entitled to a decree directing the corporation to issue to him a certificate for the amount thereof.

2. A promise by one to whom a certificate of corporate stock had been issued to surrender the certificate and have the same reissued as two new certificates, one in favor of himself and one in favor of another, unsupported by any consideration, will not sustain a suit by the latter to compel the corporation to issue to him a certificate of stock.

Appeal from District Court, Summit County.

Suit by James B. Knoblock against Frederick W. Griffin and another. From a decree for plaintiff, defendants appeal. Reversed.

A. B. Seaman and H. S. Silverstein (John C. Gage, of counsel), for appellants. Fillius & Davis, for appellee.

GUNTER, J. The gist of the allegations of the complaint is that certain placer mining claims were conveyed to appellant company; that as part consideration therefor a certificate for 150,000 shares of the capital stock thereof was issued to one Miller, he taking the same under an agreement between appellee and himself that it should be owned by them equally; that soon after the issuance of the certificate—that is, about February, 1898—it was agreed between Miller and appellee that the certificate should be surrendered and reissued as two certificates, one to Miller and one to appellee, each for 75,000 shares of stock; that said certificate was not surrendered by Miller for reissuance, nor reissued as agreed; that appellee thereafter notified appellant company and appellant Griffin that he was the owner of one-half of the shares of stock evidenced by the certificate, and demanded the issuance to him of a certificate for 75,000 shares of said stock; that thereafter Griffin pretended to purchase the certificate for 150,000 shares of Miller, and had a transfer thereof made to himself; that Griffin now claims to own the same, and appellant company denies that appellee has any interest therein, and refuses to issue to him a certificate for the 75,000 shares. A decree is prayed declaring that Griffin has no interest in the 75,000 shares, that appellee is the owner thereof, and for an order requiring appellant company to issue to appellee a certificate for 75,000 shares. From a decree as prayed the case is here.

If appellee had no cause of action of the nature pleaded against Miller, he has none against the transferee of the stock, appellant Griffin, nor against appellant company. If a cause of action existed against Miller, it was through the alleged agreement between him and appellee made before the issuance of the certificate, or through the alleged agreement of February, 1898, made after the issuance of the certificate to Miller. The facts are: February, 1896, it was agreed be-

tween Miller and appellee that at a convenient time they would locate certain placer mining claims on Blue river, Summit county this state. May, 1896, Miller, appellee, and other associates made locations of placer claims on said stream, and secured options on certain other locations. These parties developed to some extent such claims, and made repeated efforts to effect a sale thereof. Money and time were expended in such undertakings, the amount of which the evidence does not reveal. July, 1897, Miller, with certain associates, gave an option to purchase on the interests acquired through the locations and the options to appellant Griffin. This option resulted in the formation November, 1897, of appellant corporation, and the conveyance to it soon thereafter—about February, 1898—of said mining interests, and in consideration of the transfer by said conveyance of Miller's interest in said claims, and of whatever interest appellee had therein, there was issued to Miller a certificate for 150,000 shares of the capital stock of appellant company. From February, 1896, the inception of the business association between Miller and appellee, to February, 1898, the date of the issuance of the certificate for 150,000 shares of stock, Miller had been interested in various mining enterprises and other business ventures. From time to time during this period he informed appellee that he should have an equal interest with him in all of his business undertakings. May 25, 1896, he wrote appellee, "You can have one-half of all my interest in the peak or elsewhere," meaning by "interest in the peak" certain mining interests which Miller claimed to have at Hahn's Peak. On same date, in a letter in reference to Willow Canyon mining claims, Oro Cache mining claims, and certain other mining interests and town lot interests, all being different ventures from the claims upon Blue river, he says, "Will just pull together the best we can, and divide the cake between us." June 11, 1896, he writes of certain mining properties in which he and appellee are interested, and of a general merchandise store which he and Foster were locating at Dillon, and says: "You know that in whatever I do, you share. In whatever you do, I want a share." The substance of Miller's statements, by his letters and otherwise, from February, 1896, to February, 1898, is that appellee shall have one-half of everything that he has or expects to have. But the evidence reveals no promise at any time made by appellee; the promises are all by Miller. During this period Miller had been engaged, as stated, in various mining enterprises and other business ventures. He had become interested in the Willow Canyon mining claims, the Oro Cache mining claims, mining claims at Hahn's Peak, mining claims in Wyoming, and certain other business ventures, as the above-mentioned general merchandise store, and also an investment bro-

kerage business. All of these undertakings were within the broad terms of Miller's promise that he would divide everything in which he was interested with appellee. As stated above, appellee made no promises in return. There is no evidence of the terms upon which he was to share in these various enterprises. He contributed, however, to the various undertakings of Miller about \$1,000 in money and services. How much to any one enterprise appellee could not say, except that of this contribution about \$60 in cash and \$250 in stenographic services, went into the Blue River mining claims. Whether appellee agreed to contribute more than \$1,000 to the general ventures or more than \$310 to this particular undertaking the evidence does not inform us. That considerable money and labor must have been contributed by Miller to these various undertakings appears from the evidence, but how much by him does not appear. If the evidence establishes any contractual relation between Miller and appellee, it is that of a general partnership in these various business ventures. We do not hold that it does this, but, if we assume that it does, appellant is not the owner in severalty of any specific part of any particular property of the copartnership as this 150,000 shares of stock, but he has an interest in the copartnership assets determined by an accounting. This is not an action for an accounting, but an action to compel a transfer to appellee of a particular asset of the copartnership. If a cause of action exists, it is not within the pleadings. Further, there is no evidence here upon which an accounting could be had. From the evidence before us it is impossible to say how stands the account between Miller and appellee. Again, if the certificate for 150,000 shares was an asset of the copartnership, one of the partners, Miller, had the right to sell it, and his sale to Griffin cannot be questioned by the other partner, appellee.

Shortly after the issuance to Miller of the certificate in 1898, he told appellee that he would have it canceled and reissued, a certificate to himself and one to appellee. This was never done. Shortly after the issuance of the certificate for 150,000 shares to Miller, it was pledged to secure two notes given by him. Later Griffin took an assignment of these notes and of the certificate, and later purchased of Miller for \$1,000 his right to redeem the certificate from the hypothecation. The stock was later reissued, one-third thereof to Griffin, the remainder thereof to other parties. The promise of Miller of February, 1898, to surrender the certificate and have it reissued as two new certificates, one to appellee, one to himself, will not sustain this action, because it was made without consideration. The promise was simply a statement by Miller to appellee, unsupported by any change in the situation of the parties or by any consideration whatever. A cause of action has not been proven on the promise

alleged to have been made before the issuance of the certificate for 150,000 shares, nor upon the promise alleged to have been made thereafter.

Judgment reversed. Reversed.

20 Colo.A. 139

STATE BOARD OF AGRICULTURE v.  
MEYERS.\*

(Court of Appeals of Colorado. May 9, 1904.)

CORPORATIONS—STATE BOARD OF AGRICULTURE  
—POWERS—EMPLOYMENT OF PROFESSOR IN  
AGRICULTURAL COLLEGE—REASONABLE TIME  
—IMPLIED CONTRACTS.

1. Where a servant employed for one year continues to render services without objection by the master after the expiration of the year, a new contract for a year arises by implication.

2. Under 1 Mills' Ann. St. 1891, pp. 411, 414, §§ 56, 74, 76, creating the State Board of Agriculture as a body corporate, providing that it should have control and supervision of the State Agricultural College and fix the salaries of the professors, and empowering it to remove the president or subordinate officers and supply all vacancies, the board has power to make a valid contract employing a professor in the college for a reasonable length of time.

3. An employment of a professor in the State Agricultural College by the State Board of Agriculture under 1 Mills' Ann. St. 1891, pp. 411, 414, §§ 56, 74, 76, for one year is not for an unreasonable length of time.

Appeal from District Court, Larimer County.

Action by William J. Meyers against the State Board of Agriculture. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank J. Annis, for appellant. T. M. Robinson and T. A. McHarg, for appellee.

GUNTER, J. Appellee (plaintiff) was employed by appellant under an implied contract as professor of mathematics in the Colorado Agricultural College for the year commencing July 1, 1896, at a salary of \$1,500 per annum. The contract originated in an express one for the year beginning July 1, 1891, and was created by the services of appellee being continued after the expiration of the original definite term of employment, without objection by the employer, and without any new agreement. 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1092. December 11, 1896, a committee of appellant on faculty and course of studies reported to it that the work in appellee's department was unsatisfactory, and would continue so while he was at its head. The report made no charges against his professional work, but stated as the opinion of the committee that the best interests of the department and the college required his removal. It recommended that he tender his resignation to take effect December 31, 1896, and that his salary terminate at that date. Appellant adopted the report, notified appellee of its action, and re-

\*Rehearing denied July 2, 1904.



quested his resignation. He refused to resign and tendered performance of his duties as professor of mathematics until June 30, 1897. The tender was declined by appellant and appellee discharged December 31, 1896. His salary was paid to last-mentioned date. He endeavored to obtain employment elsewhere, but failed. He sued appellant July 3, 1897, to recover as damages his salary according to said contract from December 31, 1896, to July 1, 1897, and had judgment. Therefrom the case is here.

If there was a contract of the nature stated, and appellant violated the same by the wrongful discharge of appellee, and damages resulted, he should recover. The defense was the invalidity of the contract, in this: that appellant could not make a contract employing appellee for a definite time; that is, that appellant could not by contract deprive itself of the power of terminating at pleasure its contract with appellee. A determination of this question is decisive of the case.

Appellant is a corporation created by statute, and its powers are thereby defined. "The State Board of Agriculture shall be a body corporate, capable in law of suing and being sued; of taking, holding and selling personal property and real estate; of contracting and being contracted with; of having and using a corporate seal; and of causing to be done all things necessary to carry out the provisions of this act." 1 Mills' Ann. St. 1891, p. 411, § 56. "The State Board of Agriculture shall have the general control and supervision of the State Agricultural College, the farm pertaining thereto, and the lands which may be vested in the college by state or national legislation, and of all appropriations made by the state for the support of the same. The board shall have plenary power to adopt all such ordinances, by-laws and regulations, not in conflict with law, as they may deem necessary to secure the successful operation of the college and promote the designed objects." 1 Mills' Ann. St. 1891, p. 414, § 74. "The board shall fix the salaries of the president, professors and other employees of the college and prescribe their respective duties. The board may remove the president or subordinate officers and supply all vacancies." 1 Mills' Ann. St. 1891, p. 414, § 76.

Appellant, a corporation, is thus given the general control of the State Agricultural College, and of all property belonging thereto, and the power of taking, holding, and selling personal and real property, and of making contracts necessary to the successful operation of the college. As contracts employing professors to teach therein are of this nature, then the board is authorized by the terms of the statute to make such contracts. It is said, however, that the mere fact that the contract here under consideration is for a definite time—one year—is fatal to it; that under no circumstances can the board employ a professor to teach for a def-

inite time. The statute gives the board express power to employ professors. There is no provision thereof expressly limiting this power as to the time for which a professor may be employed. Whatever limitation there may be on such power in such particular is an implied one. We know of no provision of law impliedly so limiting the power of the board; that is, prohibiting appellant from employing appellee for the term of one year. The power of the board to employ a professor for a definite time is impliedly limited to his employment for a reasonable length of time. It has not the power to employ him for an unreasonable time, but it does not appear to us that this employment for one year is for an unreasonable time. In the successful operation of the college, it is necessary to make contracts of employment with various parties in the different departments connected with the college. In making such contracts, the length of time for which they should run depends upon what is for the best interest of the college. We think the statute has left the determination of this question—the length of time for which the employment should be made—largely to the judgment of the board, and that such lodgment of the determination of the question is wisely made. The board is well able, as it understands the circumstances surrounding the employment, to determine whether it is for the best interest of the institution to make the contract of employment determinable at the pleasure of the board, determinable on short notice, or whether the employment should be for a reasonably long definite time. It may be that such professors as are required cannot be secured under a contract determinable at the pleasure of the board. If so, the board should have, and we think has, the power to employ for a definite time, not unreasonably long. There are implied limitations on this power, as that the contract must not run unreasonably long, but, as stated, the contract under consideration is not subject to this objection. Professors in the various departments of the college, however distinguished and learned, are mere employés. *Hartigan v. Board of Regents*, 49 W. Va. 14, 22, 38 S. E. 698. "We do not think that a professor in the university is a public officer in any sense that excludes the existence of a contract relation between himself and the board of regents that employed him in respect to such employment. It seems to us that he stands in the same relation to the board that a teacher in a public school occupies with respect to the school district by which he is employed, and that is purely a contract relation." *Butler v. Regents*, 32 Wis. 124. "It is clear that a professor is not an officer, but an employé under contract to fill a chair of learning." *Hartigan v. Board of Regents*. We think, according to the terms of the statute, that appellant had power to employ appellee for the term of one year.

This action is to recover damages for the wrongful discharge of appellee. It is not a proceeding to prevent the removal of appellee by appellant, nor to reinstate him after removal. It is not an attempt to control appellant in the exercise of any of his discretionary powers. It is simply an attempt to hold it for a violation of a valid contract. To hold that appellant is liable in damages for a breach of its contract with appellee is not to hold that it cannot remove him. A private corporation can discharge an employé before the expiration of his term of employment, because he has no franchise or property in his office. *Hartigan v. Board of Regents*. But if it wrongfully discharges him, thus violating the contract between it and the employé, it will be liable to him for consequent damages.

Prof. Meyers was an employé of appellant corporation, his relation thereto being contractual; and he had the same remedy in the event of a violation of that relation by a wrongful discharge that he would have had if his employer, appellant, had been an ordinary private corporation. While section 76, *supra*, gives to appellant the power to remove appellee, it does not absolve it from responsibility in damages if the discharge be wrongful. There is authority sustaining the conclusion we have reached.

In *Board of Regents v. Mudge*, 21 Kan. 223, 229, 230—the court being composed of Chief Justice Horton and Justices Brewer and Valentine—Mudge was elected a professor of the Kansas Agricultural College under a contract that he should receive three months' notice of discharge, which was an employment for at least three months. He was discharged without notice, and for three months thereafter was without employment, notwithstanding his efforts to secure it. He was paid for his services to the date of discharge, but nothing for the succeeding three months. He sued the board for his salary during the three months succeeding dismissal, and recovered below. The judgment was reviewed on error and affirmed. The statute of Kansas made the board of regents a body corporate, with right as such to sue and be sued, and empowered it to govern the college, elect the president, professors, and teachers, and to determine the amount of their salaries. The statute also gave it express power to remove the president and any officer or teacher when the interests of the school should require. It was contended as a defense to the action that the contract between the board and Mudge was an employment for a definite time; that the board had no power to employ a professor for a definite time—that is, could not deprive itself of the power to terminate at its pleasure a contract with a professor; that therefore the contract was void. The court held that the board had the power to employ Prof. Mudge for a definite time, that it was a violation of the contract of employment to

discharge him without cause before the expiration of the time of his employment, and that for damages consequent it was responsible. Therein the court said: "While their powers [those of the board of regents] are extensive, still they may render their board liable by the wrongful exercise of such powers. Thus they have the unquestioned and continuing power of employing a president, professors, and teachers whenever they may choose, and of discharging any of them whenever they may choose; but if they agree to employ a president or professor or teacher for a period of three months, and then wrongfully discharge him before the three months have elapsed, they will leave their board responsible for the whole amount of the salary for such three months, notwithstanding such discharge. While the Legislature unquestionably intended to confer upon the board of regents extensive powers, yet it did not intend to confer upon them the irresponsible power of trifling with other men's rights with impunity; and making the regents responsible for their acts does not in the least abridge their powers. It only tends to make them more cautious and circumspect in the exercise of their powers. But the plaintiff in error claims, in substance, that the board has no legal power to make a contract to employ a president or a professor or a teacher for any particular period of time—not even for a day or an hour—and therefore that an agreement to employ a president or a professor or a teacher for three months, or for any other definite period of time, would be an absolute nullity. Now we cannot think this is correct. There is no express limitation upon the power of the board to make a contract to employ a president or a professor or a teacher for any period of time, and we know of no implied limitation that would prevent the board from employing or agreeing to employ a president or a professor or a teacher for three months, or for even a longer period of time, provided it were not unreasonably long. We would think that the board has the power to make a valid contract in advance to employ a president or a professor or teacher for some short but definite time—say three months—and especially so where the board reserves the right to discharge such president, professor, or teacher at any time for misconduct. It would certainly be for the interest of the college that the board should have such power. No man of spirit, of self-respect, and of capability would want to hold an office or position at the whim or caprice of a body of men with whom he might have but little, if any, personal acquaintance. No man of spirit, of self-respect, and of capability would accept an office unless he felt that he was reasonably certain to hold the same for some reasonable period of time."

In *Board of Education v. Cook* (Court of Appeals) 3 Kan. 269, 45 Pac. 119, Miss Cook was employed by the board of education of

Ottawa under a contract to teach in the public schools of that city for the ensuing year, "unless sooner removed by vote of the board." She was discharged before the expiration of the school year, and sued for damages sustained through the breach of the contract of employment by her wrongful discharge. There the contract was with a public board, and for services in a public institution. The contract with appellee has in these particulars the same characteristics. There the express contract of employment was for a definite time, unless Miss Cook was sooner removed by action of the board. The implied contract of appellant with appellee was for a definite time, and the statutes supplied to it the clause that appellee might be removed by the board. There is no reason of public policy for construing the contract with appellee as permitting appellant to terminate its contract with appellee at pleasure that did not apply to the contract between the board of education and Miss Cook; yet the court there held that her discharge without good cause therefor was a violation of the contract of employment, and that the board was liable in damages. The gist of the holding was that the contract for the employment of Miss Cook for a definite time as teacher in the public schools was valid, and that she could not be wrongfully discharged before the expiration of the term of her employment without liability attaching to the board therefor. If that contract was good, the one before us should be good.

School District No. 3 v. Hale, 15 Colo. 369, 25 Pac. 308, was an action against the school district to recover the balance due the plaintiff, Hale, under a contract employing him as a teacher for a definite period of time. The complaint set up the contract of hiring, plaintiff's performance, and his wrongful discharge. There the contract between the school district and the teacher was to teach for a definite time. It was held that the contract was valid, and that the district was liable thereon for the wrongful discharge of plaintiff. It seems, if that contract between the board of directors of the school district and the teacher for a definite time was valid, and the board was liable for the wrongful discharge, then the contract here, employing appellee to teach for a definite time, ought to be valid. If the fact that the contract of employment was for a definite time was not fatal to that contract on grounds of public policy, then it ought not to be fatal to this. In the course of the opinion the court said: "In the statute relating to schools, the board of directors is given full power to do whatever may be necessary for the due and regular management of the schools of their district. This, in terms, includes the hiring and discharge of teachers. This power, however, must always be exercised in obedience to the general principles of law governing contracts of this class, unless there be some specific restriction in the statute which prevents

their application. There is nothing whatever in the statute which gives the board the right to make a contract for a specific term at a specified price which shall not be subject to the legal consequences of a breach. The power of employment and discharge is not in terms beyond the control of the general law. It was always true that where a contract of hiring was entered into between two parties for a fixed period, at a definite price, the employer could not escape liability for a discharge without cause."

School District v. Ross, 4 Colo. App. 493, 496, 36 Pac. 560, was an action by a teacher against a school district for damages on a contract of employment as teacher for a definite time. Such damages arose through a breach of the contract by her wrongful discharge before the end of her term of employment. Want of power in the board of directors of the school district to employ a teacher for a definite time would have defeated the action, yet this objection, although there was a recovery, and although the respective parties were represented by able and experienced counsel, was not even mentioned by the court or by counsel. The case is at least suggestive of an absence of merit in the contention here made that the board of regents of appellant was without power to employ appellee for a definite time. Counsel say that the law in this particular is not the same in contracts between school districts and teachers as between the board of regents and professors. No reason has been advanced why it is not the same, and we know of none.

School District v. Stone, 14 Colo. App. 211, 59 Pac. 885, was an action upon a contract of employment as teacher for a definite time against a school district. There was a recovery. Want of power in the board of the district to make the contract for a definite time would have defeated the action, yet this objection was not made.

In Butler v. Regents of the University of Wisconsin, an action on a contract of employment for a definite time between the professor and the board of regents was sustained. Although eminent counsel appeared for the respective parties, it was not suggested that the fact of the contract being for a definite time was fatal thereto.

The statute in terms authorized the making of this contract. It was made, and it was violated before its expiration by the discharge of appellee. In the absence of any showing of sufficient cause for the discharge, we must, for the purpose of this ruling, conclude that the discharge was wrongful, and that therefore appellant violated its contract. Appellee was damaged thereby, and entitled to recover therefor. We think the judgment of the trial court permitting him to do so was right.

Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774, Hartigan v. Board of Regents, 49 W. Va. 14, 38 S. E. 696, and Devo v. Board

of Regents (Ariz.) 56 Pac. 737, are cited as contra the conclusion we have reached.

*Richards v. Clarksburg* was an original proceeding in the Supreme Court of West Virginia to prohibit the common council of the town of Clarksburg from removing from office the mayor of that town. The court denied the writ, holding that the common council possessed, upon good cause, such power of amotion. It does not follow that, because the common council of a town can remove from public office its mayor for misconduct therein, appellant can violate its contract with its mere employé (appellee) without responsibility for consequent damages. We find nothing in the case pertinent to the question before us.

*Hartigan v. Board of Regents* was an original proceeding in the Supreme Court of West Virginia to secure a writ prohibiting the board of regents of the West Virginia University from carrying into execution a resolution passed by it removing Dr. Hartigan from a professorship therein. The writ was denied. The proceeding was to prohibit the board from carrying into effect its resolution of removal. It was not an action to recover damages for a violation by the board of any contract of employment for a definite time with Dr. Hartigan. The case does not hold that if Dr. Hartigan had a contract of employment for a definite time, and the board should remove him without cause, he could not recover damages consequent upon his wrongful discharge. The writ of prohibition was denied upon three grounds: (1) The board of regents, in removing Dr. Hartigan, was exercising discretionary powers granted a branch of the executive department of the state government. Acts of the executive department of the state government involving discretion cannot be reviewed by the judicial department. (2) If the action of the board were subject to review, it would be by certiorari, not by prohibition. (3) Dr. Hartigan was not a public officer, but a mere employé of a corporation, and therefore subject to discharge at any time. The court, in declining to prohibit the removal of Dr. Hartigan, and in saying that he was subject to discharge at any time, did not hold that the board would not be responsible in damages for a wrongful discharge in violation of some contract between it and an employé. It does not follow, because the power to remove exists, that the principal will not be liable in damages for a wrongful discharge of the employé. The contract between Dr. Hartigan and the board provided that he should receive 60 days' notice of discharge. The board discharged him without this notice, but it observed its contract in paying him for the 60 days. It thus recognized that it could make a contract for a definite time, and that it was liable for a violation of such contract in discharging Dr. Hartigan without this notice; and, while the opinion of the court does not turn on the question of the

validity of the contract in discussing the case, it regards the contract as a valid one. This case contains nothing, in our judgment, contra the conclusion we have reached.

In *Devol v. Board of Regents*, *Devol* was employed by the board of regents of the University of Arizona as a professor, under an agreement that he should receive three months' notice of the termination of his employment. He was discharged without notice and without cause, and sued to recover as damages his salary for the three months succeeding his discharge. The decision against him below was affirmed on appeal. The territory of Arizona authorized the board to hire and discharge employés "when in the judgment of the board the interests of the university required it." The court said if the board had power to employ a professor for a definite time, and should exercise it, then it would thereby deprive itself of the power given by the statute to discharge him when, in its judgment, it was to the interest of the university to do so. It further said that if the board had the power to employ a professor for a definite time, however short, it would follow that it would have the power to employ for a long time, and thus deprive succeeding boards of their legitimate powers. The lack of power to discharge does not follow from the exercise of the power to employ for a definite time. Notwithstanding a contract is made under the power of employing for a definite time, the board can discharge the employé at any time; but, if it does so wrongfully, it is liable, as it ought to be, for damages thus unjustly caused. The existence of the contract no more deprives the board of the power to discharge than a contract of employment deprives a private corporation of the power to discharge an employé. The effect of the contract made under the power is not to prevent a discharge, but to create responsibility in damages for a wrongful discharge. Nor does it follow that because the board can employ for a short, definite time, it can employ for any length of time it may see fit. When a contract arises which provides for the employment of a professor for an unreasonable length of time, or for one of such great length that it deprives succeeding boards of their powers, it will be time enough to consider such objections. The term of employment of the professor in the Arizona case was for only three months. It does not appear in the opinion that such term was unreasonable in its length, or impaired the power of any succeeding board. The same can be said of the contract with appellee. It does not appear that the contract was unreasonable in the length of the term of employment, nor does it appear that it impaired the power of succeeding boards. The contract is one made by a branch of the executive department of the state government, and is presumed valid until the contrary appears. The court in the Arizona case assigns as the only further rea-

son for its conclusion that, if the contract were a valid one, it would obligate the territory to pay for services never rendered; further, that if some one else was employed to succeed the discharged professor, and filled his place, the territory would have to pay twice for a single service. It is said that the public money could not be so used. If the contract were otherwise valid, the fact of a double liability—one for damages thereon, and one to the party performing the services—would not be a sufficient reason for invalidating the contract. Such liability against public corporations frequently exists. No authority is cited by the court for its conclusion. We are unable to agree with the conclusion of the Arizona court, or with any one of the reasons assigned therefor.

Judgment affirmed. Affirmed.

#### BAILEY v. CASCADE TIMBER CO.

(Supreme Court of Washington. July 2, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—SELECTION OF APPLIANCES—DUTY OF MASTER—INSTRUCTIONS—DAMAGES—EXCESSIVENESS—NEW TRIAL—TRIAL COURT—JURISDICTION—REDUCTION OF VERDICT.

1. Where, in an action for injuries to a servant, the court charged that one of plaintiff's allegations was that defendant had neglected to furnish a reasonably safe and suitable hook or appliance for the work in hand; that the burden of proof of such failure was on plaintiff; and that, if defendant was negligent in that regard, plaintiff still could not recover, unless such failure was shown to have been the proximate cause of the injury—the instruction sufficiently charged the jury on the question whether or not suitable appliances had been furnished.

2. Where, on a prior appeal in an action for injuries to a servant, the court held that the work of moving a tank was not an ordinary detail of the work of the crew in which plaintiff was working, but that the duty rested on defendant to direct the work, and provide suitable appliances therefor, such holding constituted the law of the case on a retrial.

3. Plaintiff was injured by the recoil of a cable, caused by the breaking of a hook during the movement of a water tank in a logging camp. The hook which broke was selected by a servant known as the "rigging slinger," under the immediate direction of the hook tender, who was the master's primary representative. The tank contained 700 gallons of water, and from its position it was necessary for it to plow its way through a mound of earth and roots. *Held*, that the duty of selecting the hook under such circumstances was a duty devolving on the master, and hence it was immaterial whether the immediate act of selection was done by the "rigging slinger," who was plaintiff's fellow servant, or by the hook tender.

4. Where the verdict is excessive, the trial court may require plaintiff to remit the excess or submit to a new trial.

5. Plaintiff's injury consisted of a fracture of the ulna and a dislocation of the head of the radius. The turning motion of the forearm was somewhat limited by the injury, though not destroyed, and plaintiff was partially prevented from bending his arm. He testified that he was

able to earn \$700 a year before the accident, and that between the first and second trials he had been engaged in cutting wood, and had earned \$2 net per day. *Held*, that a verdict in plaintiff's favor for \$8,000 was excessive, and should be reduced to \$4,000.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Action by Martin Bailey against the Cascade Timber Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed conditionally.

John A. Shackelford and E. M. Hayden, for appellant. Governor Teats, for respondent.

HADLEY, J. This case was once before in this court, and the opinion upon the former appeal will be found reported in 73 Pac., at page 385. For a statement of the issues and facts we refer to that opinion without repetition here. At the first trial, when the evidence of both parties had all been introduced, the defendant moved that the court discharge the jury and render judgment for the defendant, which motion was granted. This court reversed the judgment on the ground that there was evidence which should have been submitted to the jury, and the cause was remanded for a retrial. At the second trial the jury returned a verdict for the plaintiff. Thereupon the defendant moved for a new trial, which was denied, and judgment was entered in accordance with the verdict. The defendant has appealed.

Many alleged errors are assigned relating to the instructions given by the court and to the refusal to give certain requested instructions. In argument appellant groups what it claims to be the principles involved in its assignments of error under the following general statement: "Appellant contends that whether proper appliances for moving the tank had been furnished by the master was a question for the jury; whether the work of moving the tank was an ordinary detail of the work of the crew was a question for the jury; and that it was for the jury to say whether it was the duty of the hook tender to select, from those on hand, the appliance to be used in attaching the line to the tank, or whether such selection was a part of the duty of the rigging slinger, as an incident to his duty to use and attach the appliance. By the instructions all of these questions were taken from the jury." The different assignments relate to segregated parts of the instructions. It is our duty to examine the instructions as a whole, and determine whether, when construed together, they fairly state the law applicable to the case. Referring to the first proposition included in the above statement of counsel—that is to say, that it was a question for the jury whether proper appliances had been furnished by the master—the court did specifically state to the jury that one of respondent's allegations was that appellant had neglected to furnish a reasonably safe and suitable

¶ 4. See New Trial, vol. 37, Cent. Dig. § 324.

swamp hook or appliance for the work to be performed in the removal of the tank; that the burden of proof as to the respondent's allegations was upon him; and that, even if the jury should find the defendant negligent in not having furnished suitable appliances, still respondent was not entitled to recover for wrong alleged unless it was shown by the evidence to be the proximate cause of the injury. We think the instructions sufficiently left it with the jury to say whether suitable appliances had been furnished or not.

The next criticism as to the instructions suggested by counsel's statement is that it was a question for the jury whether the work of moving the tank was an ordinary detail of the work of the crew, it being contended that, if it was such, then the duty of the master did not extend to the supervision of details such as the selection of appliances, and that injuries arising from such circumstances should be held to be due to the neglect of a fellow servant, and not of the master. We said of the circumstances of this case when it was here before, as follows: "We think the circumstances were such that it ought not to be said that the selection of appliances could properly be left to the judgment of a fellow servant, but that such duty properly rested with the master acting through a directing mind supposed to be skilled from experience in such matters." It will be remembered that the station of respondent at the location of the donkey engine was such that his safety depended upon the security of the appliances used to connect with the heavy tank. He was at a distance from the tank, and his duty called him to remain at his post ready to control his engine in accordance with signals given him. He had not the opportunity to inspect the appliances used unless he left his post for that purpose, and such was not his duty. His situation was such that, if the appliance broke, the large cable would recoil toward him, involving him in much danger, as the result proved. It was because of such peculiar surroundings that we before held it to be the duty of the master to select the appliances, acting through a directing mind skilled from experience in such matters. Under that view of the case, which we reiterate here, the removal of this heavy tank cannot be classified as a mere ordinary detail of the work of the crew, to be left entirely with fellow servants, and calling for no immediate duty from the master. This view had become the law of the case at the last trial, and the question whether the removal of the tank was a mere ordinary detail of the work of the crew was therefore not one for the jury.

Counsel's next suggestion of error is that the court should have left it to the jury to say whether it was the duty of the hook tender to select from appliances on hand the one to be used, or whether such selec-

tion was a part of the duty of the rigging slinger, as an incident to his duty to attach the appliance. This contention also seeks to classify the rigging slinger as a fellow servant in charge of the detail of selection, with the master relieved from any share in the duty. The facts in evidence were in all material respects the same as were before this court on the former appeal. We then declared the relations of the hook tender to the crew of men and the duties he admittedly discharged to be such as made him a vice principal, for the reason that it was his duty to direct the men, to determine what appliances should be used, and the method of adjusting them. Such being the case, then, as we held before, the duties discharged by the rigging slinger pertaining to the selection and adjustment of appliances were delegated duties, and passed to him from the hook tender, the master's primary representative. The environment called for the exercise of skill and a high degree of care in order to preserve the safety of life and limb, and which should have been exercised by the master or his representative. It therefore became immaterial whether the immediate act of selection was done by the hook tender or by the rigging slinger, since in either case it was a duty of the master which was being discharged. We think the instructions as a whole fully and fairly stated the law of the case, and we find no error.

Appellant next urges that the verdict was excessive. The amount returned was \$6,000. Respondent's injury consisted of a fracture of the ulna of the forearm and a dislocation of the head of the radius. The turning motion of the forearm was somewhat limited by the injury, although not destroyed, and respondent is also unable to bend the arm at the elbow to the full extent. The injury was severe, and the condition resulting therefrom undoubtedly entails much inconvenience to the respondent, but the arm is still useful for many purposes. Respondent himself testified that during the time intervening between the two trials of this case he was a part of the time engaged in cutting wood. He also said he was able to earn about \$700 per year before the accident, and that for about five weeks prior to the last trial he had been earning more than \$2 per day—\$2 net after paying car fare. It would thus appear from his testimony that his present earning capacity is not greatly less than it was before the accident. He has, however, a crippled arm, which he must carry through life, and, at best, either his earning power is in some degree impaired, or he must undergo great inconvenience with the possibility of increased impairment with advancing years. Under such circumstances, the jury having determined other questions in his favor, he is entitled to recover a substantial amount, based, however, upon the nature of his injury and its bearing upon his usefulness. The trial court was of the opinion that

the verdict is excessive, and so found. The following appears in the order denying the motion for new trial: "The court finds that the verdict of the jury was excessive, unreasonable, and exceeded in amount the damages sustained by the plaintiff, and that the amount of said verdict should not in any event exceed the sum of four thousand dollars (\$4,000.00); but that this court has no power to reduce said verdict without granting a new trial; and that with the findings heretofore made in this order, the Supreme Court can pass upon the question of the excessiveness of said verdict without prejudice to the rights of the defendant by reason of the refusal of this court to grant a new trial." We think it was within the power of the trial court to have required respondent to remit the excessive amount or submit to a new trial. But the court declined to do so, seemingly under the belief that it had not such power. It is therefore for this court to determine whether it will confirm the court's finding as made in its said order concerning the excessive amount of the verdict, or whether it is excessive in any amount. Taking into consideration the evidence as above discussed, together with the fact that the trial court heard the witnesses testify, and more particularly observed the nature of respondent's injury, we shall adopt the views of that court as to the excessive amount.

The judgment is approved in all particulars except as to amount. But as entered it is reversed, and the cause remanded, with instructions to the lower court that within 30 days from the time the remittitur is filed in that court it shall, in the alternative, require respondent to file a remittance of \$2,000 from the amount of the verdict, or submit to a new trial. In the event such remittance shall be filed within the specified time, judgment shall then be entered for \$4,000, and, if respondent shall refuse to file such remittance, the motion for new trial shall be granted. Appellant shall recover the costs of this appeal.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

#### FARWELL v. COLMAN.

(Supreme Court of Washington. July 2, 1904.)

ATTORNEY AND CLIENT—SERVICES—CONTRACTS  
—ABANDONMENT—FEES.

1. Defendant employed plaintiff as her attorney to defend an eminent domain proceeding, under a contract by which she agreed to pay plaintiff for his services 7 per cent. of the amount of any judgment recovered for the taking of the land. A judgment in favor of defendant was reversed on appeal, and thereafter for more than 10 years plaintiff failed to bring the case on for a retrial, though defendant requested him to do so at various times, and provided funds for the payment of costs, etc. Plaintiff testified that the reason for his neglect was that after the case was reversed a panic

ensued, and the land greatly depreciated in value, and that he was afraid, if he pressed the case for trial, the petitioner would withdraw its petition, and plaintiff would be unable to get anything. *Held*, that by reason of such delay defendant was justified in concluding that plaintiff had abandoned the contract, and that plaintiff was therefore not entitled to recover for services rendered.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by George D. Farwell against Clarissa D. Colman. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

George D. Farwell, for appellant. Jacobs & Jacobs, for respondent.

DUNBAR, J. The complaint in this case alleges that the plaintiff was attorney and counselor at law, duly qualified, and the defendant was indebted to him in the reasonable sum of \$750, balance due for legal services and other valuable services rendered, furnished, and performed for defendant by plaintiff, at her special instance and request, between the dates of October 1, 1890, and June 20, 1903, which amount was unpaid, and prays judgment against the defendant in said sum. The answer denies the rendition of services alleged, and alleges that the cause of action mentioned in plaintiff's complaint did not accrue within three years from the commencement of said action; that the contract of liability set forth in plaintiff's complaint is not in writing, and did not arise out of any written agreement. The second affirmative defense by way of new matter alleges that the cause of action set forth in plaintiff's complaint did not accrue within six years from the commencement of plaintiff's said action. For a third affirmative answer she alleges that in A. D. 1890 the Northern Pacific & Puget Sound Shore Railroad Company filed in the superior court of King county a petition for the condemnation of a right of way over and across certain described lands of defendant; that plaintiff solicited employment in said proceeding, and represented to the defendant that he had requisite knowledge, experience, and ability to secure to defendant her rights in such proceedings; alleges want of knowledge, experience, and skill on the part of plaintiff, to her damage, in that he filed an answer to said petition of condemnation in which he confined the damages to be recovered by the defendants therein to the value of the land actually taken, and excluding all right to recover damages done to abutting lands belonging to defendants, and because evidence was introduced of damages to such abutting lands, and such evidence was considered by the jury, the judgment was reversed by the Supreme Court to the great damage of the defendant; alleges that by a verbal contract of employment plaintiff was to have and recover as full compensation for said services 7 per cent. of the final judgment recovered, and alleges that no final judgment was ever recovered in said action;

that a verdict and judgment for \$9,500 and costs was rendered in the superior court of the state of Washington in favor of the defendants therein; that before appeal was taken the railroad petitioner in said proceedings tendered the amount of said judgment, less the interest on the same, which tender was refused by the plaintiff, to her damage in the sum of \$5,000; alleges that it was the duty of plaintiff to have submitted all propositions of compromise or settlement to her; and asks that she may go hence with her costs. The reply denies substantially the affirmative allegations of the answer. The case was tried by the court, and the following facts and conclusions of law were made by the court:

"(1) The court finds that this is a cause of action for compensation for legal services performed by the plaintiff for defendant in the matter of the condemnation of the right of way of the Northern Pacific & Puget Sound Shore Railroad Company against this defendant and others, being cause No. 9,269 in this court, and a further action of this defendant and others against said Northern Pacific & Puget Sound Shore Railroad Company, being cause No. 9,338, in this court, restraining them from going across the lands of plaintiff.

"(2) The court finds that the services were performed between 1890 and 1893, inclusive. Said services consisted in contesting the petition of said railroad companies for a condemnation of a right of way over and across the premises belonging to said defendant and others and the subsequent issuance of an injunction prohibiting work on the said premises by said companies during the continuance of the litigation.

"(3) The court finds that there was a special contract entered into between plaintiff and defendant as to the compensation plaintiff was to receive for his legal services. By the terms of said special contract plaintiff was to receive seven per cent. of all moneys which should be collected from said companies, or either of them, in such proceedings, as his full compensation.

"(4) The court finds that no final judgment was ever recovered against said companies, or either of them, and that no money was ever collected from said companies, or either of them.

"(5) The court finds that the petition for condemnation was tried in the fall of 1890, and a judgment was rendered for defendant. An appeal was taken to the Supreme Court, and the judgment was reversed and a new trial granted. A remittitur was sent down in the summer of 1892, and plaintiff in said year obtained permission to and did file an amended answer, and that this was the last court service he ever performed for the defendant in the case.

"(6) In the summer of 1892 I find defendant went to plaintiff's office in the city of

Seattle, and personally requested and urged him to proceed in the retrial of the condemnation case, telling him she had placed ample funds for costs and expenses in the hands of Judge Orange Jacobs, subject to his order; that he would act for her, as she would be out of the city for some time. I further find that a few days after said personal interview defendant wrote a letter to plaintiff, and duly and properly addressed, paid the postage thereon, and placed the same in the post office, in which letter she requested and directed plaintiff to proceed in said action, again assuring him that she had placed ample funds in the hands of Judge Jacobs for costs and all other expenses. I find that he neglected and refused to proceed with said litigation. I further find that the reason he gave for his neglect and refusal, as stated by himself, was that it was an inopportune time; that the railroads had stopped construction, and, if he attempted to proceed, the railroad companies would withdraw their petition, and he would lose his fee. I further find that after the filing of the amended answer, in the fall of 1892, the plaintiff performed no service for defendant; that he kept the ordinary office files, remained and still remains attorney of record; that he lives in the city of Seattle, and has continuously maintained an office and practice in said city, where service of papers could be had upon him. I further find that said cause of action No. 9,269 and cause of action No. 9,338 are each still pending, at issue, and undisposed of; that said condemnation suit renders a cloud on the defendant's title to said land.

"(7) I find that for over ten (10) years plaintiff did not, notwithstanding defendant's said requests and direction to proceed in the action, do anything except to retain the ordinary office files, and to remain attorney of record and maintain an office in the city of Seattle, as aforesaid; and I find that in the meantime the Northern Pacific & Puget Sound Shore Railroad Company had become owned and absorbed by the Northern Pacific Railway Company, as successor in interest to its rights and privileges. I further find that the injunction proceeding, being cause No. 9,338, restraining the defendant company and its successors named therein from going across the lands of the defendant in this action, is still pending.

"(8) This court further finds that in June, 1903, the defendant, Clarissa D. Colman, without the knowledge or consent of the plaintiff, George D. Farwell, sold the identical land and right of way theretofore involved in litigation in the condemnation proceedings and injunction proceedings between the Northern Pacific & Puget Sound Shore Railroad Company and the defendant Clarissa D. Colman and others to the Northern Pacific Railway Company, a corporation that is the successor in interest to the Northern Pacific & Puget Sound Shore Railway Company,



for four thousand two hundred and ninety-five dollars (\$4,295.00).

"Done in open court this 4th day of January, 1904.

"[Signed] R. B. Albertson, Judge.

**"Conclusions of Law.**

"The court finds as conclusions of law from the above findings of fact that plaintiff is not entitled to recover, and that the defendant is entitled to judgment for her costs and disbursements herein.

"Done in open court this 4th day of January, 1904.

"[Signed] R. B. Albertson, Judge."

Judgment was entered in accordance with the findings, and from such judgment this appeal was taken.

The plaintiff excepted to the material findings of fact made by the court. The testimony in this case was exceedingly brief, and from its examination we are not able to say that the facts found by the lower court are not justified. It is true that some services were rendered by the appellant to the respondent in this action, but we think with the lower court that the testimony shows that this work was done under an agreement that the appellant should have for his legal services 7 per cent. of the amount of judgment recovered by the defendant, and that for more than 10 years after the reversal of the case by this court nothing was done in the case by the appellant, although its prosecution was urged by the respondent, and that the respondent was justified in concluding, under the circumstances, that the appellant had failed and refused to proceed with the work under the agreement which had been entered into. Upon rebuttal the appellant testified, among other things, as follows: "Q. Was it a fact that Mrs. Colman requested you to press the trial of this action after the case was reversed by the Supreme Court? A. She asked me if the case could not be brought up a long time after this. She insisted upon making the railroad company pay, but I realized and knew very well, and told her at the time, that I was in no position to press the matter. That if I attempted to make a move, and brought the case on for trial, that the times were hard; that we were in the midst of a panic; that the land wasn't worth a quarter what it was worth in 1890; and that the company had abandoned construction, and, if we pressed for trial then, that they would dismiss their action, and I would be unable to get anything. The Court: Was that the ground of your refusal? A. That was the reason. The Court: But was that the ground of your refusal? A. That was the ground of my refusal, because in such case I lost any chance to recover." This is the last testimony offered in the case, the attorney for the plaintiff then announcing that he did not desire to argue the case. Upon this statement alone we think the ap-

pellant should not recover. Certainly not if the respondent's construction of the testimony is correct, namely, that the appellant refused to proceed with the case lest it should result in the loss of a fee to him. And such a construction, we think, would not do violence to the language used, and was evidently the construction placed upon the testimony by the trial judge, as shown by the questions so pointedly asked. The principal and ultimate object of a lawsuit is for the benefit of the client, and it is the client's interests that must be considered by the attorney throughout the trial of the case, and he must not place himself in a position where his personal interest will interfere with a full performance of his duty to his client. It is, however, insisted by the appellant that the use of the personal pronoun "I" was not intended to refer to the personal interests of the attorney, but referred to the interests of the client. But, even conceding that this construction of the testimony is reasonable, it would still not justify the attorney in refusing to proceed with the trial of the case when requested so to do by the client, and when the necessary funds for prosecuting the suit were placed at his disposal, for the object of a defense to an application for a condemnation in a case of this kind ought simply to be to obtain legitimate damages, and not to encourage the railroad company to proceed with the suit for the purpose of obtaining a judgment that would more than compensate for the loss sustained; and this must have been appellant's idea, or there would have been no objection to the withdrawal of the suit by the railroad company. We think, under all the circumstances of the case, that the respondent was justified in concluding that the appellant had failed to carry out the conditions of the contract entered into, and that the relation of attorney and client had been severed by the refusal of the appellant to perform the duty for which he had been employed, and that she was justified in moving in the matter on her own account to settle with the railroad company in any manner which she considered advantageous to her interests.

In consideration of the whole record, the judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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**TEMPLEMAN v. EVANS.**

(Supreme Court of Washington. July 2, 1904.)

**APPEAL—BILL OF EXCEPTIONS—CERTIFICATION.**

1. Where, on appeal from an order dissolving an attachment on real estate, a bill of exceptions was filed and served on respondent's attorney, who filed amendments thereto, after which the court certified on notice that the motion to discharge the attachment was heard on affidavits which were specifically referred to and

attached to the record, and that such affidavits constituted all the evidence before the court on the hearing of the motion, the bill of exceptions so certified was sufficient.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action between James A. Templeman and Fred T. Evans, Jr. From an order discharging an attachment on real estate, the former appeals. Affirmed.

C. L. Parker, for appellant. Jerold Landon Finch, for respondent.

MOUNT, J. This appeal is from an order of the lower court discharging an attachment upon real estate. Respondent moves to strike the statement of facts and dismiss the appeal for the reason that the statement consists of affidavits which were not incorporated in any statement of facts or bill of exceptions. A bill of exceptions, however, was filed, and served upon respondent's attorney, who thereupon filed certain amendments thereto. Thereafter, upon notice, the court certified that the motion to discharge the attachment was heard upon affidavits, which affidavits were specifically referred to and attached to the record; and also certified that the said affidavits constituted all the evidence before the court upon the hearing of the said motion on the part of both plaintiff and defendant. We think this was sufficient under the statute, and the motion to strike and dismiss is therefore denied.

On the merits of the case the question is one entirely of fact. It is sufficient to say that the affidavits are somewhat conflicting, but upon a careful reading thereof we think the appellant has failed to show by a preponderance of the evidence that the defendant was attempting to dispose of his property in order to defraud his creditors, as alleged in the application for the writ.

The judgment appealed from is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

#### BALL et al. v. O'KEEFE et al.

(Supreme Court of Washington. June 30, 1904.)

#### APPEAL—STATEMENT OF FACTS—SETTLEMENT—CERTIFICATION—REVIEW.

1. Where a statement of facts on appeal was stricken at the hearing because not properly settled and certified, and no question was presented by the record proper which could be reviewed without a consideration of the facts, the judgment will be affirmed.

Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by Catherine Ball and others against Jackson O'Keefe and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Sturdevant & Bailey, for appellants. M. M. Godman and E. O'Neill, for respondents.

PER CURIAM. The statement of facts filed in this cause was stricken at the hearing because the same was not settled and certified in the manner prescribed by the statute, but the cause was retained for further examination on the suggestion that there was possibly a question made by the record not dependent on the statement of facts. We are convinced, however, after such examination, that no question is presented by the record which can be reviewed without a consideration of facts shown at the trial, and that there is nothing before the court for review. The judgment will therefore stand affirmed.

#### STATE ex rel. KENT LUMBER CO. v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. July 2, 1904.)

#### EMINENT DOMAIN—MUNICIPAL CORPORATIONS—POWERS—LIGHT PLANT—ESTABLISHMENT OUTSIDE CITY LIMITS—STATUTES—CONSTRUCTION—ORDINANCE.

1. 1 Ballinger's Ann. Codes & St. § 739, subd. 6, declares that cities of the first class shall have power to purchase and appropriate private property for corporate uses on making just compensation to the owners thereof. Subdivision 15 authorizes the city to provide for the lighting of streets and public places, and to acquire and maintain such works as may be necessary therefor. *Held*, that cities of the first class were authorized under such sections to condemn private property for the maintenance of a light plant.

2. 1 Ballinger's Ann. Codes & St. § 739, authorizes cities of the first class to condemn land for public use "within or without" the city. Subdivision 15 gives the city power to erect a lighting plant, without providing whether the same shall be within or without the city limits; and subdivision 14 provides for the construction of waterworks, and declares that they may be erected, purchased, or acquired within or without the corporate limits. *Held*, that the fact that subdivision 15 was silent as to whether lighting plants might be constructed without the city limits, while subdivision 14 expressly authorizes the maintenance of water plants outside the limits, did not preclude a city, subject to such sections, from condemning property outside the city limits for the maintenance of a light plant.

3. Where the statute authorizes a city to condemn land for a lighting plant, an ordinance condemning the land in question, providing for a proceeding in the superior court to appropriate the land, and to assess damages to the owner, and authorizing the corporation counsel to conduct such proceedings, was sufficient to authorize the city to maintain such proceedings.

Writ of review by the state, on the relation of the Kent Lumber Company, against the superior court of King county and Arthur E. Griffin, judge thereof. Decree affirmed.

John G. Barnes, for relator.

MOUNT, J. The city of Seattle, a city of the first class, brought an action in the superior court of King county for the purpose of

condemning a right of way over certain lands to be used for pole and transmission lines for an electric lighting plant which the city is now constructing for its use. The whole of the lands sought to be condemned are without the city of Seattle. The Kent Lumber Company, a corporation, is the owner of certain of the lands sought to be condemned. This company appeared in the action, and filed a demurrer to the petition of the city upon the grounds (1) that it appears upon the face of the petition that the superior court has no jurisdiction of the subject-matter of the action; (2) that the petitioner has no capacity to prosecute said proceeding; and (3) that said petition does not state facts sufficient to constitute a cause of action, or to entitle the city to the relief demanded. This demurrer came on for hearing and was denied by the court. The relator duly excepted to the order denying the demurrer, and then filed its answer. Thereupon a hearing was had, and, upon evidence taken, the lower court made findings and entered an order declaring the use of the lands sought to be condemned to be a public use, and also ordered a jury to assess the damages. Relator thereupon filed his petition in this court praying for a writ of review. The writ was issued, and is now here for review upon the questions presented by the demurrer.

Relator insists, first, that the power of eminent domain does not exist in the city of Seattle, because such power has never been expressly conferred upon it, and therefore the court has no jurisdiction to maintain the action. Section 739, 1 Ballinger's Ann. Codes & St., in defining the powers of cities of the first class, provides, at subdivision 6, that such city shall have power "to purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use." This same section also confers power upon the city "to provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas and other lights, and to erect, or otherwise acquire, and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor, and to regulate and control the use thereof." Section 739, subd. 15, 1 Ballinger's Ann. Codes & St. This latter provision clearly authorized the city to erect and maintain works for furnishing gas or other lights to the city and its inhabitants. Lights so furnished are for corporate uses. The former provision clearly authorized the city to condemn private lands, either within or without the city, for such uses. By enacting these provisions we think the Legislature of the state has authorized the city of Seattle to exercise the right of eminent domain and to

maintain the action. Since the decision in *Tacoma v. The State*, 4 Wash. 64, 29 Pac. 847, the Legislature has passed an act authorizing, regulating, and prescribing the procedure by which municipal corporations of the first class may condemn land for any public use within the authority of such city. Section 775 et seq., 1 Ballinger's Ann. Codes & St. This procedure was followed in the case at bar. Holding as we do upon the provisions above considered, it is unnecessary to consider other provisions of the statute claimed by respondent to authorize the condemnation.

2. It is next contended that the city is without legal capacity to maintain the proceedings because the lands sought to be condemned lie wholly without the corporate limits of the city. As we have seen above, subdivision 15 of section 739, 1 Ballinger's Ann. Codes & St., gives the city power to provide for lighting the streets and all public places, and for furnishing the inhabitants with gas or other lights, and to erect or otherwise acquire and maintain the same. This power is one of the corporate functions which may be exercised by the city, and property used for such purposes is for a corporate use. It is true that subdivision 14 of the same section, referring to waterworks, provides that such works may be erected, purchased, or acquired within or without the corporate limits, while subdivision 15, relating to works for lighting purposes, makes no reference to the same being within or without the city limits. This omission makes room for argument, but is not conclusive that the Legislature thereby intended to limit works for lighting purposes within the corporate boundaries, especially when it had provided that the city might appropriate property within or without its corporate limits for corporate purposes. We are therefore of the opinion that the city is authorized to erect works for lighting purposes without its corporate boundary.

3. It is next contended by the relator that no ordinance has been passed by the city authorizing the lands to be condemned and paid for, but we find attached to the return, as a part of the petition, Ordinance No. 10,723, which condemns the land in question, and provides for a proceeding in the superior court to appropriate the lands in question, and to assess to the owner his damages, and which authorizes and directs the corporation counsel to conduct the necessary proceedings therefor. This ordinance is not mentioned by the relator in his brief. As it appears regular upon its face in all respects, we think it is sufficient under the statute to confer authority upon the city by the proper officer to maintain the action.

No question is made here as to the finding of the lower court that the contemplated use is a public use. The other questions presented go to the question of damages, which are not properly before us upon this review, and will therefore not be considered.

We find no error of the lower court in overruling the demurrer or in adjudging the contemplated use to be a public use. The order made thereon is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

### GRAVES v. THOMPSON.

(Supreme Court of Washington. June 29, 1904.)

#### REPLEVIN—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY—DETERMINATION.

1. In an action to recover personal property, the amount in controversy for the purpose of determining appellate jurisdiction is the value of the property as found by the trial court, and not the value alleged in the complaint.

2. In an action for the recovery of personal property the alleged damages for the detention thereof cannot be added to the value of the property for the purpose of determining whether the amount in controversy is sufficient to sustain an appeal.

Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by Charles Graves against H. L. Thompson. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

W. E. Southard, for appellant. Myers & Warren, for respondent.

DUNBAR, J. Plaintiff brought an action to recover the possession of two certain horses and a set of harness, all described in the complaint; also alleging damages for the detention in the sum of \$475. The jury found a verdict in favor of the defendant, and also found that the value of the property was \$200. Judgment was entered in favor of the defendant for costs, and from such judgment this appeal is taken.

The respondent moves to dismiss the appeal for the reason that this court has no jurisdiction because this is an action for the recovery of personal property and the value thereof does not exceed \$200. The decisions of this court seem to be somewhat conflicting on this proposition. In *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732, which was an action for the recovery of personal property, in the course of the discussion the following announcement was made: "The amount in controversy was \$200 value of the goods, and \$500 damages for their detention. This court, therefore, has jurisdiction of the case." This was all the discussion of the question that was indulged in in that case. The question was discussed at some length, however, in *Herrin v. Pugh*, 9 Wash. 637, 38 Pac. 213, where it was held that the allegation of the pleader that the value of the property in controversy was a sum in excess of \$200 was not sufficient to give the Supreme Court jurisdiction

on appeal; but that, before the appellate court will assume jurisdiction, there must be a finding as to the value by the lower court. After quoting the constitutional provision that the jurisdiction of this court shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of \$200, it was said: "Under this provision it has been held that the amount claimed by the plaintiff in his complaint is the original amount in controversy, but, so far as we are advised, it has never been held that the bare allegation that property sought to be recovered is of a certain value establishes such value for the purpose of giving jurisdiction on appeal. An examination of the language of the Constitution will lead to the contrary holding. 'The original amount in controversy,' is the language of one clause, and must refer to the amount claimed, and not to the amount which may ultimately be established upon trial. But the language of the other clause, 'the value of the property,' is not qualified by the amount in controversy, or by the word 'original,' and must be construed as referring to such value as found by the court or jury. To hold otherwise would be to enable every case for the recovery of personal property to be brought within the jurisdiction of this court on appeal. The statement of the value of the property is purely a matter of opinion on the part of the pleader, and such opinion cannot give this court jurisdiction." So that, yielding our allegiance to the doctrine announced in the last case—which we are constrained to do—the only remaining question is whether the jurisdiction is affected by the amount claimed for damages. This proposition has also been squarely decided by this court in favor of respondent's contention in the case of *Doty v. Krutz*, 13 Wash. 169, 43 Pac. 17, where it was said in the course of the discussion: "• • • But appellant insists that the amount alleged in the ad damnum clause in the complaint, and for which judgment was prayed, was the amount involved, so far as the constitutional inhibition on appeals where the amount is less than \$200 is concerned. We do not think the Constitution can be so construed. If so, any claim for a judgment which could not possibly be obtained under the pleadings would permit an appeal, and destroy the object of the constitutional enactment." And this, we think, is the construction placed upon statutes of this kind by the great weight of authority. See 1 Enc. Pl. & Pr. 728, where it is said: "In suits to test the title to or for the recovery of specific personal property the damages claimed or recovered are generally merely an incidental matter. It is the value of the property which is the determinative factor upon the question of jurisdiction *vel non*." The same rule is announced in *Astell v. Phillippi*, 55 Cal.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 219.

265; Peyton v. Robertson, 9 Wheat. 527, 6 L. Ed. 151; Higgins v. Deloach, 54 Miss. 498.

The motion will be sustained, and the appeal dismissed.

MOUNT, HADLEY, and ANDERS, JJ., concur. FULLERTON, C. J., did not sit in this case.

# WILLIAMS v. PITTOCK et ux.

(Supreme Court of Washington. June 28, 1904.)

TAXATION—FORECLOSURE OF DELINQUENCY TAX CERTIFICATE—SUMMONS—FORM—SERVICE BY PUBLICATION—DENIAL OF DUE PROCESS—DEFAULT JUDGMENT—RIGHT TO OPEN.

1. 1 Ballinger's Ann. Codes & St. § 1009, and Sess. Laws 1899, p. 287, c. 141, § 3, permit property to be assessed to an unknown owner. Section 1751 provides that the notice of foreclosure of delinquency tax certificate shall contain the name of the owner, if known. Sess. Laws 1901, p. 383, c. 178, § 1, subd. 1, contains a similar provision as to the contents of the notice. *Held*, that where property has been assessed to an unknown owner, and the certificate of delinquency has been so issued, the foreclosure may be had against an unknown owner.

2. Where land has been assessed to an unknown owner or to one not the owner, the holder of the delinquency tax certificate is not required to determine who the owner is, and make him a party to the foreclosure suit.

3. In a suit to foreclose a delinquency certificate the person in whose name the property was assessed and others named, and "all persons unknown \* \* \* having an interest in \* \* \* the real property," were made parties. The publication summons was directed to the same persons. The owners were nonresidents, and the person in whose name the land was assessed was not the owner. *Held*, that the owners were not denied due process of law because of the want of personal notice, but were bound by the judgment of foreclosure.

4. The form of summons in proceedings to foreclose a delinquency tax certificate authorized to be served by publication by Sess. Laws 1901, p. 384, c. 178, § 1, subd. 2, is the form prescribed by 2 Ballinger's Ann. Codes & St. § 4878, and a tax foreclosure publication summons must therefore set out the date of the first publication.

5. Following the attorney's signature to a tax foreclosure publication summons were the words, "Date of first publication, October 9th, 1902." *Held*, that the summons sufficiently set forth the date of the first publication, within 2 Ballinger's Ann. Codes & St. § 4878, prescribing the form of summons.

6. Under 2 Ballinger's Ann. Codes & St. § 4880, which allows a defendant one year within which to open a default judgment foreclosing a delinquency tax certificate rendered on publication service on "sufficient cause shown," a defendant is not entitled to relief as a matter of right, but must show a sufficient cause, and presenting a case of mere neglect to pay the taxes is not such a showing.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Petition by H. L. Pittock and wife for the vacation of a judgment of foreclosure of a delinquency tax certificate rendered in a suit to foreclose the same by F. F. Williams, the holder thereof. From a judgment dismissing the petition, the petitioners appeal. *Affirmed*.

B. G. Cheney and Coover & Stapleton, for appellants. John C. Hogan, for respondent.

HADLEY, J. Respondent, as the holder of a delinquency tax certificate, brought suit to foreclose the same. Judgment by default was entered. The sale of the premises was ordered, and respondent became the purchaser at treasurer's sale. Within a year from the date of its entry, appellants, by petition, asked for the vacation of the judgment. Respondent demurred to the petition on the ground that it does not state facts sufficient to support the relief asked, and also that the court has not jurisdiction to entertain the petition. The demurrer was sustained. Appellants elected to stand upon their petition, and judgment was entered dismissing the same. This appeal is from the judgment.

It is assigned that the court erred in sustaining the demurrer for the alleged reason that the allegations of the petition show that the foreclosure proceedings amounted to an attempt to deprive appellants of their property without due process of law. The petition avers that appellants are, and ever since 1871 have been, the owners of the land, and that in the foreclosure proceedings they were neither served with process nor made parties. It is alleged, however, that service upon them was attempted to be made by publication directed to W. L. Pittock and Mrs. W. L. Pittock, his wife, and to R. L. Pittock and Mrs. R. L. Pittock, his wife; but that the court did not acquire jurisdiction of the subject-matter of the action for the reason that neither the actual owners nor the reputed owners were made defendants, and that neither were served with process. It is also alleged that neither of the appellants had actual notice or knowledge of the pendency of the action, the publication of the summons, the entry of the judgment or the sale of the property until some months thereafter. Reference to the application for judgment in the foreclosure proceeding, which it attached to the petition as an exhibit, discloses that the property was assessed for these taxes in the name of R. L. Pittock, who was made a party, together with the other persons named above, "and all persons unknown, if any, having or claiming to have an interest in and to the real property hereinafter described." The publication summons was directed to the same persons. Appellants do not contend that they were residents of this state, but allege in their petition that they have at all times mentioned been, and now are, residents of the state of Oregon. It is manifest, therefore, that as far as appellants were concerned, publication summons became the proper process in the case under our statutes. Such being true, are they bound by the notice that was given, although they were not named therein? That the summons was specifically directed to the person in whose name the property was as-

sessed must be taken as true, since the exhibit attached to appellants' petition so states, and it is not denied by other averments. It appears, therefore, that good faith was exercised by naming in the summons the person whose name appeared upon the tax records as the owner. We think no more was required. Tax proceedings under our statutes are purely in rem. *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391. The same is true of tax foreclosure proceedings. *Washington Timber & Loan Co. v. Smith* (Wash.) 76 Pac. 267. Our statutes permit property to be assessed to an unknown owner when the owner's name is unknown. Section 1699, 1 Ballinger's Ann. Codes & St. Also Sess. Laws 1899, p. 287, c. 141, § 3. It is also provided that the notice in the foreclosure proceedings shall contain the name of the owner, if known. Section 1751, subd. 1, 1 Ballinger's Ann. Codes & St. Also Sess. Laws 1901, p. 383, c. 178, § 1, subd. 1. The fair inference to be drawn from these statutes is that, if the property has been assessed to an unknown owner, and the certificate of delinquency has been so issued, the foreclosure may be had in form against an unknown owner. It would appear that the actual name of the real owner is made no more essential in the proceedings to foreclose than it is in the assessment. The whole procedure, including the assessment, foreclosure, and sale, is for the purpose of establishing and enforcing a lien for public revenue, which, under the policy of the state, is chargeable to the property only, and not personally to the owner. It is the land itself with which the state is concerned, and its dominion over the land for revenue purposes exists without regard to who may be the owner. All owners know that such is the fact, and that the power of taxation will be exercised each year. In the very nature of our revenue procedure the statutory provisions with regard to owners must have been intended to be directory, rather than mandatory—of the form, and not of the essence, of the proceedings. "Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself, rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity, that the case shall assume that form. As in all other cases of proceedings in rem, if the law makes provision for publication of notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who exercise ordinary diligence in looking after their interests in the lands, it is all that can be required." *Cooley on Taxation* (2d Ed.) p. 527. If the proper-

ty is assessed to an unknown owner, or to one not the real owner, the holder of a certificate should not be required to determine in advance who may be the real owner. That may be a difficult matter, and may often be the subject of serious dispute. The Supreme Court of Minnesota, in *McQuade v. Jaffray* (Minn.) 50 N. W. 233, 234, aptly observed as follows: "In several cases, as in *Association v. McComber*, 41 Minn. 20, 42 N. W. 543, it appeared that the ownership of the land was erroneously stated in the published list; but no suggestion was ever made that this invalidated the judgment. Any such rule would subvert the whole policy of our tax law. The statute nowhere makes it the duty of assessors or county auditors to search the records with a view of ascertaining the names of the real owners. Such a search would impose upon them an impossible labor; and, even if it were possible to perform it, it would often still remain a doubtful question of law who was the real owner, for, as is said in the *McComber Case*, the ownership of land is often a matter of grave doubt and uncertainty." The above reasoning is clearly as applicable to the holder of a delinquency certificate as to assessors and county auditors. If the duty to determine in all cases who is the real owner rests upon individual certificate holders, then in the event of foreclosure by a county the officers must determine the real ownership of the long lists of property usually included in such cases. Such a requirement would be impracticable, and, as said by the Minnesota court above quoted, "would subvert the whole policy of our tax law." This summons contained a proper description of the land and the name of the person shown by the tax records to be the owner. Commenting upon what the notice in such proceedings shall contain, the opinion in *McQuade v. Jaffray*, supra, further observes: "It is elementary that no reference to the name of the owner is necessary in proceedings in rem. It is, however, a common practice in such proceedings to give the name of the owner, if known, 'for frankness' sake,' to increase the chances of his attention being called to the notice. The provisions of our statute on the subject are but declaratory of this established practice, and are to be construed as merely directory. The essential thing in such proceedings is the description of the res (the land), and this is complete without the name of the owner. We think it has been the uniform understanding, ever since our present statute was adopted, that no error or omission in stating the name of the owner affected the jurisdiction of the court over the land."

The principle decided in the above case seems to be directly in point here against appellants' contention. In *Leigh v. Green*, 24 Sup. Ct. 390, 48 L. Ed. 623, a recent decision of the Supreme Court of the United States, the subject of due process of law under the tax procedure of the state of Nebras-

ka is fully discussed. The notice in that case, as in the one at bar, was directed to all persons interested in the property. The federal question presented was, did the failure of the Nebraska statute to make provision for service of notice of the pendency of the proceedings upon a lienholder amount to a deprivation of property without due process of law within the protection of the fourteenth amendment? It was held that it was not such deprivation, and that the notice given by publication to all persons interested in the property was sufficient process, inasmuch as the proceeding was in rem, and was in aid of the collection of public taxes. Following an extended discussion of authorities, the opinion concludes as follows: "The principles applicable which may be deduced from the authorities we think lead to this result: Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court; and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the fourteenth amendment to the Constitution. In the case under consideration the notice was sufficiently clear as to the lands to be sold. The lienholders investigating the title could readily have seen in the public records that the taxes were unpaid, and a lien outstanding, which, after two years, might be foreclosed, and the lands sold, and, by the laws of the state, an indefeasible title given to the purchaser. Such lienholder had the right for two years to redeem, or, had he appeared in the foreclosure case, to set up his rights in the land. These proceedings arise in aid of the right and power of the state to collect the public revenue, and did not, in our opinion, abridge the right of the lienholder to the protection guaranteed by the Constitution against the taking of property without due process of law." If, as held in the above case, a lienholder is chargeable with knowledge that taxes are unpaid, by so much more should an owner be so chargeable. The primary duty rests upon him to see that the taxes are paid if he would prevent his land from being sold therefor. He is chargeable with knowledge of every step in the tax procedure, including the listing by the assessor, the sitting of the board of equalization to hear complaints, the completion of the rolls, their delivery to the treasurer, and the issuance of the certificate of delinquency. He must also know that, after the lapse of the statutory period, the right of redemption will be foreclosed. With such knowledge, and after his neglect to pay the taxes within the long period which the state has graciously given him, he cannot complain when he is given the same notice of foreclosure proceedings which may be giv-

en to others interested in the property. With in the authority of our statutes already cited and discussed, together with the liberal curative provisions of section 18, c. 141, p. 299, Sess. Laws 1899, and subdivision 6, § 1767, 1 Ballinger's Ann. Codes & St., the notice issued in this case was sufficient, and the above-cited decision of the federal Supreme Court is authority that a judgment founded upon such notice does not amount to a taking of property without due process of law.

The petition further alleges that the summons was insufficient to confer jurisdiction, for the reason that it did not set out therein the date of the first publication, and was therefore too indefinite to inform the defendants therein named, or the appellants, when they were required to appear and defend the action. Respondent argues that a tax foreclosure is a special proceeding, governed by the special revenue statutes only, and that, inasmuch as those statutes do not specifically require that the date of the first publication of the summons shall be stated, it is therefore unnecessary. Subdivision 2 of section 1, c. 178, pp. 383, 384, Sess. Laws 1901, relates to the special tax procedure, and declares that service by publication of summons may be had. There is no requirement in such summons different from those described by the general statute. We therefore think the law of 1901 requires a reference to the general statute for a description of what the summons shall contain. That statute, as found in section 4878, 2 Ballinger's Ann. Codes & St., requires that the date of the first publication shall be named. It follows that a tax foreclosure publication summons shall state such date. Such, in effect, was said by this court in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and afterwards approved in *Smith v. White*, 32 Wash. 414, 73 Pac. 480. If it be true, therefore, that the summons in question did not disclose the date of its first publication, it was insufficient to confer jurisdiction. Immediately following the attorney's signature to the summons is the following: "Date of First Publication, October 9th, 1902." Appellants contend that the above words, not being in the body of the summons, are not contained therein within the meaning of the statute. They also argue that, since the words follow the signature of counsel, it does not appear that they were authorized by the plaintiff in the case; that they may have been placed there by the printer, or by some one else not representing the plaintiff, and by whose acts the plaintiff was not bound. The words were, however, in a conspicuous place, and where they must have been seen if the summons was read. It was the duty of the defendants in the action to presume that the correct date was stated, and to act accordingly. If it afterwards developed that the date was incorrect, the diligence of the defendants would have saved them from any prejudicial consequences. The fact that the words

followed the signature of counsel, we think, is immaterial. They conveyed as much information as if they had preceded the signature, and their location is analogous to that of the post-office address of counsel which usually follows the signature upon the summons. In *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035, it was held that section 4871, 2 Ballinger's Ann. Codes & St., which contemplates that the post-office address of the attorney shall be contained in the summons, was sufficiently complied with when such address followed the signature. It is true that section 4872 sets forth a form of summons which places the post-office address after the signature, but the section descriptive of the summons contemplates that the statement as to the post-office address shall be a part of the summons itself. The form section is a mere legislative construction of the meaning of the prior one to the effect that when the address follows the signature it is sufficiently a part of the summons, and the case cited is a judicial approval of that construction. We think the essence of that construction is applicable to the subject-matter here. The recital stating the date of the first publication was attached immediately at the conclusion of the summons. One could not, with ordinary care, have read the entire summons without seeing this recital, and we think it should be held to have been a part of the summons. Nothing short of a substantial departure from the statutory requirements for a summons should be held to be fatal to a proceeding under it, and, unless it is clear that a defendant has been prejudiced, the variation in form is not such substantial departure. *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133. To the same effect is *Ralph v. Lomer*, 3 Wash. St. 401, 28 Pac. 760. We are unable to see that the defendants in the action were prejudiced by the form of this summons. We therefore conclude that in both particulars discussed by appellants the summons was sufficient to confer jurisdiction.

Appellants further urge that, even if the court acquired jurisdiction, they are, in any event, entitled to have the judgment vacated under the provisions of section 4880, 2 Ballinger's Ann. Codes & St., inasmuch as their application was made within one year from the rendition of the judgment, accompanied with a tender of the taxes and interest. That section, however, provides that for "sufficient cause shown" one shall be entitled to such relief. In *Whitney v. Knowlton*, 74 Pac. 469, which involved a tax foreclosure, we held that one is not entitled as a mere matter of right to the vacation of the judgment, and that, in the absence of a showing of sufficient cause, the petition will not be granted. There is no such showing here. The petition does not allege that the taxes had been paid, or that by mistake, fraud, or other sufficient cause appellants have been misled to their prejudice. The petition presents a case of mere neglect to pay the taxes, which is not

a showing of sufficient cause. Respondent contends that under the provisions of subdivision 6, § 1767, 1 Ballinger's Ann. Codes & St., the appellants are in any event estopped to raise objections to the judgment. It is urged that said section is a special provision of the revenue law, and that tax foreclosure judgments are thereby excepted from the general provisions of section 4880, supra, relating to ordinary judgments. It is not necessary that we shall decide that question now, inasmuch as sufficient cause has not been shown in this case even under the terms of section 4880. When a case arises where meritorious cause is made to appear, it will then be our duty to ascertain if there is any conflict between the statutory provisions, and to construe them if such conflict is found to exist.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT, and ANDERS, JJ., concur.

#### TISCHNER v. RUTLEDGE et al.

(Supreme Court of Washington. June 30, 1904.)

LANDLORD AND TENANT—LEASES—CONSTRUCTION—JUDICIAL NOTICE—NOTICE OF APPEAL—ACCEPTANCE OF SERVICE—SIGNATURE OF DEFENDANT—APPELLATE COURTS.

1. Judicial notice will be taken of the signature of the defendant attached to an acceptance of service of notice of appeal, without proof of the genuineness thereof.

2. An appellate court will notice judicially whatever the court of original jurisdiction was bound to judicially notice.

3. Where a lease provided a rental of \$33.33 per month, payable monthly for a term terminating on April 8, 1901, "with the privilege of renewal at the same rate and terms each year thereafter from year to year," such lease did not entitle the lessee to a perpetual right of renewal, but constituted a letting from month to month after the expiration of the term specified.

Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by Robert Tischner against William Rutledge and others. From a judgment in favor of plaintiff, defendants other than H. G. Anderson appeal. Affirmed.

Thayer & Belt, for appellants. Martin & Grant, for respondent.

PER CURIAM. This is an action of unlawful detainer. The facts are not in dispute, and are substantially these: On April 9, 1900, the respondent, being the owner of a store building and the lands on which the same was situate in the city of Davenport, in this state, leased the same to the defendant Anderson at a rental of \$33.33 per month, payable monthly, for a term terminating on the 8th day of April, 1901, "with the privilege at the same rate and terms each year thereafter from year to year." Anderson held under the lease until September 30, 1902,



when he transferred his interests in the premises to the appellant William Rutledge, who in turn sublet a portion thereof to the appellant G. K. Birge. On February 23, 1903, the respondent caused notice to be served on the appellants and the defendant Anderson, notifying them that the lease would be terminated on April 8, 1903, and that they were required to quit the possession of the premises and surrender the same to the respondent on that day. In the month following the appellant William Rutledge notified the respondent that he elected to continue to hold possession of the premises under the clause of the lease above quoted, and that he would refuse to surrender possession on the date named by the respondent. Demand for possession was again made on April 8th, which being refused this action was brought under the statutes of forcible entry and detainer to recover such possession. The case was tried before the court without a jury, and resulted in findings of fact substantially as above outlined, from which the trial court concluded as a matter of law that the respondent was entitled to recover, and entered a judgment accordingly.

This appeal is taken by Rutledge and Birge, the defendant Anderson not joining therein. Anderson appeared separately and by separate counsel in the court below, and the respondent moves to dismiss the appeal, because, as he contends, the notice of appeal was not served on Anderson as required by statute. The record shows an acceptance of service of the notice over the signature of Anderson, but unaccompanied by any proofs of its genuineness. It is said that this is insufficient, because the court will not take judicial notice of the signatures of persons other than public officers or officers of the court, and that the signature of persons other than such officers must be accompanied by proofs of their genuineness. It is undoubtedly true that a court will not notice judicially the signature of a defendant unaccompanied by proofs of its genuineness, when it is sought to show thereby the service of an original process by which the defendant is brought into court (*Downs v. Board of Directors*, 4 Wash. 309, 30 Pac. 147); but this is as far as the rule extends. After a party has once appeared in an action, he may be served with all notices and motions pertaining to that proceeding, and his signature to an acceptance of service thereof is entitled to recognition by the court without other proof of its genuineness than the court requires of any fact it knows judicially. If this were not so, a party would be without power to conduct his own case. The taking of an appeal is not the commencement of a new action, nor is a notice of appeal in any sense an original process by which parties are brought into court. *Philadelphia Mtge. & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501, and cases cited. This being so, it must necessarily follow that the signature of a

party to the notice of appeal must receive the same consideration it would receive if to any other notice or paper served in the cause, not an original process. In other words, it must be noticed judicially. It is suggested, however, that while the trial court might notice judicially the signature of a party who has appeared before it, the rule is different in the appellate court. But we think not. The rule is that an appellate court will notice judicially whatever the court of original jurisdiction is bound to notice judicially; and hence, as the superior court before whom this case was pending was bound to take notice of the signature of Anderson when signed to papers in the cause before it, so must this court take notice of it in the same cause. The motion to dismiss is denied.

On the merits of the controversy the appellants contend that the lease confers upon the lessee and his assigns the right of perpetual renewal, while the respondent argues, first, that the writing does not bear that construction, and second, that, if it does, then it is void, because it creates a perpetuity. Whether or not a lease providing for perpetual renewals is valid is a question upon which the authorities are not agreed, though perhaps the weight is with the holding that such leases are valid. On principle, it would seem that, where a person has the right to convey in fee absolute his whole estate, he could convey in the same manner a part of it less than the whole. But be this as it may, the authorities are uniform on the propositions that the law does not favor perpetual leases of the character claimed for this one, and that the intention to create such a lease must be expressed in clear and unequivocal language, and not be left to mere inference. Courts will also, whenever it is possible without doing violence to the plain meaning of words, so construe the language used as to avoid a perpetuity by renewal. We think it clearly appears from the instrument in question here, when examined as a whole, that the parties did not intend to provide for perpetual renewals. With the exception of the clause above quoted, the lease contains only covenants applicable to a short fixed term. It makes no provision for waste, for repairs to, or for rebuilding in case of the destruction of the buildings on the property by fire or accidents of any kind. It provides that upon the "expiration of the time mentioned in this lease peaceable possession of said premises shall be given to said" lessor "in as good condition as they now are, the usual wear, inevitable accidents, and loss by fire excepted." It does not employ the terms "in perpetuity," "forever," or words or similar import, such as one would expect to find in instruments granting perpetual rights. Moreover, the phrase used which is thought to create the perpetual right is of itself likely to conceal its real meaning. When we speak of a thing as continuing from year to year, it

is only on second thought that we conclude it means forever. This we do not think is the direct and unequivocal language necessary to create a lease of the character contended for. We are of the opinion, therefore, that the lessee and his assigns became tenants from month to month after the expiration of the year mentioned in the lease, and that their tenancy was terminated by the notice to that effect given by the lessor.

The judgment appealed from is affirmed.

### SMITS v. HOGAN.

(Supreme Court of Washington. June 30, 1904.)

CHAMPERTY—ATTORNEY AND CLIENT—CONTINGENT FEES — CONTRACTS — STATUTES—MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE—PROOF.

1. The doctrine of champerty, in so far as it relates to the mode of compensation, between attorney and client, was repealed by 2 Ballinger's Ann. Codes & St. § 5165, declaring that "the measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties."

2. A contract between attorney and client by which the former agreed to prosecute a suit for the latter for malpractice, and pay the necessary disbursements, in consideration of one-third of the amount recovered, is valid.

3. Where plaintiff alleged that defendant, an attorney, maliciously and without reasonable or proper cause induced B. to prosecute plaintiff for malpractice as a physician and surgeon under a contract for a contingent fee, the contract not being illegal in itself, defendant was not liable, in the absence of proof of malice and want of reasonable or probable cause.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Paul Smits against John C. Hogan. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. B. Rawson and J. C. Cross, for appellant. W. H. Abel and John C. Hogan, for respondent.

HADLEY, J. Appellant brought this suit against respondent to recover alleged damages. The complaint, in substance, avers that respondent is an attorney at law; that he maliciously and without reasonable or proper cause stirred up one Erickson (the latter being insolvent and in indigent circumstances) to prosecute an action against appellant for alleged malpractice as a physician and surgeon; that the following written agreement was executed between said Erickson and respondent, to wit:

"It is hereby agreed by and between John C. Hogan and John Erickson as follows: That the said Hogan is to act as attorney for said Erickson in the matter of bringing suit against Paul Smits to recover for negligent and unskillful setting of fractured finger, and to prosecute said case to final

judgment in the superior court of Chehalis county, and pay the necessary court disbursements in prosecuting said case.

"And for said services the said Erickson agrees to give him one-third of the amount recovered in said action as full compensation. And neither of the parties hereto shall settle said case without the consent of the other."

It is alleged that the suit for malpractice was prosecuted by respondent, as attorney for said Erickson, in pursuance of the above agreement; that the same resulted in a judgment against Erickson for costs, and that he should take nothing by his action. Appellant avers damages to himself for necessary attorney's fees and expenses incurred in the former suit, and demands recovery from respondent. Issue was joined upon the complaint. A trial was had before the court, and a verdict was returned for respondent. Appellant moved for a new trial, which was denied. Judgment was entered in accordance with the verdict, and this appeal was taken.

The alleged errors assigned as stated, in the brief, are (1) "in the giving of certain instructions"; and (2) "in refusing to give certain instructions." The second ground of error, as stated above, is waived in the brief, the first only being discussed. The general and indefinite assignment as to the instructions given is of no practical assistance to the court, and we are compelled to resort to the general discussion in the brief to discover what objections are intended to be urged. From the general discussion we understand that the instructions are criticised on the theory that it was error for the court to instruct that appellant must show that respondent maliciously stirred up or incited the bringing of the former suit. We think this was not error, for the reason that the complaint alleges with much emphasis that respondent did act maliciously, and it seems to have been drawn upon the theory that the action is one for malicious prosecution. We understand from appellant's argument, however, that he contends now that, by reason of the written agreement above set forth, the action is based upon a claim of damages for champerty or maintenance. It is insisted that the agreement was champertous, and that appellant is entitled to recover, even though malice in fact is not shown. It is doubtful if the doctrine of champerty was ever in force in this state as a part of the common law, under the authority of decision by American courts. "Nor is the contract void as being contrary to the policy of any law of this state in regard to maintenance. That offense was created by statute in England in early times, in order to prevent great and powerful persons from enlisting in behalf of one party in a lawsuit, by which the opposite and feeble party would be oppressed and prevented from obtaining justice. It has been said by English judges that, under the enlightened and impartial

¶ 2. See Champerty and Maintenance, vol. 9, Cent. Dig. § 26.

administration of justice in later times, the object of the law had ceased, and the law itself had become nearly obsolete. It has been said in America that the law against maintenance was peculiar to early English society, and inapplicable to American society, and therefore that it would not exist here unless by statute enacted here. At an early day in the history of the state of New York a statute was enacted against maintenance. At the revision of the laws of that state in 1830, the revisers, in a report to the Legislature, say, 'It is proposed to abolish the law of maintenance, and to qualify that of champerty, by permitting mortgagees of lands in dispute to raise money, under guards and restrictions which will prevent abuse;' and the mode adopted to 'abolish the law of maintenance' was simply to omit enacting any statute upon the subject, and repealing the old statute by which it was created or adopted. There was no special repeal of this old statute, but it was included in the general repealing act, nor was there any law directly abolishing the offense of maintenance. Under these circumstances, Judge Paige, in the case of *Hoyt v. Thompson*, 5 N. Y. 347, said: 'Since the adoption of the Revised Statutes, maintenance has not, under our laws, been recognized as an offense, and champerty only remains an offense in a qualified form.' Chancellor Walworth, in the case of *Small v. Mott*, 22 Wend. 405, said: 'I am prepared to say that all the absurd doctrines of maintenance that grew out of the statutes which might have been necessary in a semi-barbarous age were swept away by the recent revision of the laws, and many of them had been virtually abrogated long before that time.' Chancellor Sanford, in the case of *Thalhimer v. Brinckerhoff*, 3 Cow. 647 [15 Am. Dec. 308], said: 'In many states of this Union these laws are not in force, and the want of them is said to be no inconvenience.' These remarks show that, in the opinion of these judges, in the absence of a statute creating it, the offense of maintenance does not exist in America as a part of the common law." *Mathewson v. Fitch*, 22 Cal. 86, 94, 95. In *Courtright v. Burnes* (C. C.) 13 Fed. 317-320, the court observed: "The tendency in the courts of this country is stronger in the direction of relaxing the common-law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state." See, also, *Sedgwick v. Stanton*, 14 N. Y. 289; *Richardson v. Rowland*, 40 Conn. 565; *Lytle v. State*, 17 Ark. 608. If, however, the doctrine of champerty ever was in force in this state, then, as far

as it relates to the mode of compensation between attorney and client, it must have been repealed by our statute as found in section 5165, 2 Ballinger's Ann. Codes & St., which is as follows: "The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. \* \* \*" There is nothing in the above statute which prevents the making of the contract set out above, but the parties were left to make such contract as to the compensation of the attorney, if they saw fit to do so. In Utah it has been held that a statute of practically the same words as our own quoted above has modified the common-law rule as to champertous contracts so as to leave client and attorney free to contract as they choose with reference to the attorney's compensation. *Croco v. O. S. L. R. Co.*, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285. The same has been held in Michigan. *Willey v. Crane*, 30 N. W. 327.

Under either view of the case at bar, therefore, the contract mentioned was not an illegal one, for, if the rule as to champerty ever prevailed here, it has been modified by our statute. If it should be said that the statute of 1903 (page 68, c. 58, Sess. Laws of that year) upon the subject of barratry bears upon the subject-matter of this contract, it is sufficient to say that said statute was not in force when the contract was made. The contract not being illegal in itself, it was proper for the court, under the issues, to instruct the jury that appellant should show malice and want of reasonable or probable cause before he could recover, for the reason that, with the illegality of the contract eliminated, the only remaining issue was that of malicious prosecution.

Respondent insists that, even if this contract came within the rule as to champerty, still appellant could not recover of respondent, and counsel assert in respondent's brief that they have been unable to find in the whole range of American cases a single case where an attorney has been held to respond in damages to the opposite party because of having made a champertous agreement with his client. It is true, appellant has not cited such cases, but that question we do not now decide, for the reason, as we have seen, that no champertous contract is involved.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

#### DECHENBACH v. RIMA.

(Supreme Court of Oregon. July 5, 1904.)

APPEAL—EXTENT OF RIGHT—QUESTIONS PRESENTED—FORCIBLE ENTRY—APPEAL FROM JUSTICE'S JUDGMENT.

1. B. & C. Comp. § 548, provides that any party to a judgment or decree may appeal

\* 1. See *Forcible Entry and Detainer*, vol. 23, Cent. Dig. § 168.

therefrom, and there is no exception against an appeal from a judgment rendered in a forcible entry and detainer action.

2. The question of plaintiff's right to appeal to the circuit court from a justice's judgment in a forcible entry and detainer action does not arise on an appeal by plaintiff to the Supreme Court from a judgment of the circuit court, rendered on an appeal by defendant from a judgment of a justice in forcible entry for plaintiff.

3. The question of plaintiff's right to appeal to the circuit court from a justice's judgment in forcible entry and detainer proceedings is one for the circuit court to pass upon in the first instance, so that an appeal from its decision to the Supreme Court does not present a question for a dismissal of the appeal to the Supreme Court.

**Action by J. Dechenbach against D. O. Rima.** From a judgment for defendant, plaintiff appeals. On motion to dismiss. **Denied.**

**J. N. Teal, for appellant. Edw. Mendenhall, for respondent.**

**PER CURIAM.** This case originated in the justice's court, being an action for forcible entry and detainer. The plaintiff recovered judgment in that court, and the defendant appealed to the circuit court, wherein he was successful. The plaintiff has now appealed to this court, which appeal the defendant moves to dismiss on the ground that the plaintiff is without right of appeal.

There appears to be no limitation to the right of appeal from the circuit to the Supreme Court (B. & C. Comp. § 548), and there is certainly no exception against an appeal from a judgment rendered in a forcible entry and detainer action. If it be admitted, as defendant's counsel argues, that plaintiff has no appeal in such an action from the justice's to the circuit court, a matter which we do not now decide, it cannot help the defendant here, as he himself took the case to the circuit court on his own appeal, and the question whether the plaintiff has an appeal from the justice's court has not arisen and could not have arisen from the very nature of the record, and is therefore not here for our determination. If the question had arisen, it would have been a matter for the circuit court to pass upon first, and we should have had it for review, so that in any event it would not have presented a question for dismissal of the appeal to this court. *Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

**Motion denied.**

(45 Or. 131)

**EGAN v. NORTH AMERICAN SAVINGS, LOAN & BUILDING CO. et al.**

(Supreme Court of Oregon. July 5, 1904.)

**COSTS — STATEMENT OF DISBURSEMENTS — MOTION TO STRIKE — STATUTE — CONSTRUCTION.**

1. B. & C. Comp. § 568, as amended by Laws 1903, p. 209, provides that: "No disbursements shall be allowed to any party, unless he shall serve on such adverse party or parties as are entitled to notice by law, or rule of the

court, and file with the clerk of such court within five days after the rendition of the judgment or decree, a statement, with proof of service thereof, if notice to the adverse party is required, endorsed thereon or attached. \* \* \* Such statement of disbursements may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term of the court occurring after the expiration of said five days; but in such case, such statement must be served on the adverse party or parties whether he or they shall have appeared or not." *Held*, that a statement of disbursements, if filed with the clerk within five days after the rendition of judgment or decree, was not required to be served on the adverse party, but if not filed within five days it must be so served, whether or not the adversary had appeared.

**Motion to strike out the respondent's statement of disbursements. Motion denied.**

**See 76 Pac. 774.**

**H. G. Platt, for appellant. M. G. Munly, for respondent.**

**PER CURIAM.** The respondent, who was successful in this court (*Egan v. North American Savings, Loan & Building Co.*, 76 Pac. 774), filed her statement of disbursements on May 21st, the decree having been rendered May 16th, and the appellants now move to strike it out because it was not served upon them.

The question involved depends upon a construction of section 568, B. & C. Comp., as amended by the Legislative Assembly in 1903, Laws 1903, p. 209. It now reads: "No disbursements shall be allowed to any party, unless he shall serve on such adverse party or parties as are entitled to notice by law, or rule of the court, and file with the clerk of such court within five days after the rendition of the judgment or decree, a statement, with proof of service thereof, if notice to the adverse party is required, endorsed thereon or attached. \* \* \* Such statement of disbursements may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term of court occurring after the expiration of said five days; but in such case, such statement must be served on the adverse party or parties whether he or they shall have appeared or not." It is not entirely apparent what was intended by this statute, but from a survey of it in its entirety it seems to us that it is susceptible of no other construction than that service of the statement is not required to be made upon the adverse or any party if filed within five days after the rendition of the judgment or decree. It shall be served upon such adverse party or parties as are entitled to notice by law or rule of the court. There is no law, so far as we are advised, or rule of this court, entitling any adverse party to notice of a proceeding of this nature. The term "notice" is employed merely in the abstract, and what notice is intended, whether of a motion or of appeal or otherwise, is not specified. The last clause of the above excerpt would seem to suggest that the statute has

reference to a notice of appeal, as only such party or parties as have appeared in the action or suit are entitled to such notice, and that the statement should be served upon such as have appeared. But the statute does not say so, and we are not permitted to read into it anything of the kind for the purpose of construction. The statute has used the term in a general sense, and if there was a law or rule of the court requiring notice of all papers filed, or other proceedings, to be served upon certain adverse parties, then a notice of filing such a paper as a statement of disbursements would be included, but, as it concerns this court, there is no such law or rule. So we conclude, as above suggested, that a statement of disbursements, if filed with the clerk of this court within five days after the rendition of judgment or decree, is not required to be served upon any adverse party. If not filed within five days, the statute requires its service upon the adverse party, whether he has appeared or not. The cases of *McFarlane v. McFarlane*, 43 Or. 477, 73 Pac. 203, 75 Pac. 139, and *Anderson v. Adams* (Or.) 76 Pac. 16, are not in conflict with this holding. The former decides that a statement of disbursements filed after the first day of the succeeding term of this court occurring more than five days after the rendition of the judgment or decree could not be allowed, and the latter case simply holds that a statement of costs filed after five days, without service upon the adverse party, will be stricken from the record.

The motion to strike out the statement here will therefore be denied, and it is so ordered.

#### SHERIDAN et al. v. EMPIRE CITY.

(Supreme Court of Oregon. July 5, 1904.)

**EJECTMENT—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY—MUNICIPAL CORPORATION—PLAT—RATIFICATION—ORDINANCE—EFFECT.**

1. In a suit against a city to recover possession of real estate which was claimed by the city as part of its streets, evidence examined, and held sufficient to show that plaintiffs' title had been extinguished by adverse user by the city and public as public streets for more than 10 years.

2. In a suit against a city to recover possession of real estate which was claimed by the city as part of its streets, the mere payment, without objection or protest, of taxes and assessments levied by the city thereon, is no proof of an adoption or ratification of the plat of the city with reference to which the levies and assessments were made.

3. In a suit against a city to recover possession of land claimed by the city as part of its streets, the common council of the city in re-establishing its base line by ordinance, from which to determine the correct location of streets, lots, and blocks in the city and its additions, showing the land in controversy to be within the streets of the city according to the plat thereof, does not preclude the plaintiffs, in the absence of proof of adverse user, though the ordinance was passed a sufficient length of time before suit was brought, to gain title by adverse user.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Suit by Florence Sheridan and others against Empire City. From a decree for plaintiffs, defendant appeals. Modified.

John F. Hall, for appellant. J. W. Bennett, for respondents.

**WOLVERTON, J.** The plaintiffs claim to be the owners in fee of that portion of First street in the town of Empire City, Coos county, Or., as denoted on the plat thereof filed by W. H. Harris and A. N. Foley, November 19, 1858, beginning with the southern boundary of F street, and extending southwesterly 90 feet, and also of about 14 feet in width of F street, beginning at the meander line where it crosses said street, and extending westerly along the northerly boundary of block 6, and beyond to deep water on Coos Bay. The defendant claims the property as public streets thereof, which it is alleged have been used and occupied exclusively and adversely as such for more than 40 years, and, as a further defense, it is alleged that in August, 1888, the defendant, with the knowledge and consent of plaintiffs' predecessors, adopted a plat of the town of Empire City, showing said tracts to be within the boundaries of First and F streets, and that the same was acquiesced in, adopted, and ratified by P. Flanagan, the immediate predecessor of plaintiffs. The meander line of ordinary high water, as indicated by the government survey, passes through the northeasterly corner of block 5, thence in a southerly direction across First and F streets, entering block 13 a little to the south of the northwesterly corner, and extends through lots 8, 1, and 2 thereof. Block 6 lies westerly from block 13, and wholly to the west of the meander line. On May 12, 1873, one H. P. Whitney obtained a deed from the board of commissioners for the sale of school lands for the state of Oregon to tide land fronting and abutting on lot 8, in block 13, comprising the property in dispute. The plaintiffs deraign title from Whitney, but none of the conveyances in their chain are made with reference to the town plat. On June 11, 1873, Whitney deeded lot 8, block 13, to James S. Kiley, who, with his successors in interest, has occupied it ever since. Prior to Whitney's purchase from the state, one Amos Rogers erected a building, partially if not wholly within the boundary of First street, fronting on F street and extending back some 60 feet. Kiley subsequently erected a building extending along the western boundary of lot 8, fronting also upon F street. An elevated sidewalk was maintained along F street in front of the Kiley building, thence to and in front of the Rogers building. Kiley also constructed a walk eight feet in width along the westerly side of his building, and Rogers, or Whitney, who succeeded him, constructed a walk four or five feet in width along the easterly side

of his building, and from the southerly end of the Rogers building a crosswalk was devised by placing some planks from one walk to the other. These buildings and walks were maintained continuously for many years, and until the Rogers building was destroyed by fire in 1899, thus completely obstructing First street at that point to the use of the public, except as the sidewalks designated afforded opportunity therefor. In later years the sidewalk along the Kiley building on First street has been continued southerly along the margin of the block to the Odd Fellows' building, situated on lot 1, and was being so maintained at the time of the commencement of this suit. In 1891 the common council of the town of Empire City re-established the base line along Broadway street, from which to determine the location of streets, lots, and blocks in the town and its additions, and on January 19, 1892, adopted an ordinance for the improvement of First street, from the southern line of E street to within seven feet of the southern line of F street, by constructing an elevated roadway and decking the same with planks, the cost of which improvement was assessed against the abutting property. Among others, a portion was assessed against lots 5 and 6 in block 6 to Patrick Flanagan, the ancestor of plaintiffs, and from whom they derive their title. It will be noted that these lots lie at the southwest corner of the square formed by the intersection of First and F streets, all but seven feet of the southerly portion of which was included in the improvement. This assessment was paid, whether by Patrick Flanagan or not does not appear. Lots 5, 6, 7, and 8, in block 6, have been from time to time assessed by the county to the predecessors of plaintiffs. After obtaining title from the state, H. P. Whitney constructed a driveway from First street, commencing, perhaps, within the street along the southerly side of F street, extending to deep water on the bay, where he erected a wharf. These structures have since been maintained by him and the predecessors in interest of plaintiffs. While the public have used them, they have been maintained in a private capacity and regarded as private property, with the exception of that portion thereof which lies within the square formed by the junction of First and F streets. These facts clearly appear from the testimony, and it remains to deduce the legal status of the parties litigant.

Evidently, when Harris and Foley dedicated the town of Empire City in 1858, they nor neither of them owned the tideland which is indicated as lying westerly from the meander line designated by the government survey, and could not, therefore, lawfully make dedication of any part thereof to the public. How Whitney came by lot 8 in block 13 does not appear. He probably purchased with reference to the plat, however, and this holding very likely formed the basis for his

purchase of tideland from the state, which includes the premises in dispute. But Whitney has not, nor have plaintiffs' other predecessors in interest, conveyed with reference to the plat of Empire City, or in that manner adopted, approved, or ratified it. They continuously maintained the building erected by Rogers in First street until destroyed, and the crosswalks in connection therewith, so as to exclude the public from the entire street, except upon the walk constructed by Kiley along his building, and since maintained by him and his successors in interest. As to this walk, plaintiffs' predecessors seem never to have exercised any control over it or to have claimed any right with reference to it, and as to it the use has been adverse to plaintiffs. Plaintiffs' predecessors have had and maintained a like use of the driveway along F street to the bay, exclusive of the public, except that portion thereof comprised in the crossing of First street. The improvement of the square was made by the town shortly after February, 1892, more than 10 years prior to the commencement of this suit, in which plaintiffs and their predecessors seem to have acquiesced without objection. They have not since claimed any interest in that portion of the street, or exercised private ownership thereof, while, on the contrary, it is manifest that the public have in the meantime used and occupied it adversely. With these two exceptions, plaintiffs are the owners in fee of the whole of tracts 1 and 2 as described in their complaint. But as to the exceptions, their right and title must be held to have been extinguished by adverse user by the town and the public as public streets.

It is further insisted by counsel for defendant that plaintiffs and their predecessors have ratified the dedication of the town plat, as made by Harris and Foley, by having paid the taxes levied from time to time on lots 5, 6, 7, and 8, in block 6, of the town of Empire City, so described upon the assessment roll, and the assessment for street improvements heretofore alluded to; but we do not think that such is the result or legal effect of their acts in that respect. They were not called upon to supervise or revise the acts of the officers of the county or town, if inaccurate or erroneous, and the mere payment, without objection or protest, of taxes and assessments levied and made upon realty, is an act without persuasive force as indicating an adoption or ratification of any particular plat with reference to which the levies and assessments were made.

Nor do we think that the act of the common council in re-establishing the base line by ordinance in 1891, from which to determine the correct location of streets, lots, and blocks in the city and its additions, had any tendency to preclude the plaintiffs as it relates to the dedication of said plat, for it does not appear that they have ever done anything or performed any act with reference to the

re-establishment of such base line, or to the lots and blocks as designated by the plat, from which a ratification could be inferred.

Another contention advanced by defendant's counsel is that the tideland did not extend to the meander line indicated by the government survey. But the strong weight of the testimony is against the position.

It follows from these considerations that the decree of the trial court should be modified so as further to except from plaintiffs' ownership in fee that portion of the square formed by the intersection of First and F streets included in tract No. 2 as described in the complaint, and in all other respects it should be affirmed, and such will be the decree of this court.

(45 Or. 301)

**TROTTER v. TOWN OF STAYTON.\***

(Supreme Court of Oregon. July 5, 1904.)

**ACTION TO RECOVER LAND—WITHHOLDING POSSESSION—MEASURE OF DAMAGES—EVIDENCE—ADMISSIBILITY—WITNESSES—EXCLUSION FROM COURT—PARTIES—MUNICIPAL CORPORATIONS.**

1. B. & C. Comp. § 326, permitting recovery of damages for the withholding of possession of real property, includes all damages to which the owner is entitled on account of the wrongful occupation of the property, and hence, in an action against a city for withholding possession, plaintiff was properly permitted to show that the wrongful retention prevented him from constructing a building on the property in which he intended to conduct his business.

2. Though B. & C. Comp. § 843, providing that, if either party request, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, does not authorize exclusion of a party, it was not error, in an action against a city in which the exclusion of witnesses was requested, to refuse to permit the city recorder to remain for the purpose of advising with counsel.

3. In an action against a city to recover possession of land, it was not error to exclude a decree of the circuit court, rendered in a suit in equity brought by the plaintiff against defendant to quiet his title; it appearing that an appeal had been taken and the decree reversed.

4. In an action against a city to recover possession of land, it was not error to exclude certain proceedings of the common council of the defendant, instituted for the purpose of condemning and appropriating the land for public use, where the proceedings were not consummated, and the final ordinance attempting to appropriate the property in question was not passed, until after the issues in the case at bar had been made public.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by G. D. Trotter against the town of Stayton. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover possession of a strip of land 12 inches wide off the north end, and a strip 6½ inches wide off the east side, of the north half of lots 5 and 6, in block 5, in the town of Stayton, and damages for withholding the same. In 1900 the defendant corporation caused the street lines

of the town to be surveyed by Mr. Gobalet; the survey showing the property in controversy to be in the streets. In making the survey, however, Gobalet did not follow the original field notes, or attempt to locate the street as actually established, but endeavored to straighten them, so that those in the town as first laid out and those in the subsequent additions would conform as nearly as possible. A short time after the Gobalet survey was made, the plaintiff, at the request of the town authorities, built a sidewalk in front of his property, conforming to the lines of the street as run by Gobalet. He subsequently had the county surveyor run the true lines, and moved his sidewalk out to them, inclosing his property with a fence. He then brought a suit in equity against the town to quiet his title, which was decided by the circuit court in favor of the town; but upon an appeal to this court the decree was reversed, and one entered here in favor of the plaintiff, establishing his title to the property now in controversy. Trotter v. Stayton, 41 Or. 117, 68 Pac. 3. A short time after the decree of the circuit court, and after the appeal had been taken, the town took possession of the disputed property, notified the plaintiff to remove his fence and sidewalk, and arrested and fined him for not doing so. After the decree of this court it refused to surrender possession, whereupon this action was commenced. The complaint contains the allegations usual in actions of this character, and in addition avers, in paragraph 4 thereof, in substance, that the plaintiff was at the time of the commencement of the action, and for many years prior thereto had been, engaged in a general merchandising business, occupying a rented storeroom adjacent to the property in controversy, and doing a large and prosperous business; that prior to the commencement of the action he had been notified by the owner to quit and deliver up possession of the building occupied by him, and was therefore compelled to look elsewhere for a suitable storebuilding; that he was unable to rent such a building in the town, and had intended to construct, and had actually begun the construction of, a building on his property, but was prevented from completing the same by the defendant wrongfully and unlawfully taking possession thereof; that the whole of his premises was necessary for his building, but the defendant had purposely and willfully, and with the intent to prevent him from occupying or using the same and to injure him in his business, taken possession of the strip of land in controversy and withheld it from him, and thereby prevented him from having free access to or use or occupancy of his premises; that before the commencement of the action, and for the express purpose of intimidating and preventing him from exercising and enjoying the free use and occupation of his premises, it caused him to be arrested for an alleged offense of

\* Rehearing denied October 17, 1904.

obstructing a public street; that by reason of the facts alleged the plaintiff has been deprived of the use of his premises, injured in his business, and has thereby sustained special damages in a stated sum. A motion to strike out paragraph 4 of the complaint, because it was sham, frivolous, and irrelevant, and the damages claimed were too remote to be recovered in this action, was overruled, and the defendant answered. In its answer it denied the material allegations of the complaint, except its possession of the property in controversy, setting up affirmatively: (1) An appropriation of the property by virtue of the Gobalet survey; (2) that the equity suit brought by the plaintiff against the defendant to quiet his title was still pending and a bar to the maintenance of the present action; (3) the proceedings of the common council of the defendant, initiated after the decree in equity, for the purpose of condemning and appropriating the property in controversy to the town as a public street; and (4) an estoppel or acquiescence by the plaintiff in the lines as surveyed and established by Gobalet. The reply put in issue the material allegations of the answer, and the trial resulted in a verdict and judgment in favor of the plaintiff, and defendant appeals.

Tilmon Ford and W. H. Holmes, for appellant. George G. Bingham and John A. Carson, for respondent.

BEAN, J. (after stating the facts). The motion to strike out paragraph 4 of the complaint was properly overruled. The right to recover damages for withholding the possession of real property, given by section 326, B. & C. Comp., is equivalent to the common-law action for trespass for mesne profits, and "includes all damages to which the owner is entitled on account of the wrongful occupation of the property." *Wythe v. Myers*, 3 Sawy. 595, Fed. Cas. No. 18,119. Ordinarily, the measure of damages is the fair value of the use of the premises during the occupancy of the defendant; but the plaintiff is not confined alone to such damages. He is entitled to recover all damages which he may suffer, fairly resulting from the wrong complained of, if specially pleaded. 10 Am. & Eng. Enc. Law (2d. Ed.) 547; Newell, Ejectment, pp. 607, 627; 3 Sedgwick, Damages, § 907; 3 Sutherland, Damages, §§ 993, 994; *Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104; *Dunn v. Large*, 26 Eng. Common Law, 223. At common law nominal damages only were recoverable in an action of ejectment, and a plaintiff, if he recovered more, was obliged to bring an independent action in trespass to recover mesne profits. The statute combines these two actions; but there is no reason why a plaintiff may not plead and give in evidence in an action to recover real property under the statute any damages he may have suffered, fairly result-

ing from his having been wrongfully kept out of the possession. In this, as in all cases, compensation is the measure of damages, and if a plaintiff has been unnecessarily annoyed or harassed and his business injured by the wrongful acts of a defendant in taking and retaining possession of real property, there is no reason why, in an action to recover possession thereof, he may not plead and recover such special damages. The matters set up in the fourth paragraph of the complaint, if true, entitled the plaintiff to damages in excess of the mere rental value of the property, and were, we think, proper to be pleaded in an action of this character. This conclusion disposes of the objections made by the defendant to the evidence offered and admitted tending to sustain the allegations of the complaint.

On motion of the plaintiff the court excluded all witnesses of the defendant from the courtroom, except the one under examination. The defendant's counsel requested that the recorder of the defendant municipality be exempt from the order and permitted to remain within the bar of the court for the purpose of advising with counsel during the trial. This request was denied, and the ruling is assigned as error. The statute provides that, if either party requests it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination. B. & C. Comp. § 843. This statute does not authorize the exclusion of a party (*Schneider v. Haas*, 14 Or. 174, 12 Pac. 236, 58 Am. Rep. 296); but an officer of a corporation litigant is not within that sense a party, and especially where, as in this case, no showing was made that he possessed any special information or knowledge concerning the case on trial which would render it necessary that he should remain in the courtroom to protect the interests of the defendant. Whether an officer of a corporation might not occupy such a relation toward it and the subject-matter of the litigation as to be within the spirit of the rule announced in *Schneider v. Haas*, 14 Or. 174, 12 Pac. 236, 58 Am. Rep. 296, we do not undertake to decide.

The defendant offered in evidence the decree of the circuit court, rendered in the suit in equity brought by the plaintiff against the defendant to quiet his title; but the court refused to admit it, and in this there was no error. The decree had been reversed, and a final decree rendered in this court establishing the plaintiff's title, and the rights of the parties must be ascertained from the decree on appeal, and not from that of the court below. *Gentry v. Pacific L. S. Co.* (decided June 20, 1904) 77 Pac. 115.

The remaining question discussed in the brief is based on the alleged error of the trial court in refusing to admit in testimony certain proceedings of the common council of the defendant corporation, had after the final decree in the equity suit, for the purpose



of condemning and appropriating for public use the property now in controversy. This matter is not assigned as error in the abstract, and under rule 10 of this court (9 Pac. 4v) and the decision interpreting it (Re Assignment Bank or Oregon, 32 Or. 84, 51 Pac. 87), we are probably precluded from considering it. Passing over this point, however, the record was properly excluded because the proceedings were not consummated, and the final ordinance, attempting to appropriate the property in question, was not passed by the council, until after the issues in this case had been made up, and it is not pleaded as a defense. The amended answer was filed on the 14th of October, 1902, and the reply filed on the 18th of the same month. Ordinance No. 67, "to straighten certain streets within the town of Stayton," was passed by the council about a month later, and no supplemental answer was filed setting up such proceedings as a defense.

It follows that the judgment must be affirmed, and it is so ordered.

#### MASSEY v. SELLER et al.

(Supreme Court of Oregon. July 5, 1904.)

NEGLIGENCE — DANGEROUS PREMISES — OPEN ELEVATOR SHAFT—DUTY OF OWNER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Where the owner of premises on which there is an unguarded elevator shaft invites a person to enter such premises, it is his duty to warn the other of the danger or apprise him of the unguarded shaft.

2. Where one who was in a strange building saw a dark place in a corner, and, thinking there might be a water closet there, walked into the corner without determining what was there, and was injured by falling down an open elevator shaft, he was guilty of contributory negligence, precluding recovery.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Action by P. M. Massey against M. Seller and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This action is in tort, arising on account of the alleged negligence of the defendants in maintaining an elevator or hoist in their store building for the purpose of transferring merchandise from one floor to another. It is averred that the elevator was not inclosed in a shaft, and that it had no guards, railing, gate, trapdoors, or other protection, on account of which the plaintiff, without fault on his part, was precipitated down the open space, resulting in his injury. The defendant set up contributory negligence on the part of the plaintiff. A nonsuit having been granted on motion of the defendants, plaintiff appeals.

D. R. Murphy, for appellant. R. W. Wilbur, for respondents.

WOLVERTON, J. The question presented for our consideration arises upon the non-

sult, and, to be understood, requires a statement of the facts developed by the evidence:

By agreement of the parties a map of the ground plan of the store building in which the accident occurred was considered in evidence. The building extends from Front street on the east, along Burnside street on the north, to First street on the west. The regular entrances for customers are from the east, but there is also an entrance way from the west. The main business office is situated near the center of the building, with its westerly wall approximately at the center, the entrance thereto being from Burnside street, and the manager's office set off from this in the southeast corner. West of and adjoining the business office is the shipping room, having an entrance from Burnside street, through which there appears to be a slight incline from the sidewalk. The room is approximately 16 by 28 feet, extending lengthwise with Burnside street. In the southeast corner is the shipping clerk's office, approximately 6 by 8 feet, possibly 6 by 9, situated lengthwise with the room. Next to this on the north is the elevator shaft, of about the same dimensions; the westerly end extending out even with the shipping clerk's office. This shaft appears from the map to be inclosed on the south by the office partition, on the east by the partition between the shipping room and the main business office, and on the north by a wall running up with the shaft. The latter inclosure is two feet four inches from the outside wall of the building, and extends slightly, from 8 inches to a foot, past the easterly jamb of the doorway from Burnside street. On the west there is no inclosure whatever to the shaft, the entire width being without gate or guard rails to impede entrance therein from the main floor of the shipping room. On the opposite side of the shipping room from the entrance from Burnside street is a door leading into the main westerly room of the building, which is designated as "Display Room—Tinware Dept." This door is situated 4 or 5 feet further west than the main entrance, so that one crossing from the display room to the outside entrance would pass in a diagonal direction across the shipping room, approaching the elevator shaft, but leaving it clearly to the right from the nearest point of contact.

The plaintiff was an employé of another wholesale house, and is the only witness who testified to the circumstances of the accident, which occurred about 11 o'clock in the morning. He was sent to the house of the defendants to exchange 18 or 20 cases of fruit jars. He first drove to the front of the building on Front street and entered by that way, going around to the shipping clerk's office to ascertain about the jars, but, being afraid to leave his horse standing, went out the way he came, and drove around on Burnside street, and hitched the horse to a telegraph pole. From this point his jars were

<sup>1</sup> See Negligence, vol. 37, Cent. Dig. § 65.

deposited on the outside of the shipping room, whereupon, by request of the clerk of the defendants, he entered the shipping room and assisted in loading jars from that room which were upon the opposite side of the door from the shaft upon his wagon. Finding that defendants did not have at the building a particular size of the jars that was wanted, the clerk, while with plaintiff on the outside of the shipping room upon the sidewalk, said to him that they would have to go over to Fifteenth and some other street, the name of which plaintiff did not catch, to get them, and went immediately back through the shipping room, the plaintiff following, passing into the display room or tinware department toward First street. When they had continued some little distance therein, the plaintiff, finding that the clerk was getting ahead of him or was going too fast, concluded to turn about and await his return on the outside. He testified, using his own language: "So I turned to go outside of the door, to get outside again. I came pretty near to the door, and looked in there. It was a little dark in there. I didn't find him. I thought maybe I would find a water closet in there, because I wanted to go to the closet, and I made a step or two, and I went right in the elevator." Later, he continues, relative to the same incident: "But when I got here, I seen this dark place. I had not been there. I thought it was a closet, and I had been working hard, and wanted to go to the closet, \* \* \* and I walked right into it." And, as to the condition of the room: "It seemed very dark to me. I could not say—I never noticed inside of the building enough to know—but it seemed very dark to me in there; but, to say whether there were any windows or not, I could not say. I know it seemed dark to me after coming out of the light." On cross-examination he further testified, relative to the time of turning back: "I was going outside, but I thought that I could get to the closet. Q. On your way back, how long did you stop in the shipping room? Did you stop there at all? A. No; I walked right back and went off. \* \* \* Q. Your remembrance of it is that you passed right back here? A. Yes. Q. What made you think the water closet was in that place? A. It was a dark, desolate looking place. It was a dark corner, \* \* \* and I thought from the looks of it there might be a closet there. Q. Did you pay much attention where you were going? A. I was not looking for a trapdoor to fall in, but I could see nothing. \* \* \* It looked dark. It looked just like a dark corner. Q. What attention did you pay to where you were going? A. I just looked back; simply glanced back. \* \* \* Q. Did you look carefully to see? A. No, I don't think I looked; but it was dark in there, a dark corner." He further testified that it was a bright sunny morning, that the door entering from the street was a good-

sized one, but that he did not pay any particular attention to it, because he was in a big hurry, and that he did not ask any one where to find a closet.

This comprehends the gist of the testimony, and the pivotal question in the case is whether the plaintiff has been guilty of such contributory negligence as will prevent his recovery. It may be assumed that it was the duty of the defendants to warn plaintiff of the danger or apprise him of the unguarded elevator shaft when inducing him to enter the shipping room to make the exchange or transfer of the fruit jars, that it was a duty they owed him, and that they were negligent in the nonobservance of it; but was their negligence the proximate cause of the injury, or was it the contributory negligence, if so found to be, of the plaintiff? "Although," says Mr. Justice Lord, in *Walsh v. Oregon Railway & Nav. Co.*, 10 Or. 250, 253, "the evidence may disclose the defendant to have been guilty of negligence, it will not excuse negligence or the want of proper care and precaution on the part of the plaintiff. The law will not permit a recovery where the plaintiff, by his own negligence or carelessness, has contributed to produce the injury from which he has suffered." If allowed to recover in such a case, he might, as observed by Mr. Justice Strong, in *Heil v. Glanding*, 42 Pa. 493, 82 Am. Dec. 537, "obtain from the other party compensation for his own misconduct"; and the result will be the same if such negligence or carelessness be made to appear by plaintiff's own proof, offered for the purpose of establishing defendant's culpability. *Tucker v. Northern Terminal Co.*, 41 Or. 82, 68 Pac. 426. Generally speaking, the question of what is ordinary care and what is negligence is one exclusively for the jury. It carries with it the inquiry as to what a prudent man would have done under like circumstances, and it is not for the court to teach the jury the ways of the prudent man; for the latter, in legal contemplation, are better qualified to speak and judge of that than the court. *Richmond & Danville R. Co. v. Howard*, 79 Ga. 44, 3 S. E. 426; *Killian v. Railroad Co.*, 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410.

There are three conditions which must obviously take the question of negligence, or its counterpart, contributory negligence, to the jury: (1) Where the facts which, if true, would constitute negligence are disputed; (2) where there might be a fair difference of opinion whether the inference of negligence should be drawn from undisputed facts; and (3) where both the facts and inference are legitimate subjects of controversy. *Hathaway v. East Tennessee R. Co. (C. C.)* 29 Fed. 489. When, however, the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the party whose acts are in the balance was or was not at fault, then it is for the court to say as a matter of law whether such acts constitute negligence,

or contributory negligence, as the case may be. *Beach, Cont. Neg. (2d Ed.)* §§ 446, 447; 1 *Shearman & Red. Neg. (5th Ed.)* § 56; *Walsh v. Oregon Railway & Nav. Co., supra.*

Now, to apply these principles: The acts of the plaintiff are entirely undisputed, at any rate they must be so taken and considered for the purposes of the nonsuit; for the motion operates as a demurrer to the evidence, conceding its truth, and we have but the simple question left whether there can be two inferences from the testimony for reasonable deduction. It is plain that, if plaintiff had pursued his first purpose on turning back from following the clerk and gone outside the building, there to await his return, the accident complained of would not have happened, for the elevator was entirely clear of the passageway from the inner door of the shipping room to the outer door. If blinded somewhat, as he says he was, by coming from the bright sunlight into the building, that could not have stood in his way or confused him in the least, as he was going toward the light admitted into the room by the door through which he was intending to pass out, and a direct course would have taken him to the outside safely. But in approaching the outer door he observed "this dark place," as he terms it, and, wanting to find a water closet, walked right into the shaft, without knowledge of its existence. He says: "It was a dark, desolate looking place. It was a dark corner, and I went back once before to just about such a place and found a water closet, \* \* \* and I thought from the looks of it there might be a closet there. \* \* \* I was not looking for a trapdoor to fall in, but I could see nothing." Now, if it was so dark in there that he could "see nothing," it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for the jury to determine, and the trial court very properly declared the result as a matter of law.

In *Johnson v. Ramberg*, 49 Minn. 341, 51 N. W. 1043, contributory negligence was imputed to plaintiff for not having looked where he was going in the light. Having entered a warehouse in which he had never been before, and meeting the defendant, he turned aside for him to pass, and in doing so stepped off the head of a pair of stairs. It was held that the bare statement of the facts, together with the admission of the plaintiff that he could have seen the stairway if he had looked, and did not look, was proof inhibitory of his recovery. It was there observed, that, "while the plaintiff was permitted to pass through the wareroom into the store, he could not but

know from the surroundings that the place was not a passageway merely, but that it was also largely, if not principally, devoted to the private uses of the proprietor connected with his business; and the plaintiff was not justified, either in closing his eyes as he went through, or in neglecting to observe where he went. He was not justified in assuming that the place was so free from obstacles and from the ordinary conveniences for business that he could move anywhere without paying any attention to the surroundings." In *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308, 15 Am. St. Rep. 370, the plaintiff attempted to enter a building by a way with which he was not familiar. To illustrate the condition, we quote from his testimony. He says: "I saw a little light shining through here, ahead of me, just a dim light, and I walked up here, saw this light, took it to be an opening between the door, between the two sections, the middle and the north sections. I turned to my right, and, as I supposed, was going through into this department through a door, and I stepped into a hole." The court, in deciding that the case should not have been left to the jury on account of the contributory negligence of the plaintiff, says, among other things: "It was his business, if he found it [the room] obscure, to wait until his eyes got accustomed to the light before moving round at haphazard, without using any care whatever to know where he was going. No one has any right to endanger himself, or to disturb other people's arrangements, by moving round in the dark—if it is dark—in a strange room, into which he has entered of his own accord and without direction." And in *Hutchins v. Priestly, El. W. & S. Co.*, 61 Mich. 252, 28 N. W. 85, it was held that it was contributory negligence as a matter of law for a person to attempt to pass heedlessly through an elevator shaft, supposing it to be a doorway. The principle is further illustrated by the case of *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580.

There is a distinction to be observed, we are aware, between the rights and responsibilities of a person who is a mere licensee, and one who comes upon premises or into a building of another through invitation or inducement of the owner, express or implied. The former takes the premises as he finds them, but the latter is entitled to the observance of due care and considerate precaution on the part of the owner for his safety and protection against accident. *Indiana, etc., Ry. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Faris v. Hoberg (Ind. Sup.)* 33 N. E. 1028, 39 Am. St. Rep. 261. But, having fully in mind this reasonable distinction, we are nevertheless of the opinion that the plaintiff was guilty of contributory negligence. He was in the room by express invitation, it is true; but the purpose for which he had been invited in there had been subverted, and he was not about the business that called him in at the time he was injured. We place no

stress on this fact, however, and it may be conceded that he was still in the shipping room by invitation. However, by his own statement, and it is all there is in the case upon the subject, he passed back into the shipping room from the display room with the express purpose of passing through it to the outside. If he had continued in his course, he would have passed out with perfect safety; but, desiring to get to a closet, he precipitately changed his purpose, and, noticing a dark corner, where he could see nothing, as he says, walked right into the elevator shaft without heeding his way, and the result was the injury of which he complains. He could not have been injured if he had paid the slightest attention to where he was going, or if he had not bolted headlong into the dark corner. He made no inquiry touching the object of his quest, and was heedless in proceeding in the dark without observing where he was going.

From this plain state of the facts, about which there can be no cavil, we are firmly impressed that the plaintiff's acts constitute contributory negligence as a matter of law, and he cannot for that reason maintain the action. The judgment of the trial court will therefore be affirmed.

**BAINES v. COOS BAY, R. & E. R. & NAV. CO. et al.**

(Supreme Court of Oregon. July 5, 1904.)

**RAILROADS—NOTES—POWER OF GENERAL MANAGER—KNOWLEDGE OF PAYEE—PRESUMPTION—JURY QUESTION—PLEADINGS—AMENDMENT—DISCRETION OF TRIAL COURT.**

1. Where a director of a railroad company, who is also an officer thereof, procures from its general manager as such the execution and delivery of promissory notes of the company to the director himself as payee, which the general manager has no express authority to execute, the payee is presumed to know the measure of power delegated to the general manager, so that no apparent holding out of the general manager can be invoked in behalf of the payee.

2. In an action on notes of a railroad company executed by the general manager to secure the discharge of a lien on the company's property which was a pressing demand, whether the general manager had implied power to execute the notes held under the evidence to be a question for the jury.

3. The privilege of amending pleadings is a matter within the sound discretion of the trial court.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by W. E. Baines against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and another. From a judgment for defendants, plaintiff appeals. Reversed.

For former opinion, see 68 Pac. 397.

J. W. Bennett and T. S. Minot, for appellant. J. Couch Flanders, for respondents.

**MOORE, C. J.** This is a second appeal by the plaintiff from a judgment rendered against him for costs and disbursements upon a verdict returned in pursuance of instructions. The question involved is whether the testimony taken at the trial was sufficient to be submitted to the jury as tending to show that the general manager of a railroad company possessed implied power to execute on its behalf promissory notes evidencing debts claimed to have been incurred by it in the legitimate exercise of its business; and the chief error relied upon is the action of the court in charging the jury to find for the defendant.

The bill of exceptions contains all the evidence from which it appears that the defendant is a corporation existing under the laws of this state, and organized to construct, maintain, and operate a railroad from Marshfield to Roseburg; that one R. A. Graham was its promoter and the subscriber for all its capital stock, though each director was the nominal holder of enough thereof to qualify him for office. At the first meeting of the board of directors, held August 19, 1890, the following, among other resolutions, was adopted: "That there shall also be elected a general manager, whose authority shall be to have the general management of the business of the company." And in pursuance thereof Graham was chosen to that position. The plaintiff, W. E. Baines, was a director, and also secretary and treasurer, of the corporation; but his duties as such were only nominal. Graham having entered into a contract with the corporation to build its road, plaintiff was employed to secure rights of way, and also performed other duties from the time of the organization of the company until March 5, 1894, when he was discharged by Graham. He thereupon filed in the office of the county clerk of Coos county his notice of lien on the roadbed, structure, etc., to secure the sum of \$12,750, and on April 18, 1894, the corporation being without funds, its general manager, in settlement of plaintiff's claim, executed to him on its behalf two promissory notes, each for the sum of \$4,000, payable in 12 and 18 months, respectively, with interest at the rate of 7 per cent. per annum. The notes not having been fully paid this action was instituted April 25, 1900, and at the former trial it was held that the testimony, though controverted, was sufficient to be submitted to the jury as tending to show that the corporation was indebted to plaintiff (Baines v. Coos Bay, etc., R. Co., 41 Or. 135, 68 Pac. 397); and the conclusion then reached has not been changed by the evidence given at the subsequent trial, from which the jury might reasonably have inferred that a consideration existed for the execution of the notes.

Graham had no express authority to execute negotiable instruments on behalf of the corporation, and, the plaintiff having been a director and an officer thereof, and

presumed to know the measure of power delegated, no apparent holding out of the general manager can be invoked in his behalf; and it remains to be seen whether the testimony indicates that Graham possessed implied authority to evidence the indebtedness of his principal by executing the notes in question. The rule is general that no managing agent of a corporation, except the cashier of a bank, possesses implied power to bind it by issuing, accepting, or indorsing on its behalf negotiable instruments. 10 Cyc. 929; 3 Clark & Marshall, Private Corp. § 700; 2 Cook, Corp. (5th Ed.) § 719; McCullough v. Moss, 5 Denio, 567; Culver v. Leovy, 19 La. Ann. 202; New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Helena Nat. Bank v. Rocky Mt. Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628; Sanford Cattle Co. v. Williams (Colo. App.) 71 Pac. 889. This is so because such paper, in the hands of an innocent holder, is subject practically to no defense, and to protect corporations from the fraud of their agents, for through them alone can they act, the law requires that such an agent must possess express authority before he can bind his principal by putting in circulation negotiable instruments. Elwell v. Puget Sound, etc., Co., 7 Wash. 487, 35 Pac. 376. Where, however, the exigency of a creditor's demand against a corporation, incurred in the legitimate exercise of its business, necessitates a speedy settlement, it has been held that its general manager, for lack of funds, possesses implied power to evidence the debt by executing on its behalf a promissory note therefor.

Thus, in *Bates v. Kieth Iron Co.*, 7 Metc. 224, the defendant's agent was authorized by one of its by-laws "to manage the affairs of the corporation committed to his care, according to the best of his ability, and at all times exercise the powers committed to him according to his discretion, and promptly to collect all assessments or other sums that shall become due to the corporation, and disburse them according to the order of the board of directors, saving that the board of directors shall be a board of control over him, and whenever they shall give him special instructions he shall be bound strictly to adhere to them." The defendant being indebted to an employé and not having the money with which to pay him, its managing agent gave him its promissory note, and in an action to recover the sum due thereon it was held that, if the board of directors did not interfere to control the agent's proceedings, he had authority to employ workmen and carry on the business of the corporation, and to pay them its funds therefor, and for want thereof to give its notes in payment. In *Castle v. Belfast Foundry Co.*, 72 Me. 167, the directors of the defendant corporation, at a meeting of the board, voted "that the president have full power and control of all the business of the company"; and in pursuance thereof such agent bor-

rowed money with which to purchase materials to be used in conducting the business of the corporation, and, having given its promissory notes therefor, it was held that he had sufficient authority to evidence the debt in that manner. In *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608, it was held that when an officer of a construction company had full control of the building of a railroad, and was charged with the general management of the business of the corporation, promissory notes given by him, in the absence of contrary instructions by the directors, for moneys used to pay off indebtedness of the company arising in the construction of a railroad, could not be considered as in excess of his powers. As illustrating the implied power possessed by a subordinate agent, in the absence of his superior, to bind his principal by contracts entered into on its behalf in cases of urgent necessity, see *Holt v. Cumming*, 48 Am. Rep. 199; *Terre Haute, etc., R. Co. v. McMurry*, 49 Am. Rep. 752; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052. So, too, where the general manager of a corporation owns practically all its capital stock, and "is virtually the corporation itself" (*Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458), the validity of promissory notes executed by him on its behalf to evidence bona fide corporate debts has been upheld (*Castle v. Belfast Foundry Co.*, 72 Me. 167; *First Nat. Bank of Halley v. G. V. B. Mining Co.* [C. C.] 89 Fed. 439). Thus, in *Africa v. Duluth, etc., Co.*, 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424, it was held that the president and general manager of a corporation, who possessed and exercised with its assent general and unrestricted charge and control of the management of its affairs, and who was the sole stockholder thereof, had implied authority to borrow money to pay and discharge maturing debts and obligations of the corporation, and to make and deliver for that purpose its promissory notes.

It will be remembered that, the defendant herein being without funds, Graham, as its general manager, executed to plaintiff its promissory notes to secure a discharge of the lien, which was evidently a pressing demand. As a speedy settlement of the claim became necessary to maintain the credit of the defendant, that it might continue the building of the railroad, we think the court could not say, as a matter of law, in view of the necessity adverted to, that Graham was without implied power to make the notes in question. The general manager of a corporation should not, except in cases of extreme necessity, be permitted to issue negotiable instruments without express authority, even to evidence bona fide debts contracted by it in the legitimate exercise of its business; for, if he were invested with implied power in all cases, he might, by issuing promissory

notes, impose upon the corporation excessive burdens and prevent an inquiry by the stockholders into the reasonableness of the creditor's claim thus approved by him. Where, however, the general manager of a corporation is practically the owner of all its capital stock, self-interest must necessarily prompt him to protect the rights of his principal in approving claims against it, in which case no valid reason can well be assigned why power to issue negotiable instruments to evidence debts incurred in the legitimate prosecution of the business of the corporation should not be implied. In the case at bar Graham was the subscriber for all the capital stock of the defendant corporation, and, though he had hypothecated a part of his stock, he was legally the owner thereof, and as such might have possessed implied power to make the notes sued upon, and, in our opinion, the testimony was sufficient to be submitted to the jury on that question.

The plaintiff's counsel contend that the court erred in permitting the defendant, over their objection and exception, to file a third amended answer, alleging a want of authority on the part of the general manager to execute the notes. The privilege of amending pleadings is a matter within the sound discretion of the trial court, and, as no abuse thereof is manifest herein, its action will not be disturbed.

For the error committed in charging the jury to find for the defendant, the judgment is reversed, and a new trial ordered.

MABB et al. v. STEWART et al. (L. A. 1,200.)  
(Supreme Court of California. June 7, 1904.)

REMITTITUR — FILING — PRESUMPTION — MEMORANDUM OF COSTS.

1. Under St. 1895, p. 269, c. 207, and Code Civ. Proc. § 1963, subds. 15 and 17, providing that it will be presumed that official duty has been performed, and that a judicial record, when not conclusive, still correctly determines or sets forth the rights of the parties, it will be presumed that failure to file the remittitur for four months after it was sent down was because the fee for filing had not been paid or tendered, or for some other sufficient reason.

2. A memorandum of costs filed three days after the filing of the remittitur is filed in due time.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by J. W. Mabb and others against Lyman Stewart and others. On appeal there was a decision for defendants, and, from an order allowing them to file a memorandum of their costs on appeal, plaintiffs appeal. Affirmed.

Cramer B. Morris and J. L. Murphey, for appellants. Otis & Gregg (Howard Surr, of counsel), for respondents.

SMITH, C. The parties here are the same as in the case of the same title heretofore de-

cided by this court (133 Cal. 556, 65 Pac. 1085), and the appeal is from an order of the lower court, of date January 6, 1902, allowing the defendants to file a memorandum of their costs on appeal.

The case is: The decision of this court, which was for the defendants, was rendered August 7, 1901. The remittitur was issued September 7, 1901, and received by the clerk of the lower court September 9th of the same year, but was not filed by the clerk until January 3, 1902. The reason of the clerk's delay in filing does not appear, but, in support of the correctness of the record and of the regularity of the officer's proceeding, it will be presumed it was because the fee for filing had not been paid or tendered, or that there was some other sufficient cause (St. 1895, p. 269, c. 207; Code Civ. Proc. § 1963, subds. 15, 17): for otherwise it would have been the duty of the court, on proper motion, to have ordered the filing to be corrected so as to show the right date. The order appealed from (after some further proceedings, that need not be particularized) was made January 6, 1902, and the memorandum of costs therein referred to was presumably filed on the same day—that is to say, three days after the filing of the remittitur. The memorandum was therefore filed in due time. It might have been filed without any order of the court, but it was within the power of the court to make the order, and, in view of the misunderstanding of the parties as to the defendants' rights, such action was not inappropriate.

Under this view of the case, the facts shown in the bill of exceptions, other than those above stated, and the various points made by the appellants' counsel, become immaterial, and need not be stated or considered.

We advise that the order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

In re SUTRO'S ESTATE. (S. F. No. 3,844.)

SCHUCKING v. MERRITT et al.

(Supreme Court of California. June 9, 1904.)

ADMINISTRATION—CLAIMANT—SETTLEMENT OF RIGHTS—PETITION—SUFFICIENCY—JURISDICTION—NOTICE—DEFAULT.

1. Code Civ. Proc. § 1664, provides that on the filing of a petition to ascertain the interest of persons in an estate being administered the court shall direct service of notice to all persons interested to appear at a certain time and place, and shall also make an order "establishing proof of the service of said notice," and after expiration of the time limited for appearance shall "enter an order adjudging the default of all persons for not appearing who shall not have appeared as aforesaid." *Held*, that an order so adjudging default, but adding

that it was without prejudice to the rights of persons who had petitions for distribution therein, did not, by such additional matter, deprive the court of jurisdiction.

2. Such section also provides that "at any time within 20 days after the date of the order or decree of the court establishing proof of the service of said notice any of said persons so appearing may file his complaint." Upon proof of the service of the notice to the satisfaction of the court, "the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in the property of said deceased." *Held*, that the requirement as to filing of complaint was directory only, and failure to file within time did not deprive the court of jurisdiction.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Theodore Schucking in the settlement of the estate of Adolph Sutro, deceased, against Emma L. Merritt, Kate Nussbaum, and others. From the judgment said Nussbaum and others appeal. Reversed.

Thomas & Gerstle, Campbell, Metson & Campbell, Morrison & Cope, and Bradley & McKinstry, for appellants. Bishop, Wheeler & Hoefler and Garret W. McEnerney, for respondents.

McFARLAND, J. During the administration of the estate of Adolph Sutro, deceased, and one year after the issuance of letters testamentary therein, Theodore Schucking filed a petition, under section 1664 of the Code of Civil Procedure, praying the court to ascertain and declare the rights of all parties to said estate, etc. The court made an order directing service of notice to all persons interested to appear at a named time and place, in terms as provided in said section of the Code; and on November 6, 1902, an order or decree of the court was made and filed "establishing proof of the service of said notice," as provided by the section. Up to this point in the proceeding the provisions of the section were, beyond question, fully complied with. The section, however, provides that "after the expiration of the time limited for appearing" the court shall "enter an order adjudging the default of all persons for not appearing, who shall not have appeared as aforesaid"; and an order of that character was made on November 17, 1902, the sufficiency of which is disputed. On November 28, 1902, which was just 22 days after the order establishing service of notice, Theodore Schucking filed a "complaint." To this complaint Kate Nussbaum and six other persons, who are "respondents" herein, filed a demurrer, which was overruled, and thereafter they filed an answer setting up their claims to heirship and distribution. They also stipulated that the proceeding should be tried on October 14, 1903, but upon the case being called on that day respondents moved the court to dismiss the proceedings for want of jurisdiction. This motion was based on two grounds: (1) That the decree establishing default, above refer-

red to, was void for the reasons hereinafter noticed; and (2) because the complaint of Schucking was filed more than 20 days after the decree establishing proof of service of notice. The court granted the motion on said grounds, and made an order that the proceedings "be, and the same are hereby, dismissed for want of jurisdiction, and said court refuses to proceed with the trial of said action." From this order dismissing the proceeding for want of jurisdiction the plaintiffs Schucking and about 200 other persons, who had appeared and are defendants, appeal.

1. We do not think that the first point needs much consideration. By the decree in question establishing defaults it is first declared that "all persons" who "have not appeared as aforesaid, and each of them, are hereby ordered, adjudged, and decreed to be in default for not appearing as aforesaid," etc. This decree is so far a full compliance with the provision of section 1664 on that subject, but it is contended that the decree is rendered nugatory because the court added to it the following: "This order, however, shall be without prejudice to the rights of such persons who have heretofore filed petitions for distribution herein, provided such petitions are now pending and undisposed of, and the rights of such petitioners may be determined in such proceedings for distribution, but not otherwise." (There were four petitions for distribution.) This contention is not maintainable. If it could be taken as touching the matter of jurisdiction, still the order was not, as contended by respondents, an order adjudging the default of all persons except those who had filed petitions for distribution. It adjudged the default of "all persons," and such decree of default was not set aside or affected by the last clause above quoted, which at best was a mere expression of the opinion of the court that, notwithstanding the defaults, a person having filed a petition for distribution was not precluded from pressing such petition to a final hearing—a view which is, perhaps, sanctioned by the cases of *In re Oxart*, 78 Cal. 109, 20 Pac. 367, and *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12.

2. We do not think that the failure of appellant to file the complaint until after the expiration of 20 days from the decree of service of notice touched the matter of jurisdiction, and therefore we need not consider appellants' contention that respondents waived the point by appearing generally by demurrer and answer. Any one of the persons named in the petition may file a complaint, although the section evidently does not contemplate that there should be numerous complaints; and the persons other than the petitioner may naturally assume that the latter, who has inaugurated the proceeding, will proceed by making himself plaintiff. But, under the contention here made, those other persons, no matter how willing and anxious

they might be to have their rights established in the proceedings, might entirely lose the remedy if they should rely on the petitioner, or some other person, filing the complaint within the 20 days. Each of such persons—about 200 in the case at bar—in order to be safe, would have to file a complaint within the 20 days, which would lead to a confusion not contemplated by the Code. Such a result could hardly have been intended by the Legislature. However, other parts of the section clearly settle the question of jurisdiction here made adversely to the contention of respondents. The provision of section 1664 as to the filing of the complaint is simply that “at any time within twenty days after the date of the order or decree of the court establishing proof of the service of said notice, any of said persons so appearing may file his complaint”; but no penalty is imposed for a failure to file the pleading within the time, and there are no negative words of limitation as to such time. And in a previous part of the section it is expressly provided that upon proof of the service of the notice to the satisfaction of the court “the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased.” Jurisdiction having thus attached, the provisions as to the time of future steps in the proceeding are merely directory, are not to be considered as conditions precedent, and are not of the essence of the proceeding. In *Potter's Dwarrior on Statutes and Constitutions*, p. 222, it is said: “The provisions of a law fixing the time for intermediate steps after jurisdiction has once been acquired, are to be deemed directory, and a disregard of them does not avoid the proceedings;” and at page 226 as follows: “And in general it may be laid down as a rule that, when a statute directs certain proceedings to be done in a certain way, or at a certain time, and the form or period does not appear essential to the judicial mind, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being the essence of the thing required to be done.” And these expressions seem to state the law correctly as established by the adjudicated cases, many of which are cited by the author. See, also, cases cited in 17th American & English Ency. of Law under note 7 on page 1069. The cases cited by respondents are not in conflict with these views. In *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206, it was very properly held that jurisdiction under section 1664 was never acquired by the superior court, because the petition was filed within less than four months after the issu-

ance of the letters of administration, whereas no proceeding under the section can be inaugurated, and of course, no jurisdiction acquired, until the expiration of one year after the issuance of letters. What was said in the opinion about probate proceedings being “statutory” was, of course, correct, and was naturally preliminary to the conclusion that there could be no jurisdiction of a “petition” under section 1664 until after the expiration of the year. In the case at bar jurisdiction was clearly acquired, and the contention is that the court was ousted of such jurisdiction by the failure of the appellant to strictly comply with the provision, which, as before stated, is merely directory. The other cases cited—*In re Burton*, 93 Cal. 459, 29 Pac. 36; *In re Blythe*, 110 Cal. 226, 42 Pac. 641; *Estate of Joseph*, 118 Cal. 663, 50 Pac. 768; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; and *E. Tenn. R. R. Co. v. S. T. Co.*, 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746—are not in conflict with the views and authorities above stated and referred to. And when jurisdiction has been acquired the rule applies, though the action or proceeding in question be statutory or in rem. Indeed, most of the cases on the subject deal with special statutory actions. Even as to courts of special or inferior jurisdiction, the law as established by the authorities is correctly stated in 17th Am. & Eng. Ency. of Law, p. 1083, to be that, “whenever the jurisdiction has once vested as to the subject-matter, the rules which govern its exercise as to the person with respect to process, evidence, etc., are generally the same as those applicable to courts of general jurisdiction.” See *Cason v. Cason*, 31 Miss. 578; *Davis v. Smith*, 58 N. H. 17; *Matter of the Empire City Bank*, 18 N. Y. 199; *Matter of Clark*, 168 N. Y. 427, 61 N. E. 769; *In re Hennessy*, 164 N. Y. 393, 58 N. E. 446.

It is to be noticed that the order of dismissal in the case at bar was based entirely upon the supposed want of jurisdiction, and its affirmance is sought upon that ground alone. If the 20 days and a reasonable time thereafter should expire without a complaint having been filed by the petitioner or by any other person, it would, perhaps, be the duty of the court to dismiss the proceeding for want of prosecution, and, as the settlement of an estate is involved, a comparatively short delay should, perhaps, be considered unreasonable; but such considerations are not here involved.

The order appealed from is reversed, with directions to the court below to proceed with the trial of the action.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.



143 Cal. 301

DOVER v. PITTSBURG OIL CO. et al. (L. A. 1,240.)

(Supreme Court of California. June 9, 1904.)

OSTENSIBLE AGENCY—AUTHORITY OF AGENT—RATIFICATION—ESTOPPEL.

1. Certain certificates of stock owned by plaintiff were indorsed in blank without his knowledge by his brother in plaintiff's name, and hypothecated to secure a debt of the brother. Plaintiff, being informed by the secretary of the corporation, said it was all right. The pledgeholder, by direction of the brother, sold the stock to a bona fide purchaser to satisfy the debt. Code Civ. Proc. § 1962, subd. 3, provides that, whenever a party has by his own declaration intentionally led another to believe a thing true and to act on such belief, he cannot, in any litigation arising out of such declaration, be permitted to falsify it. Civ. Code, §§ 2307, 2317, 3515, 3519, define ostensible agency and authority, provide that a principal is bound by the acts of an ostensible agent, and declare that he who can and does not prevent an act is not injured by it; that he who can and does not forbid that which is done in his behalf is deemed to have bidden it; and that, where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. *Held*, that plaintiff could not, as against the innocent purchaser, dispute his brother's authority to transfer the stock.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. M. Dover against the Pittsburg Oil Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Ahern, Geo. Flournoy, Jr., and A. I. McCormick, for appellant. J. W. Wiley, for respondents.

VAN DYKE, J. This is an action in equity brought by the plaintiff, claiming to be the owner of 2,920 shares of the capital stock of the defendant the Pittsburg Oil Company, a corporation, and to compel said corporation to recognize the plaintiff as such owner and holder of said stock, and to place his name upon the stockbooks of said corporation as the owner of the same, and to issue to him new certificates therefor, and to have the court declare the defendant E. A. Baer not the owner of said stock, nor of the certificates representing the said stock, and to have the court compel said defendant Baer to surrender up and cancel the certificates he holds representing said stock.

The court below found the facts of the case to be that prior to August 1, 1900, plaintiff was the owner of stock in the defendant corporation to the amount of 2,920 shares, of the par value of \$1 per share, which stock was evidenced by 2 certificates issued by said corporation, one for 2,800 shares and the other for 120 shares. That on or about August 1, 1900, and while said plaintiff was the owner of said stock, Jesse B. Dover, a brother of plaintiff, took possession of said certificates of stock, and, without knowledge of plaintiff, hypothecated the same to one J. C. Shiffer to secure the payment of \$75, and that at the time of hypothecating the same, and in

the presence of J. W. Wiley, secretary of the defendant corporation, indorsed said stock in blank, "J. M. Dover, by Jesse B. Dover," and delivered the same so indorsed to said Shiffer. That on or about the 12th day of August, 1900, plaintiff was informed of said hypothecation and indorsement by said Jesse B. Dover, and stated to said Jesse B. Dover that it (the indorsement and hypothecation of said stock) was all right. That at the time of the hypothecation said J. W. Wiley, the secretary of the defendant corporation, had personal knowledge of the indorsement of said certificates made as aforesaid, and as soon thereafter as possible informed the plaintiff that said certificates had been indorsed by his brother, Jesse B. Dover. That plaintiff then and there stated to said secretary that the said indorsement was all right. That soon after receiving said stock for security for the \$75, as aforesaid, said Shiffer, in the presence and with the consent of Jesse B. Dover, placed the same in the hands of one J. H. Moss, as pledgeholder, who held the same in his possession until a short time prior to the 20th of November, 1900. That said Jesse B. Dover instructed said Moss to sell the said stock and pay said debt of \$75, and the balance, if any, to be returned to him, Jesse B. Dover. That a short time prior to the 20th of November, 1900, said Moss sold said stock, and delivered said certificates, indorsed as aforesaid, to W. D. Young, a broker, who, on the 20th of November, 1900, for a valuable consideration, again sold the same, and delivered the said certificates therefor, indorsed as aforesaid, to the defendant E. A. Baer. That on November 20, 1900, the defendant the Pittsburg Oil Company, by its secretary, transferred said stock on the books of said corporation to the said defendant Baer, and issued new certificates therefor to and in the name of said defendant Baer, and thereupon said defendant Baer surrendered said old certificates, indorsed as aforesaid, to said corporation defendant, and said corporation still holds the same as surrendered. That, on transferring said stock to said defendant Baer, the said secretary of defendant corporation relied upon the statement made to him by plaintiff that said indorsement was all right. That plaintiff never made any objection or protest against the indorsement of said stock, as aforesaid, until after the same had been transferred on the books of said corporation defendant. That said plaintiff never made objection, revocation, or disavowal of said indorsement, or any other of the acts of said Jesse B. Dover relating to said stock, until after the same had been transferred by said corporation to the defendant E. A. Baer as aforesaid. That said defendant Baer bought said stock and the whole thereof in the usual course of business for a valuable consideration, and without any notice or knowledge that the same was not a bona fide indorsement. That said defendant Baer had, prior

to the commencement of this action, sold said stock in the usual course of business and for a valuable consideration, and was not, and is not now at the commencement of said action, the owner of said stock or any part thereof. As a conclusion of law from the foregoing, the court finds that said plaintiff, J. M. Dover, ratified the indorsement and hypothecation of said stock by Jesse B. Dover, and that he was not, on the 20th of November, 1900, nor has not since been, the owner of said stock nor any part thereof; and accordingly judgment was rendered in favor of the defendants, from which, and an order denying plaintiff's motion for a new trial, the appeal is taken.

From the findings, which are supported by the evidence, it follows that Jesse B. Dover was the ostensible agent of his brother, the plaintiff, in the transaction in question, and that the acts of said ostensible agent were also ratified by the plaintiff, and he is therefore estopped from maintaining this action for the recovery of the stock in question. This result is founded upon general elementary rules, as announced many times and in various ways in our Codes. It is made a conclusive presumption "whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. § 1962, subd. 3. Under the title on "Agency" in the Civil Code it is said: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civ. Code, § 2300. Again, "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification." Id. § 2307. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Id. § 2317. "A principal is bound by acts of his agent, under a merely ostensible authority to those persons only who have in good faith, and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof." Id. § 2334. And under the maxims of jurisprudence it is said: "He who consents to an act is not wronged by it." Id. § 3515. "He who can and does not forbid that which is done on his behalf is deemed to have bidden it." Id. § 3519. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer." Id. § 3543.

When plaintiff was informed by the secretary of the corporation that the stock had been indorsed by his brother, it was his duty to have spoken then, and his continued silence from that time until four months thereafter binds him. By the rules and usages of boards of trade and customs of commercial

transactions, certificates of stock in a corporation, when indorsed, pass the title to the holder. These certificates were indorsed in blank by Jesse B. Dover in the name of the true owner, J. M. Dover, the plaintiff, and, when the secretary of the corporation informed the plaintiff that the certificates had been so indorsed by his brother, he was then charged with full notice of all that might result from such certificates being recognized in the open market or by the corporation as being indorsed by him. When a certificate of stock has been indorsed in blank, the possession of the certificate gives the holder thereof all the indicia of absolute ownership, and the plaintiff in this case, when informed of the indorsement by his brother, was charged with full knowledge of this. *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665; *Spreckels v. Nevada Bank*, 113 Cal. 278, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. In *Woodsum v. Cole*, 69 Cal. 142, 10 Pac. 331, it is said: "Where the true owner holds out another or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." To the same effect, see *Carpy v. Dowdell*, 115 Cal. 687, 47 Pac. 695, where many authorities are cited in support of this doctrine; and in *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618, the United States Supreme Court states the principle as follows: "The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." But where, as in this case, the Code provisions are plain and unequivocal upon the point in controversy, it is hardly necessary to cite adjudicated cases to support the same, as the statute law must control, whether such cases are in harmony therewith or otherwise.

As already stated, the evidence sufficiently supports the findings, and the findings cover all the material issues in the case, and fully support the judgment. The court did not err in overruling plaintiff's objection to certain questions and admitting said evidence. The plaintiff's motion for a new trial was properly denied.

Judgment and order appealed from affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

148 Cal. 493

In re MORE'S ESTATE. (S. F. 3,647.)  
(Supreme Court of California. June 9, 1904.)

APPEAL—ENTRY OF DECREE—PREMATURE APPEAL—DISMISSAL—ESTOPPEL.

1. Under Code Civ. Proc. § 939, providing that an appeal may be taken from a judgment within a certain number of days after its entry, an appeal confers no jurisdiction on the appellate court, where notice of the appeal is given prior to the entry of the judgment.

2. The fact that one objecting to a decree of distribution of the estate of a decedent, in so doing, employed the word "entered" relative to the decree, was not, on appeal, record evidence that the decree was in fact entered when the objection was made.

3. The fact that the bill of exceptions of one appealing from a decree of distribution of the estate of a decedent employed the word "entered," in referring to the decree, was no evidence, on appeal, that the judgment had been entered before the making up of the bill.

4. Code Civ. Proc. § 283, declares that a stipulation is an agreement of the attorney, entered into for the purpose of binding his clients, so far as he may do so. *Held*, that the fact that a notice of appeal from a judgment recited that the appeal was from a judgment "made and entered on or about May 21, 1901," and the fact that the attorney for the appellee acknowledged service of notice of appeal from a judgment "made and entered on or about May 21, 1901," did not amount to a stipulation that the judgment was in fact entered May 21, 1901.

5. On an issue as to the date when a judgment was "entered," within the meaning of Code Civ. Proc. § 939, enacting that an appeal may be taken from a judgment within a specified time after it is entered, it appeared that there was a rough minute book kept, in which was briefly noted the proceedings of the court each day, but that such book did not contain or purport to contain decrees and orders entered at length, and in such book there was made an entry: "May 21st, 1901. \* \* \* In the Matter of the Estate of M., Deceased. Signing decree of distribution. Granted. Decree of distribution made and filed." There was also another record, called a "minute book," in which decrees were entered at length, and in such book the decree was entered at length, and on the margin, at the top of the first page of the entry, was written: "Recorded Sept. 27, 1901." There was also a register kept in which was entered daily an abstract of proceedings, and in such register was entered: "May 21, 1901. Decree of final distribution \* \* \* in re estate of M., deceased"—which entry was accompanied by the letters "m. e. & f." and it was shown that such letters meant "made by the judge, entered in the rough minutes, and filed." *Held*, that the decree of distribution was not entered until September 27th.

6. The fact that one was furnished a copy of a decree by the clerk of the court, certifying that the decree "was then on file and of record in the clerk's office," was not a certificate that the decree had been "entered," within the meaning of Code Civ. Proc. § 939, providing that an appeal may be taken from a judgment within a certain number of days after it is entered.

7. Where an appeal was prematurely taken, a contention that appellee was estopped from urging a motion to dismiss the appeal, because he had granted appellant further time to file a brief, and did not then give notice of intention to make the motion, was of no avail; the appellate court having no jurisdiction.

Beatty, C. J., and Shaw, J., dissenting.

Commissioners' Decision. In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial proceedings on the settlement of the estate of A. P. More, deceased. From the decree of distribution, Cornelia A. Baldwin appeals. Dismissed.

T. M. Osmont, for appellant. Charles W. Slack, Gunnison, Booth & Bartnett, Boyce Taggart & Kellogg, Rodgers, Paterson & Slack, Pierson & Mitchell, Oliver P. Evans, Richards & Carrier, Orestes J. Orena, Mich. Mullany, C. A. Storke, B. F. Thomas, and Whitcomb & Boyle, for respondent.

CHIPMAN, C. Cornelia A. Baldwin appealed to this court from the decree of distribution in the above-entitled matter. Respondent, Santa Rosa Island Company, served and filed its motion to dismiss the appeal, which motion is now to be determined. The grounds of the motion as stated therein were: (1) That the appeal was prematurely taken, as the notice of appeal was filed on July 20, 1901, whereas the decree appealed from was not entered at length in the minutes of the superior court until September 27, 1901; (2) that said Cornelia A. Baldwin is not a proper party appellant, and was not aggrieved by any of the provisions of the decree of final distribution; (3) that Eliza M. Miller, as administratrix of the estate of said More, deceased, and Eliza M. Miller as a distributee under said decree, are necessary parties respondent, in that she is an adverse party to said appellant in both said capacities, and will be affected by a reversal of said decree or modification thereof, and no notice of appeal was served upon her in either of said capacities within the time allowed by law.

It appears on the face of the transcript that the decree was signed as follows: "Done in open court this 21st day of May, 1901. J. V. Coffey, Judge of the Superior Court." Indorsed: "Filed May 21st, 1901. Wm. A. Deane, Clerk, by V. F. Northrop, Deputy Clerk." The notice of appeal is dated July 20, 1901, and reads: "You will please take notice that Cornelia A. Baldwin hereby appeals to the Supreme Court of the state of California from the decree of distribution made and entered in the above-entitled matter on or about 21st day of May, 1901, and from the whole thereof." The notice is directed to the clerk of the court, and to sundry parties and their attorneys, including all interested parties, except Eliza M. Miller, as above shown. Acknowledgment of service of the notice of appeal is in the following terms: "Service and receipt of copy of notice of appeal of Cornelia A. Baldwin from decree of distribution made and entered in the above-entitled matter on or about 21st day of May, 1901, admitted this 20th day of July, 1901"—signed by the attorneys of all the respondents. The certificate of the clerk is in the usual form as to correctness of the copies of papers in the transcript and the filing of an undertaking. The bill of exceptions shows that when respondent, Santa Rosa Island Company, offered its deed to

an interest in the property involved, counsel for appellant objected to the admission of the deed on the ground that the attorney in fact who signed it for his principal had no sufficient authority. The objection was overruled and appellant excepted, "and also excepted to the decree of distribution entered in said matter, in so far as it awarded a portion of said estate to said Santa Rosa Island Company." The transcript shows only the date of the rendition of judgment, May 21, 1901, and does not show when it was entered. But the appeal cannot be considered unless the notice was given within 60 days "after the entry of judgment," and it has been uniformly held, since the adoption of the Codes, that an appeal taken from the judgment is premature, and confers no jurisdiction on this court, where notice is given prior to the entry of judgment. Code Civ. Proc. § 939; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171, and cases cited. The record failing to show any entry of judgment, it does not appear that this court has jurisdiction.

Appellant claims, however, that the language of her notice of appeal and of the acknowledgment of service thereof, and her use of the word "entered" in making her objection to the decree of distribution in the bill of exceptions, constitute the equivalent of a stipulation that the decree was entered upon May 21, 1901, and could not be contradicted by evidence; citing *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Estate of Mackay*, 107 Cal. 303, 40 Pac. 558; *Estate of Pichoir*, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604. We think the word "entered," used in connection with the objection to the decree can have no significance other than to identify the document referred to in the objection. It certainly is not record evidence that the decree was in fact entered when the objection was made, for it had not at that moment been rendered; nor do we think it evidence of such fact because the word "entered" was used later on, when making up the bill of exceptions. More significance may perhaps be given to the notice of appeal and the acknowledgment of service; but we cannot regard them as being equivalent to a stipulation to the correctness of the transcript, as where the transcript shows on its face that on a date named "the court made, entered, and filed an order distributing and assigning the residue of the estate, \* \* \* which order was in words and figures following," as was the case in *Estate of Pichoir*, or as was the case in *Harnish v. Bramer*. In the case here the date named is not certain, but is stated to be "on or about the 21st of May, 1901," and the record does not purport to show that the decree was then entered. It is possible that the judgment may have been entered at length in the proper record on the day it was rendered, but the probability is that some time elapsed before the entry was so made. In any event we cannot presume that it was entered on that particular day.

Jurisdiction must be made to appear by facts, and not by presumptions. The question here, as was said in the *Estate of Pichoir*, "is as to the fact itself and the proper evidence of it, and not as to its waiver." A stipulation is an agreement of the attorney, entered into for the purpose of binding his clients so far as he may do so (Code Civ. Proc. § 283; *Anderson's Dict.* tit. "Stipulation"); whereas in the acknowledgment of services of notice of appeal the purpose is to supply evidence of service, and neither purports to be, nor in any sense is it, an agreement that its recitals are true in fact, and we do not see how it can be made equivalent to a stipulation that the decree was entered at length in the minutes of the court of the date named. It is well settled that jurisdiction is conferred by statute, and not by stipulation (*Estate of Scott*, 124 Cal. 671, 57 Pac. 654); and, as was the case in *Estate of Pichoir*, the stipulation did not operate to confer jurisdiction, but was treated as an agreement that the facts recited in the record were correct, which facts, and not the stipulation, must be examined in order to ascertain whether jurisdiction exists to have an appeal.

As, therefore, the record fails to show the date when the decree was entered, appellant seeks to show this fact by affidavits filed in support of the motion and in reply thereto. Whether this may be done is a question not necessary to be determined in the present case, for the reason that in our opinion the facts there appearing cannot, in the present case, aid appellant. From these affidavits it appears that there was a rough minute book kept, in which was briefly noted the proceedings of the court each day as they occurred; but this minute book did not contain, or purport to contain, decrees and orders entered at length. In this minute book there was made the following entry: "May 21st, 1901. 14,070. In the Matter of the Estate of A. P. More, Deceased. Signing decree of distribution. Granted. Decree of distribution made and filed." There was also another record, called "minute book 295," in which decrees and orders in probate were entered at length, and this was the only record in which such entries were made. In this book, at pages 233 to 241, inclusive, the decree in question was entered at length, showing when signed by the judge and filed by the clerk. Upon the margin of page 233, at the head of the entry, was written by the copyist who entered the decree the following: "Recorded Sept. 27, 1901." On the decree itself, after being entered at length, was indorsed by this copyist the following: "M. B. 295, p. 234"—referring to the book and second page where the entry would be found. There was also kept a docket, called a "register," in which was entered daily an abstract in brief of proceedings such as orders and decrees of court as they occurred. In the register known as "Supplemental Register A," at page 103, was

entered by a clerk, who testified to the fact, the following: "May 21st, 1901. Decree of final distribution m. e. & f. in proceedings numbered 14,070, in the matter of the estate of A. P. More, deceased." The letters "m. e. & f.," it was testified meant "made by the judge, entered in the rough minutes, and filed." Another clerk testified that, after the decree had been entered at length in minute book 295, he, in pursuance of the custom of the office, wrote in red ink in this supplemental register A, immediately following the above entry, as follows: "M. B. 295, p. 234." And he testified that this entry means "Minute Book No. 295, page 234, and designates the second page in the said minute book, in which the said decree \* \* \* had been entered at length."

Mr. T. M. Osmont, attorney for appellant, deposed at some length. He does not assume to speak from personal knowledge as to when the decree was entered. His statement goes rather to the steps taken by him to learn the fact, and to explain why he acted upon the assumption that the decree was entered at length May 21, 1901. He deposed: That on June 14, 1901, he procured from the then clerk, Mr. Deane, a copy of the decree, attached to which was a certificate, "certifying that said decree was then on file and of record in his office. \* \* \* Affiant further states that in addition to said certificate affiant learned that the register in said county clerk's office contained the entry that said decree was made, entered, and filed on said 21st day of May, 1901; that, relying upon the truth of said certificate and said register entry, affiant, on the 20th day of July, 1901, served the notice of appeal"; and that he was not aware of the fact, if it was the fact, that the decree was not actually recorded until September 27, 1901, nor was he aware of any marginal note to that effect in the minute book, and had no knowledge of the fact until the moving papers herein were served upon him. He then recites the steps taken to appeal as already shown, and adds that appellant's time for filing brief herein on the appeal was extended by respondent without any intimation that any claim would be made that the appeal was prematurely taken. We think is satisfactorily appears that the decree in question was not entered, within the meaning of the statute, at the date claimed by appellant, and that the only date which can be given for such entry is September 27, 1901. The fact is undisputed that the only minute book in which the decree was entered shows the date to have been September 27th, and there is no evidence that the record was tampered with in any way, and there is no evidence to impeach its verity.

Mr. Osmont states that he was furnished a copy of the decree by the clerk, certifying that said decree "was then on file and of record" in the clerk's office. This is not a certificate that the decree had been previous-

ly entered at length, and did not justify the assumption that it had been so entered. He also states that, in addition to said certificate, he learned that the register in the clerk's office contained the entry "that said decree was made, entered, and filed on said 21st day of May, 1901." How he learned this does not appear. If he had looked at the register, he would have seen that the entry there made conveyed no such meaning on its face, but required explanation, as the entry there was "m. e. & f.," and inquiry on his part would have at once shown that the entry did not mean that the decree had been entered at large in the minute book kept for that purpose. It was held in *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 920, that an entry in the clerk's register of actions, noting an entry of decree in the minutes, which had in truth no reference to its final entry at large in the minute book, but only to an entry made by the courtroom clerk in his rough daily minutes of proceedings, is not such an entry as could be conclusive in favor of appellant that the decree had been finally entered, where it appears that they could have ascertained the true meaning of the entry by inquiry in the clerk's office; and, although appellants were misled by such entry in the register through failure to make inquiry, that fact "cannot confer rights upon them which they otherwise have not."

Nor can appellant claim that respondent is estopped from urging its motion because it granted appellant further time to file a brief, and did not then notify appellant of its intention to make the motion. What effect, if any, would have followed, if respondent had asked for further time to reply to appellant's brief, need not be considered. It was said in *Estate of Pearsons*, supra: "The objection that respondents are estopped by their acts from pressing this motion cannot avail appellants, even if it be conceded that the facts show such estoppel. When the appeal is premature, equally with where it is too late, this court has no jurisdiction to entertain it, and, upon the fact appearing, it will be dismissed by the court's own motion." The cases sustaining the rule in *Bell v. Staacke*, supra, will be found collected in *Spelling's New Trial and Appellate Practice*, sections 532 and 653 and notes.

It is unnecessary to consider the other grounds of the motion for dismissal. It is advised that the motion be granted, and the appeal dismissed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the motion to dismiss is granted and the appeal dismissed: McFARLAND, J.; LORIGAN, J.; VAN DYKE, J.

ANGELLOTTI, J. I concur in the judgment. If the question as to the jurisdiction of this court to entertain an appeal from a

judgment or order, taken before the entry of such judgment or order, were an open one, I might come to a different conclusion. The question is, however, purely one of construction of certain statutory provisions, which has been determined by this court adversely to the contention of appellant in the following cases, viz.: *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43; *People v. Center*, 66 Cal. 567, 570, 5 Pac. 263, 6 Pac. 481; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. 302; *Tyrrell v. Baldwin*, 72 Cal. 192, 13 Pac. 475; *Estate of Rose*, 72 Cal. 577, 14 Pac. 369; *Onerdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Ooon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384; *Home for Inebriates v. Kaplan*, 84 Cal. 486, 24 Pac. 119; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Wells v. Kreyenhagen*, 117 Cal. 329, 49 Pac. 128; *Estate of Pearsons*, 119 Cal. 27, 50 Pac. 929; *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Estate of Devincenzi*, 131 Cal. 452, 63 Pac. 723; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171. The first of these decisions was rendered in 1880, and this court has ever since adhered to the construction there given to the statute. The settled construction of a statute, acquiesced in for many years by the legislative department of the state (as shown, in this case, by the failure of that department to make any change in the statute in the respect indicated, notwithstanding the amendment of the same statute in other particulars), is, in effect, a part of the statute itself, and should not be changed by the courts.

I concur: HENSHAW, J.

BEATTY, C. J. I dissent upon the grounds stated in my opinion in *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171. We have here another striking illustration of the injustice resulting from the enforcement of a rule which derives no support from the principle of stare decisis, and seems to have nothing to recommend it aside from the fact that it has been made the instrument of similar injustice in many previous instances.

I concur: SHAW, J.

143 Cal. 384

ABBOTT v. HARTLEY. (S. F. 3,706.)

(Supreme Court of California. June 8, 1904.)

ELECTIONS — CONTEST — STATEMENT — SUFFICIENCY — BALLOTS — IRREGULARITIES.

1. Under Code Civ. Proc. § 1115, requiring the particular ground of an election contest to be stated, and section 1117, declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed, for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election was contested, a complaint alleging that the contestant had received a high-

er and greater number of votes for the office than had the contestee, "but that, \* \* \* through \* \* \* the carelessness, negligence, and malconduct of the boards of judges of each and every of the said four election precincts comprising said \* \* \* township, and of the clerks thereof, in canvassing and counting the votes given at said election, \* \* \* it was erroneously and wrongfully made to appear from said returns that said contestee had received the highest number of votes," was sufficient.

2. Where a statement for the contest of an election did not allege that the contestant and contestee were the only candidates for the office, and the grounds of contest merely alleged that the contestant received a higher number of votes than the contestee, but not that he received the highest number of votes, the irregularity was cured by a recital in the judgment, "No other person received any votes for said office at said election in said township."

3. Where, in an election contest, the finding of the trial court, supported by the evidence, was that there was no malconduct on the part of the boards of judges whereby contestee was injured in his candidacy in any way, no malconduct which in any way prevented a full and fair expression of the will of the qualified electors of the precinct, or that diminished the number of legal votes that the contestee would have otherwise received, the court properly counted the ballots from the contested precincts, as Code Civ. Proc. § 1112, expressly provides that no irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes.

In Bank. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by J. P. Abbott against A. C. Hartley. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Cannon and R. H. Latimer, for appellant. W. S. Tinning, for respondent.

HENSHAW, J. This is an election contest over the office of justice of the peace of the Eighth Judicial Township of the county of Contra Costa. By the official returns it appeared that the appellant, A. C. Hartley, had received a plurality of 83 votes, and on a recount of the ballots the court found and declared the contestant elected by a plurality of 5 votes. The complaint charged that the contestant had received a higher and greater number of votes for the office than had the contestee, Hartley, "but that, notwithstanding thereof, through and by the carelessness, negligence, and malconduct of the boards of judges of each and every of the said four election precincts comprising said Eighth Judicial Township, and of the clerks thereof, in canvassing and counting the votes given at said election, \* \* \* it was erroneously and wrongfully made to appear from said returns that said A. C. Hartley had received the highest number of votes." Upon this allegation, appellant contends that his motion to dismiss the contest should have been granted, because the grounds of contest were not alleged with sufficient cer-

tainty to advise the defendant of the particular proceeding or cause for which the election was contested. Section 1115 of the Code of Civil Procedure provides that the particular grounds of such contest must be specified. But in this connection section 1117 declares that no statement of the grounds of contest will be rejected, nor the proceedings dismissed, by any court, for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election was contested. The certainty of allegation required by the statute in these cases is not, and from the nature of the action could not reasonably be expected to be, the highest degree of certainty known in pleading. *Minor v. Kidder*, 43 Cal. 229. There was sufficient in the grounds of contest here set forth to apprise the contestee of the nature of the attack which was made, and the proof was the usual proof in such cases—an inspection of the ballots, and objections to certain of them as containing distinguishing marks. There was nothing in this line of proof that was not in strict accord with the allegations of the contestant—nothing that the contestee could not have anticipated and foreseen; and, even if such had been the case, upon his application time would have been granted him to meet the case upon the merits. *Minor v. Kidder*, 43 Cal. 229. The motion to dismiss was properly denied.

It is further asserted that the judgment is erroneous in declaring the contestant elected, because the statement of contest did not allege that Abbott and Hartley were the only candidates for the office in question, and for the further reason that in the grounds of contest it is alleged only that Abbott received a higher number of votes than Hartley, but it is not alleged that Abbott received the highest number of votes. But however faulty the statement of contest may have been in this particular, it was, at the most, but subject to special demurrer, and the judgment of the court cures this irregularity, since it, in terms, declares, "no other person received any votes for said office at said election in said township."

The appellant further insists that, by reason of irregularities and misconduct of the election boards in certain precincts, the court should have refused to count the ballots from those precincts. But in this regard the trial court found that there was no misconduct on the part of the boards of judges whereby contestee was injured in his candidacy in any way, no misconduct which in any way prevented a full and fair expression of the will of the qualified electors of the precinct, or that diminished the number of legal votes that the contestee would otherwise have received. These findings draw support from the evidence, and the misconduct of the officers was not such as to vitiate the election, but rather was such as was con-

sidered in the cases of *Whipley v. McKune*, 12 Cal. 352, *Sprague v. Norway*, 31 Cal. 173, *Hayes v. Kirkwood*, 136 Cal. 400, 69 Pac. 30, and *Kenworthy v. Mast*, 141 Cal. 268, 74 Pac. 841, in which cases it was held that the specific irregularities did not vitiate the election. This is in accord with section 1112 of the Code of Civil Procedure, declaring that no irregularity or improper conduct in the proceedings of the judges, or any of them, is such misconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes.

This court has made its independent examination of the original ballots, reviewing the rulings of the trial court in admitting and rejecting certain of them. As to some ballots, it must be true in every case that the question is a close one as to whether or not they should or should not be rejected as containing distinguishing marks. All that can be said in this regard is that the trial judge should, so far as possible, observe uniformity in his rulings, and reject or admit all of a class; that is to say, all containing alleged distinguishing marks identical in character. In the case at bar the trial judge did this with much particularity. And, indeed, the result, under our recount, would indicate that, if he erred at all, it was in allowing greater latitude to the contestee than to the contestant in the matter of marked ballots. The result of our recount, therefore, in no way changes that reached by the trial court.

The judgment appealed from is therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

143 Cal. 306

MAU, SADLER & CO. v. KEARNEY. (S. F. 2,701.)

(Supreme Court of California. June 10, 1904.)

EXECUTION—SALE OF REAL ESTATE—RIGHTS OF PURCHASER—POSSESSION—RECEIVER.

1. A purchaser of real estate under execution is not entitled to the appointment of a receiver to take possession, harvest, and sell the crops growing on the land prior to the expiration of the period of redemption.

2. A purchaser of real estate under execution is not entitled to possession, as against the judgment debtor or his successor in interest in possession, prior to the expiration of the period of redemption.

Department 2. Appeal from Superior Court, City and County of San Francisco; E. A. Belcher, Judge.

Action by Mau, Sadler & Co. against Joseph G. Kearney. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John H. Durst and W. N. Goodwin, for appellant. Erwin L. Sadler, for respondent.

¶ 2. See Execution, vol. 21, Cent. Dig. § 801.

**HENSHAW, J.** Plaintiff, having become the purchaser at execution sale of a farm belonging to defendant, which farm was incumbered by two mortgages, brought this independent action, seeking the appointment of a receiver to take and hold possession of, harvest, and sell the crop, and apply the proceeds in satisfaction of the judgment under which the execution sale was had. The court granted the application for a receiver, and the single question involved in this appeal is whether the purchaser at such an execution sale is entitled to possession of the property sold, prior to the expiration of the period for redemption, as against the judgment debtor, or his successor in interest in possession. That he is not entitled to a receiver under these circumstances is squarely decided in *West v. Conant*, 100 Cal. 233, 34 Pac. 705, approved in *Scott v. Hotchkiss*, 115 Cal. 94, 47 Pac. 45, and again in *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489, in which last case it is decided that the right to possession is equally good in the successor in interest of the judgment debtor. The case of *Hill v. Taylor*, 22 Cal. 191, relied upon by respondent, is an exceptional case, as pointed out in *White v. White*, 180 Cal. 599, 62 Pac. 1062, 80 Am. St. Rep. 150. The mortgage in *Hill v. Taylor* covered a mining claim, and the mortgagor, after the issuance of the certificate of sale, remained in possession and mined the gold in the claim. It was alleged in the complaint that, if allowed to continue so to do, the value of the property would be impaired, if not destroyed. This, coupled with an allegation of the insolvency of the mortgagor, made a clear case for the appointment of a receiver to prevent waste of the realty.

The judgment appealed from is therefore reversed.

We concur: **McFARLAND, J.; LORIGAN, J.**

143 Cal. 511

In re **DIXON'S ESTATE.** (S. F. 3,419.)  
(Supreme Court of California. June 10, 1904.)

**WILLS—TRUSTS—TRUST TO CONVEY LANDS—  
VALIDITY—TRUST IN PERSONALTY.**

1. Where testatrix's will devised lands to trustees "in trust for my grandchild, D.," such provision was not equivalent to vesting title in the grandchild.

2. Where a will devised lands to trustees, who were to hold the same for the benefit of a grandchild of testator until such child should attain a certain age, and then to convey the lands to him, and, in case of his death before the age specified, to convey the same to the brothers and sisters of testator, the trust in favor of the grandchild and the trusts over were void.

3. Where a will devised lands and personalty to trustees, who were to hold the same until testator's grandchild became of a certain age, and then to transfer and convey the property to him, the trust in the real estate and the personalty being a part of the same trust scheme, and the trust as to the lands being void, the entire trust, including the personalty, was void.

**Commissioners' Decision.** Department 2.  
Appeal from Superior Court, Monterey County; N. A. Dorn, Judge.

Judicial proceedings on the settlement of the estate of Susan F. Dixon, deceased. Appeal from that part of the decree of distribution awarding Truman Tuttle Dixon the residue of the estate of deceased. Affirmed.

C. F. Lacey, for appellant. S. F. Geil and Chas. B. Rosendale, for respondent.

**COOPER, C.** This is an appeal from that part of the decree of distribution which awards to Truman Tuttle Dixon the residue of the estate of deceased. The court construed the portion of the will which attempted to create a trust to convey as void, and distributed the estate to the heir at law.

The portion of the will in question here is as follows: "Thirdly.—I hereby give, devise and bequeath all the rest and residue of my estate, real and personal, to John W. Rowling and G. A. Daugherty, or the survivor of them as trustee, in trust for my grandchild, Truman Tuttle Dixon, the only surviving child of my deceased son John F. Dixon. The same to be held, managed and controlled by said trustees, or the survivor of them, for the use and benefit of my said grandchild, Truman Tuttle Dixon, until he shall arrive at the age of thirty years, and to pay over to him or expend for him the income or such part thereof as said trustees or the survivor of them, shall deem necessary or suitable for the education and maintenance of said grandchild until he shall arrive at the age of twenty-one years, and thereafter and until he shall arrive at the age of thirty years to pay over to him the income of said trust property. And when said Truman Tuttle Dixon shall arrive at the age of thirty years, then I direct said trustees or the survivor of them, to pay over and transfer to said Truman Tuttle Dixon the said trust estate, together with the income and accumulations thereof, if any, less the necessary expenses of said trust. And I hereby direct, authorize and empower said trustees, or the survivor of them to sell and dispose of all the real property owned by me in the County of San Luis Obispo (providing I have not done so before my death, or my executors have not made such sale) whenever in their judgment a good sale can be made of said property, or whenever in their judgment it would be for the best interests of said trust estate to sell the same; and I hereby direct my said trustees to invest the proceeds of such sale in other real property near to or in Salinas City, California, or loan the same on good mortgage security, as in their judgment shall appear to be for the best interests of said trust estate. But in the event of the death of my said grandchild, Truman Tuttle Dixon, before he reaches the age of thirty years without heirs of his body then alive, then and in such event I direct my said trustees to pay over and



transfer in fee simple all of said trust estate to my brother and four sisters, viz.: J. E. Cooksey of Louis County, Missouri, Sarah Ellen Bevans of Louis County, Missouri, Eliza A. Johnson of Salinas City, California, Mary E. Jamison of Santa Barbara County, California, and Alice Stephens of Santa Clara County, California, in equal shares less the necessary expenses of said trust."

By the terms of the will the title to the estate is given to the trustees for the purposes therein specified. There is no clause in the will, independent of the trust clause, by which it can be ascertained that the deceased intended to vest the title to the property in Truman Tuttle Dixon. We have looked in vain for words, independent of the trust, which could be construed to devise the title of the residue of the estate to the devisee, but fail to find them. The words "in trust for my grandchild, Truman Tuttle Dixon," are not sufficient. They only follow the prior clause, which expressly devises and bequeaths the estate to the trustees, and shows the beneficiary of the trust. To hold in trust for the grandchild is not the equivalent of giving title to or vesting title in the grandchild. If this were so every instrument creating a trust for a named beneficiary would cast the title in the beneficiary. The testatrix clearly intended the title to remain in the trustees until the termination of the trust, for she directs the trustees, when Dixon shall arrive at the age of 30 years, "to pay over and transfer" the said trust estate to him. She further provides that, in case of the death of said Dixon before he reaches the age of 30 years, the trustees shall "pay over and transfer in fee simple" to her brother and four sisters, in equal shares, all the residue of the estate. The title to be given to the brother and sisters in case of the death of Dixon is through the trust to convey. The will does not give or devise any estate to such brother and sisters. The trusts over, therefore, are absolutely dependent upon the trust to convey, and must fall with it. The case, in principle, cannot be distinguished from the rule in *Estate of Fair*, 132 Cal. 532, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. That case has since been followed in similar cases involving trusts to convey. *Estate of Sanford*, 136 Cal. 97, 68 Pac. 494; *McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 748; *Hofsas v. Cummings et al.*, 141 Cal. 525, 75 Pac. 110.

Nor do we think the trust valid as to the personal property. There does not appear to be any personal property, except the sum of \$1,166.15 in money. The scheme by which the trust was created contemplated that the income of all the property should be used for the education and support of Dixon, and the surplus of the income, if any, to be transferred to him upon his arriving at the age of 30 years. It is not clear, nor is it probable, that, if the testatrix had known that the trust as to real estate was void, she would

have appointed two trustees, and created a trust for so many years, as to the small amount of money left after settling the estate. The income of \$1,166 at the current rates of interest, after paying the expenses and commissions of two trustees, could not be much. If the testatrix had known that the real estate was all to be distributed to Dixon, regardless of the trust, it does not appear reasonable that she would have kept the small amount of money from him during the life of the trust. Nor could she have contemplated that, in case of the death of Dixon before reaching the age of 30 years, the real estate should go to his heirs and the \$1,166 to her brother and four sisters. In fact, there is nothing in the record to show that the money is not the accumulations of the real estate. The real and personal property were all part and parcel of the trust scheme, and the trust is void as to all the property. *Estate of Fair*, 136 Cal. 79, 68 Pac. 306.

The conclusions herein reached are based upon the authority of the cases cited. The intention of the testatrix is defeated, for the reason that she attempted to dispose of her property in a manner forbidden by statute. It is always with reluctance that courts declare a will or a provision thereof void. The result in this case is that the grandchild, for whom the testatrix intended the estate, gets it, and gets it much sooner than was contemplated by the trust scheme. It may be that the result is much better than if the wishes of the testatrix could have been carried out. But as to that, it is not the business of this court to inquire. In all cases we endeavor to carry out the intentions of a deceased person, as expressed in the will, if it can be done without disregarding the law and the statutes of our state. We would violate our duty and the trust reposed in us if we should disregard the will of the Legislature and the mandates of the statute to carry into effect a will in violation thereof.

The decree and judgment should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the decree and judgment appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(30 Mont. 550)

WESTERN IRON WORKS v. MONTANA PULP & PAPER CO. et al.

(Supreme Court of Montana. June 22, 1904.)

MECHANICS' LIENS—NOTICE—DESCRIPTION OF PROPERTY—SUFFICIENCY—CONTINUING ACCOUNT—MORTGAGES—PRIORITY—CORPORATIONS—INCORPORATION—EVIDENCE—CERTIFICATE—CERTIFIED COPIES.

1. The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by

the Secretary of State, under Code Civ. Proc. § 3207, providing that a public record of a private writing may be proved by a copy thereof certified by the legal keeper of the record.

2. Code Civ. Proc. § 2130, provides for a mechanic's lien on a "building or improvement" in construction of which the labor or materials claimed for were used. Section 2133 extends the lien to the "land" on which the structure is erected, and section 2131 provides that a person desiring to perfect a mechanic's lien must file a notice containing a correct description of the property to be charged. *Held*, that the "property" to be identified under section 2131 is the building or improvement on which the lien is given, and hence a specific description of the "land" is not required.

3. Where, in proceedings to foreclose a mechanic's lien, the record disclosed that the building sought to be charged was monumental in character, easily distinguishable, and known as the paper mill of a particular corporation, and that no other mill or building of like character or description existed in the town, a notice of lien describing the property as "that certain two-story brick mill building, etc., with the lot or lots on which the same is situated, comprising portions of the following," including a general description of certain blocks in the townsite of such town and certain real estate outside the same, was sufficient.

4. Where a notice of a mechanic's lien, after describing the building on which the lien was claimed, added a description of land, in addition to that covered by the building, largely in excess of the statutory amount on which the lien might be foreclosed, such defect was not fatal to the lien; the amount to which the claimant was entitled being subject to adjudication in the proceedings for the enforcement of the lien.

5. In proceedings to foreclose a mechanic's lien, the question whether the materials were furnished and the labor was performed under one general contract, or under separate contracts, is one of fact.

6. In a proceeding to foreclose a mechanic's lien, evidence reviewed, and *held* to sustain a finding that the materials and labor were furnished under a single contract on an open, continuous account.

7. Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a bona fide purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien, under Code Civ. Proc. § 2133, providing that all such liens shall take precedence over any mortgage incumbrance subsequent to the commencement of work, or any contract for the erection of the building, structure, or other improvement.

Commissioners' Opinion. Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

Action by the Western Iron Works against the Montana Pulp & Paper Company and others. From a judgment in favor of plaintiff, defendant Union Bank & Trust Company appeals. Affirmed.

Mr. Bride & McBride and E. B. Hoffman, for appellant. Geo. A. Clark, for respondent.

CLAYBERG, C. C. Appeal by the Union Bank & Trust Company from a judgment rendered against it and from an order overruling its motion for a new trial. The Western Iron

Works (hereinafter designated as the "Iron Works") filed a complaint in the district court of Gallatin county against the Montana Pulp & Paper Company (hereinafter designated as the "Paper Company"), the Union Bank & Trust Company (hereinafter designated as the "Trust Company"), and the Davis & Weinscary Company, for the purpose of establishing and foreclosing a mechanic's lien upon certain real estate alleged to belong to the Paper Company. The Trust Company was made a party defendant, because it held a mortgage upon the property against which the lien was claimed. The Davis & Weinscary Company was made a party defendant, because it also claimed a mechanic's lien on the same property.

The property against which the lien is claimed is described in the notice of lien as follows: "That certain two-story brick mill building, with all machinery, engines, and boilers contained therein, and appurtenances, with the lot or lots upon which the same is situated, comprising portions of the following: Fractional blocks Nos. 24, 25, and 41 of the original town of Manhattan, according to the plat of said town on file in the office of the clerk and recorder of Gallatin county, Montana, and all right and title of said Montana Pulp & Paper Company to Manhattan avenue, between blocks 25 and 41 and First street, and between blocks 24 and 25 and the west half of Second street, and between blocks 25 and 26 and blocks 40 and 41 of said town site; a tract of land in the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Sec. 3, T. 1 N., R. 3 E., said Gallatin county, beginning at a stone monument, the quarter corner Secs. 3 and 10, of said township and range, running thence at magnetic variation of 19 deg. 42 min. E., north 572 and  $\frac{85}{100}$  feet, to the northeast corner of fractional block 41 of Manhattan townsite, thence west on the section line 756 and  $\frac{81}{100}$  feet, to the place of beginning, all in said Gallatin county, state of Montana."

The complaint alleges: "That the following is a correct description of the property upon which said work and labor was performed, and materials, machinery, and fixtures furnished, to wit: Block numbered twenty-five (25), in the town of Manhattan, with the improvements thereon." The judgment describes the property against which the lien is adjudged as follows: "That certain paper mill building, with lots numbered two, three, four, nineteen, twenty, twenty-one, and twenty-two, of block twenty-five, Manhattan townsite, Gallatin county, Montana, upon which the same is situated, being the property of defendant Montana Pulp & Paper Company."

The Trust Company filed its separate answer to the complaint, wherein it denied that the Iron Works furnished any materials or fixtures, or performed any labor, "for or upon any of the property described in its complaint, upon an open or continuous account." It "denies that block numbered twenty-five (25) of the town of Manhattan, with the im-

¶ 2. See *Mechanics' Liens*, vol. 34, Cent. Dig. §§ 213, 214.

provements thereon, is a correct or true description of any property for which plaintiff furnished any material or upon which plaintiff performed any work or labor." It "denies that on the 15th day of September, 1900, or at any time, or at all, the plaintiff filed in the office of the county clerk and recorder of Gallatin county, Montana, a just or true account of the amount due or owing to the plaintiff for materials furnished or labor performed upon any property described in its said amended complaint, after allowing all credits, or containing a true or correct description of any property permitted by law to be included within a notice or claim of lien, or upon which plaintiff was entitled to or could enforce a claim of lien, as against this defendant." It "denies that any alleged notice or claim of lien filed by the said plaintiff with the clerk and recorder of Gallatin county, Montana, contained a correct description of any property described in plaintiff's amended complaint, and now sought to be charged with said alleged lien, and denies that the said plaintiff, at any time mentioned in its said amended complaint, or at all, filed any other or different notice or claim of lien than the so-called notice and claim of lien hereinafter referred to, and a copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this answer." As an affirmative defense it alleges, in substance, that on May 1, 1900, the Paper Company executed to it a mortgage to secure the payment of \$60,000, covering all the property described in the Iron Works' notice of lien; that on January 21, 1901, a default having occurred in the terms and conditions of the mortgage, the Trust Company commenced a suit for the foreclosure thereof, which resulted in a decree in its favor in February, 1901; that a sale of the property was had under this decree on March 15, 1901, at which time the Trust Company became the purchaser of the property. The Iron Works was not made a party to this suit for foreclosure, although its notice of lien had been filed long before the institution of that suit. The answer then alleges that the lien claimed is subject to the Trust Company's mortgage and title.

To this answer the Iron Works replied, denying all new matter. Separate answers were also filed by the Paper Company and by the Davis & Welmsary Company, to which replies were made; but the issues raised by these other answers are not material in this case, because the court below rendered a decree in favor of the Iron Works, and none of the parties to the suit below appealed except the Trust Company.

The decision of the four following questions discussed in the brief are determinative of these appeals, and we shall not further refer to the assignments of error: (1) As to the proof of the corporate existence of the Western Iron Works. (2) As to the sufficiency of the notice of the claim of lien with reference to the description of the property therein.

(3) As to the character of the account upon which the claim of lien is based. (4) As to the lien being subject to the rights of the Trust Company.

1. As to the corporate character of plaintiff: The record discloses that the Trust Company denied the allegation of the corporate existence of the Iron Works. Upon the trial of the case the Iron Works offered in evidence a copy of its certificate of incorporation, duly certified by the Secretary of State. This was objected to as irrelevant, immaterial, and incompetent. The Iron Works was organized as a corporation under the law of 1887. Upon the organization of the state of Montana the Secretary of State succeeded to the office of Secretary of the Territory, and became the legal keeper of all the records of that office. The certificate of incorporation of the Iron Works being of record in that office, it was properly proved by a copy thereof certified by the Secretary of State. Section 3207, Code of Civil Procedure.

2. As to the sufficiency of the notice or claim of lien: An investigation of the record discloses the fact that, in the notice or claim of lien, the land upon which the buildings are situated is described very generally, that in the amended complaint it is more specifically described, and in the judgment of the court such description becomes accurate. Appellant claims that the description of the land sought to be subjected to the lien must be definite and certain in the notice or claim of lien; that the land described therein comprises "approximately 18 acres, containing practically all the ground in the town of Manhattan, and practically all the ground described by metes and bounds outside the town of Manhattan," and that the lien law gives a lien upon only one acre of ground if outside the city, or upon land or lots upon which the building is situated if within the city. It is therefore contended that the description in the notice of lien is not sufficient to support any mechanic's lien upon any property therein mentioned.

It will be noticed that the particular property upon which the lien is claimed is described in the notice of lien as follows: "That certain two-story brick mill building, with all machinery, engines, and boilers contained therein, and appurtenances, with the lot or lots upon which the same is situated, comprising portions of the following." Then follows a general description of certain blocks in the townsite of Manhattan and certain real estate outside said townsite. Section 2131 of the Code of Civil Procedure provides that every one, wishing to avail himself of the benefits of the chapter upon mechanics' liens, must file with the county clerk of the county in which the premises mentioned are situated, and within 90 days after the material or machinery aforesaid has been furnished or the work or labor performed, a true account of the amount due him after allowing all credits, and containing a correct description

of the property to be charged with said lien, verified by affidavit; "but any error or mistake in the amount or description does not affect the validity of the lien if the property can be identified by the description." The purpose of describing the land upon which the building or improvements are situated "is demanded only for purposes of identification." *Brunner v. Marks*, 98 Cal. 374, 33 Pac. 265; *North Star Iron Works v. Strong* (Minn.) 21 N. W. 740; *Drexel v. Richards* (Neb.) 70 N. W. 23; *Taylor v. Netherwood* (Va.) 20 S. E. 888. Any description which will enable one familiar with the locality to identify the property upon which the lien is claimed is sufficient. *Hooven, etc., Co. v. Featherstone*, 111 Fed. 81; *McNamee v. Rauck*, 128 Ind. 59, 27 N. E. 423; *Hughes v. Torgerson* (Ala.) 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105. By section 2130 of the Code of Civil Procedure a lien is given upon the building or improvement, in the construction of which the labor or materials were used, and section 2133 of the Code of Civil Procedure extends this lien to the land upon which the structure or building is situated. Therefore the "property" to be identified under section 2131 of the Code of Civil Procedure is the building or improvement upon which the lien is given.

The notice of lien in this case describes this property as "that certain two-story brick mill building, \* \* \* with the lot or lots upon which the same is situated," in the town of Manhattan, Gallatin county, Montana. If the description in the notice of lien ended here, it would, under the above decisions, have answered the purpose required by the statutes. It would be ample to identify the property upon which the lien is claimed. The record discloses that the building is about 300 feet long, 150 feet wide, and 50 feet high, and "is monumental in character, is easily distinguishable as, and is known to be, the paper mill of the Montana Pulp & Paper Company," as the court below aptly said. The record does not disclose that any other mill or building of like character or description exists in the town of Manhattan, but, on the contrary, does disclose that there are no other two-story brick buildings in that vicinity. The appellant introduced no testimony upon the hearing in the court below, except its mortgage, the judgment roll foreclosing the same, and the sheriff's deed of the property to itself upon such foreclosure.

The appellant insists that the remainder of the description of the land set forth in the notice of lien discloses that the land claimed by the lien exceeds the amount allowed by statute, and therefore the description is so indefinite as to avoid the lien claimed. We are of the opinion that this position is unsound. The purpose of the filing of a claim of lien is to notify all parties dealing with the property that a lien is claimed upon it. When the building is identified this notice is given. All persons are charged with the

knowledge that the statute gives a lien upon a building, and then extends it to a certain area of the land upon which the building is situated. If the lien claimant were required to specifically describe the land in his notice of lien, he would often, without any fault upon his part, be unable to do so. To ascertain the exact description, if outside the limits of a city, would in many instances require a survey, which the owner might object to and prevent. Again, such a requirement, where the structure is outside the limits of a city, would give the right to the lien claimant to select the land in any shape he desired, and the query would then arise whether his selection would not be binding upon the court and all parties to the suit. This might render the statute extremely oppressive upon the landowner. If there was more than one lien claimant, each might select the ground desired by him, and no two selections might coincide. If the tract of land described is of greater area than the statute allows, but is sufficient for identification, the amount and specific description against which the lien should be adjudged is a matter to be tried and determined by the court; and, as held in the case of *Oster v. Rabeneau*, 46 Mo. 595, the court may, if necessary, appoint a surveyor or commissioner "to make it certain and exact in every respect prior to the judgment of the court." This, we believe, is the safer rule, and the one supported by the weight of authority. *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72; *North Star Iron Works v. Strong* (Minn.) 21 N. W. 740; *Evans v. Sanford* (Minn.) 68 N. W. 21; *Drexel v. Richards* (Neb.) 70 N. W. 23; *White Lake Lum. Co. v. Russell* (Neb.) 34 N. W. 104, 3 Am. St. Rep. 262; *Edwards v. Derrickson*, 28 N. J. Law, 39; *Derrickson v. Edwards*, 29 N. J. Law, 468, 80 Am. Dec. 220; *Shattuck v. Beardsley*, 46 Conn. 386; *Whitenack v. Noe*, 11 N. J. Eq. 321; *Oster v. Rabeneau*, 46 Mo. 595; *Bradish v. James*, 83 Mo. 313; *Willamette Steam Mills Co. v. Kremer*, 84 Cal. 209, 29 Pac. 633.

In so far as the granting of the lien is concerned, the statute is remedial in character, and should be liberally construed. In so far, however, as the procedure is concerned by which the lien is claimed and enforced, being pointed out by the statute, such statute must be strictly followed. *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428. The Supreme Court of Missouri has well said: "The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits. But the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction to advance the just and beneficent objects had in view in their passage. Their great aim and purpose is to do substantial justice between the par-

ties, and this should never be lost sight of in giving them a practical construction." De Witt v. Smith, 63 Mo. 263. The case under consideration is so clearly distinguishable from that of Big Blackfoot Milling Co. v. Blue Bird Mining Co., 19 Mont. 454, 48 Pac. 778, that further comment seems unnecessary. We are therefore of the opinion that the notice, in so far as the description of the property is concerned, complies with the statute.

3. As to the account: Appellant claims that the account upon which the lien is based "is not a continuous running account; but, on the contrary, the evidence of plaintiff shows affirmatively and conclusively that any material furnished or labor performed was furnished and performed under separate contracts, payments for which were to be due at the end of each month." The question as to whether the materials furnished and labor performed were under one general contract, or under separate contracts, was one of fact. Treusch v. Shryock, 51 Md. 162; Lamb v. Hanneman, 40 Iowa, 41. Appellant introduced no evidence as to this question, and therefore its determination must rest entirely upon plaintiff's evidence. The court below, after hearing all the evidence, made the following finding: "That between the 27th day of March, 1900, and the 22d day of June, 1900, the plaintiff furnished materials, machinery, and fixtures upon an open and continuous account to the defendant Montana Pulp & Paper Company at its special instance and request." The evidence disclosed in the record fully sustains this finding.

Witness Hoyt testified that "In the first place Mr. Kennedy [manager of the Paper Company] inquired of me personally in regard to prices for materials that he would need in the specifications and construction of the Montana Pulp & Paper Company mill at Manhattan; inquired for prices on labor and prices on materials, such as shafting, pulleys, and prices on labor for blacksmith. \* \* \* This conversation \* \* \* was some time in March, 1900. \* \* \* Mr. Kennedy came to the office, and met me personally, and asked for these prices, stated who he was, and asked for these prices, and stated at that time there was quite an amount of machinery that was necessary over there, and wanted to know what our facilities were for getting this work out, and I told him we could furnish anything he wanted in our line, and he inquired for our price, and I quoted the prices, and he seemed to think they were high, but, in view of the fact that we could get the work out immediately, that he would let this work and send us an order within a very few days, and additional orders to fill right along. He gave me to believe at that time there was a vast amount of work, and therefore I quoted him quite low prices. \* \* \* There was no understanding in the conversation which I

had with Mr. Kennedy as to when the delivery of the goods should cease, nor any understanding as to when the goods should be paid for." The record then discloses the correspondence between the parties, ordering the materials mentioned in the account filed with the notice of lien at different times.

Witness Melcher testified that "Mr. Kennedy called on me that morning relative to the work that we were getting out for the Montana Pulp & Paper Company, more particularly I thought, that morning, to urge the prompt delivery of anything he would want; also to have me promise that any and all things which he would order in the future would be attended to very promptly. That was the principal object of his visit there that morning. He didn't give me any further understanding as to what would be ordered in the future, any more than that there would be thousands of dollars' worth of work required. \* \* \* I was familiar at all times with what was going on at this plant and what was to be the use of it. He gave me to understand what he would want. I knew in a general way what orders would come to me, what would be required to furnish for the building. \* \* \* I was given to understand that they were constructing a pulp and paper mill there, and they would want materials, finished and unfinished materials, at the completion of that mill, which we had the facilities for furnishing. There was no definite amount stated, nor order made for a certain amount or quantity. Each letter would specify what they wanted at that time. The general proposition didn't specify anything, and there was nothing said about the length of time these orders would continue."

We are satisfied that this testimony is sufficient to support this finding under the following authorities: Helena Steam Heating & Supply Co. v. Wells, 16 Mont. 65, 40 Pac. 78; Matthews v. Waggenhaeuser (Tex.) 19 S. W. 150; Klizer Lumber Co. v. Mosely (Ark.) 20 S. W. 409; Trustees v. Helse, 44 Md. 453; Gray v. Elbling (Neb.) 53 N. W. 68. The facts of this case are clearly distinguishable from those in Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 3; and come clearly within the rule announced in the case of Helena Steam Heating & Supply Co. v. Wells, supra.

4. As to the question of priority: Counsel for appellant claims that the Trust Company was a bona fide purchaser of the property against which the lien is claimed, was misled by the indefinite description in the notice of lien, and that the lien claimed by the Iron Works is subordinate to its claim. The Trust Company became a mortgagee under the mortgage dated May, 1900, which was subsequent to the furnishing of considerable of the material for which the lien is claimed. It foreclosed its mortgage and became the purchaser of the property at the sheriff's sale under the decree of foreclosure.

By this procedure it simply became substituted to only the rights, titles, and interest that the Paper Company had in the property upon which the lien is claimed, and to no other or greater rights. It simply stood in the shoes of the Paper Company, and was, therefore, not a bona fide purchaser, but was the successor in interest of the Paper Company. It did not allege nor show that it was in fact misled in any way by the description in the notice of lien, but contented itself by simply proving its source of title. Being merely the successor in interest of the Paper Company, it is bound to the same extent and in the same manner as that company. Under the provisions of section 2133, Code of Civil Procedure, appellant's mortgage was subject to the Iron Works' lien.

We therefore advise that the judgment and order appealed from be affirmed.

**POORMAN and CALLAWAY, CO., concur.**

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

**HOLLOWAY, J.,** being disqualified, takes no part in this decision.

(31 Mont. 120)

**SPENCER v. HERSAM et al.**

(Supreme Court of Montana. July 8, 1904.)

**VENDOR AND PURCHASER—CONTRACT—RESCISSION — FRAUD — COMPLAINT — EQUITY — NEW TRIAL—NOTICE—SERVICE—TIME.**

1. In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true.

2. The time for giving notice of intention to move for a new trial in an equity case, where issues have been submitted to a jury, begins to run from the date of notice of the decision by the court adopting or rejecting the findings of the jury, and not from the date of the return of the special findings by the jury.

**Commissioners' Opinion.** Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by John B. Spencer against M. E. Hersam and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

M. P. Gilchrist, for appellants. C. M. Parr, for respondent.

**CALLAWAY, C.** This action was brought by the plaintiff, the vendor, for the purpose of procuring the rescission of a sale of real estate on the ground of fraud practiced upon him by the defendants, the vendees. The appeal has been taken by the defendants from a judgment against them, and from an order denying their motion for a new trial.

1. The decisive question in the case is, does the complaint state a cause of action?

Counsel for the respective parties do not agree as to whether it does, under the rule announced in *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301. Without entering into a detailed discussion of the facts alleged, we may say that the complaint, in effect, states that certain representations, which plaintiff had a right to rely upon, were made to him by and at the instance of the defendants; that the representations were untrue, and therefore false; that plaintiff relied upon such representations, and was induced thereby to enter into the contract, and as a result thereof he suffered loss. There is no direct allegation that plaintiff believed the representations to be true, but from the facts alleged in the pleading the conclusion that he did is inevitable. The words "rely" and "believe" are nearly synonymous. "Rely" is to depend on some one or something as worthy of confidence; to repose confidence; to trust; used with "on" or "upon." "Believe" is to accept as true on the testimony or authority of others; to have faith or confidence in the truth of any one or anything. See *Standard and Century Dictionaries*. And one is impelled to inquire, will a man rely upon a statement of fact which he knows to be untrue? If he relies upon a statement of fact, does it not necessarily follow that he believes such statement? As a matter of law, a man may not rely upon that which he knows to be false. The complaint is inartistically drawn, and is not to be recommended as a form, but it contains the necessary substance to sustain the judgment.

2. This action was tried to a jury, which returned a verdict and special findings on February 6, 1902. On February 10, 1902, defendants served and filed their notice of intention to move for a new trial. The court adopted the findings and entered its decree on March 22, 1902. In an equity case, one intending to move for a new trial must, within 10 days after notice of the decision of the court, file with the clerk and serve upon the adverse party a notice of his intention; designating the grounds upon which the motion will be made. If the judge, as chancellor, sees fit to employ the services of a jury to enlighten his conscience, its findings are merely advisory, and it is immaterial when they are returned into court. The decision of the court is made when it adopts or rejects the findings of the jury, or makes its own findings, and directs its judgment. *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106. It was essential to the validity of their motion for a new trial that the defendants serve and file their notice of intention within 10 days after notice of the decision of the court. This they did not do. Therefore the court was obliged to overrule the motion.

It follows that the judgment and order should be affirmed.

**CLAYBERG, C. C., and POORMAN, C., concur.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order are affirmed.

**MILBURN, J.,** not having heard the argument, takes no part in this decision.

### POTTER v. LOHSE.

(Supreme Court of Montana. July 2, 1904.)

**CHATTEL MORTGAGES—SALE BY MORTGAGEE—RIGHTS OF PURCHASER—SUBROGATION—ACKNOWLEDGMENT OF TITLE—CONVERSION—ACTIONS—PARTIES—PLEADING—COUNTERCLAIMS—INSTRUCTIONS.**

1. Where a mortgagee of a chattel rightfully in possession thereof sells it to another, the mortgagor, who has neither paid nor tendered the mortgage indebtedness, has no right of possession such as to entitle him to maintain conversion against the purchaser.

2. A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and under Civ. Code, § 4602, which makes the rule the same when the reason is the same, a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee.

3. Subrogation—an equitable defense—may be pleaded to a legal cause of action.

4. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.

5. Under Code Civ. Proc. § 691, providing that a counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, a judgment cannot be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.

6. In an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has therefore become subrogated to the rights of such mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.

7. In conversion by a mortgagor of a chattel against a purchaser from the mortgagee who was rightfully in possession, a charge to find for plaintiff if he was the owner of the property and defendant had knowledge of his rights, was erroneous, as ignoring the question of plaintiff's right to possession.

8. The taking of a mortgage on a chattel by defendant's grantor in January is no acknowledgment by defendant, who purchased the chattel from his grantor in the following March, of the mortgagor's title.

**Commissioners' Opinion.** Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by David Potter against Fred Lohse. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Kirk & Clinton, for appellant. J. E. Healy and C. E. Oles, for respondent.

**POORMAN, C.** This is an action in conversion. The plaintiff had judgment in the district court, and from this judgment and an order overruling defendant's motion for a new trial the defendant appeals.

1. The defendant purchased certain personal property from one Wadsworth. The defendant sold a part of this property, and plaintiff then commenced this action to recover from the defendant the value of the property, alleging conversion thereof. It appears from the evidence that the plaintiff, Potter, in August, 1900, gave to Wadsworth an absolute bill of sale of the property in question. Afterwards, on January 11, 1901, Potter executed to Wadsworth a chattel mortgage on this same property to secure the payment of a note for the sum of \$200, executed and delivered by Potter to Wadsworth on that day, and due three months after date, with interest. The mortgage is in the usual form, and provides that the mortgagee may take possession of the property under the conditions usually provided in such mortgages. It is admitted that on March 1, 1901, Wadsworth took absolute possession of the property, locked the building in which it was kept, and refused admittance to Potter. The right of the mortgagee to such possession was not disputed. On March 5, 1901, the defendant, Lohse, purchased this property from Wadsworth, paying \$247.50 therefor, and on the succeeding day, through his agent, took possession of it. Potter at the time was present, and made no objection to the transfer. Plaintiff, Potter, has not paid nor offered to pay the mortgage indebtedness. It appears, therefore, that at the time of the sale to defendant the mortgagee was in possession of this property, claiming to be the owner thereof; and it does not appear from this record that the plaintiff, at the time the defendant acquired possession of the property or at the time this action was commenced, had the right to the possession thereof. The action of conversion under our Code is the same as the common-law action of trover. In *Harrington v. Stromberg-Mullins Co.*, 29 Mont. —, 74 Pac. 413, this court said: "The party complaining 'must have had, when the goods were taken, a general or special property in them, and a right to the immediate possession.'" *Glass v. Basin & Bay State M. Co.* (Mont.) 77 Pac. 302; *Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338; *Reardon v. Patterson*, 19 Mont. 231, 47 Pac. 956; *Binnian v. Baker* (Wash.) 32 Pac. 1008; *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198; *Laubenheimer v. Bach, Cory & Co.*, 19 Mont. 177, 47 Pac. 803; *Kennett v. Peters* (Kan.) 37 Pac. 999; 21 Enc. Plead. & Prac. 1062. The mortgagor undoubtedly has his remedy for any damage caused by fraud or injury to or sacrifice of the property by the mortgagee in possession, or by any one in collusion with him; but no such facts appear in this case.

2. At the trial it was claimed by the plaintiff that this bill of sale which he executed to Wadsworth was, in effect, a mortgage, and that it was canceled by the subsequent mortgage. The defendant, however, testified that he purchased the property believing that Wadsworth was the sole owner, and asked permission to amend his pleading; that he be subrogated to the rights of Wadsworth as mortgagee, and permitted to set up a judgment which he held against the plaintiff, and that Wadsworth be made a party to the suit. This the court denied. The theory of the plaintiff in this action is that Wadsworth was only a mortgagee in possession of the property. Wadsworth was a witness in the case, and testified: "My reasons for selling the horses to Lohse was that I wanted to get my money out of the bill of sale, and did not want to be bothered with a lawsuit. That is how Lohse and I arrived at the particular sum of \$247.50. It was the amount of Potter's indebtedness to me. That amount was just reckoned up—itemized up." It appears from this and other evidence of Wadsworth's that the amount of money that he received from his grantee, Lohse, was the amount Wadsworth claimed to be due to him from the plaintiff, Potter. This record shows that the mortgagee, at the time this suit was tried, had not disposed of the note described in this mortgage, and that the same was then past due; and it further appears that defendant, Lohse, had not made voluntary payment of plaintiff Potter's debts. The rule with reference to pledgees is, "A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee." *Britton v. Oakland Bank of Savings* (Cal.) 57 Pac. 84, 71 Am. St. Rep. 58; *Williams v. Ashe* (Cal.) 43 Pac. 595. This same principle was recognized by this court in *Reardon v. Patterson et al.*, 19 Mont. 231, 47 Pac. 956. It is difficult to distinguish in principle, then, between a purchase from a pledgee and the purchase from the mortgagee by the defendant, Lohse, under the circumstances of this case. "Where the reason is the same the rule should be the same" (Civ. Code, § 4602) to the extent of permitting Lohse, the purchaser from the mortgagee, to succeed to the rights of his grantor with respect to the property purchased. It is true there was no contract between the mortgagee and his vendee that this note and mortgage should be assigned to the vendee, but "the right of subrogation or of equitable assignment is not founded upon contract, nor upon the absence of contract, but is founded upon the facts and circumstances of a particular case and upon principles of natural justice." See note to *Crumlish's Administrator v. Improvement Co.* (Va.) 23 L. R. A. 120. It is also true that subrogation is an application of the principles of equity, but in this state an equitable defense may be plead-

ed to a legal cause of action. *Boone*, Code Pleading, par. 78; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468. It is likewise true that the defenses of absolute ownership and of rights as a mortgagee are inconsistent; but as was stated in *Ball v. Gusseuhoven*, 29 Mont. 6, 74 Pac. 871: "We recognize the rule that a defendant is entitled to plead in the same answer as many defenses as he may wish to present, even though they are inconsistent with each other, and is entitled to present and rely upon any of such defenses upon the trial of the case; subject, however, to proper instructions to the jury as to their proper effect in each case."

The judgment which the defendant, Lohse, holds against the plaintiff, Potter, cannot properly be pleaded in this action as a set-off or counterclaim. Under section 691 of the Code of Civil Procedure, in an action in tort the defendant cannot counterclaim any new matter not arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. *Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664. The converse of this proposition was held in *Collier v. Ervin*, 3 Mont. 142, where this court said, "A counterclaim founded upon a tort cannot be set off against a claim founded upon contract." The court, further construing the statute, says: "The counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. \* \* \* The words in our statute 'subject of the action' should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and grounds of the plaintiff's right to recover or obtain the relief asked." See, also, *Boley v. Griswold*, 2 Mont. 447; *Wells v. Clarkson*, Id. 230-339; *Roush v. Fort*, 3 Mont. 175; *Wells v. Clarkson*, 5 Mont. 33, 5 Pac. 804; *Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671. Section 501, Code of Civil Procedure of New York, is the same as section 691, Code of Civil Procedure of Montana. In construing this section the Supreme Court of New York, in *Eckert v. Gallien* (Sup.) 53 N. Y. Supp. 879, says: "The action is in tort, and none of the counterclaims state a cause of action arising out of the contract and transaction set forth in the complaint, or connected with the subject of the action. They are therefore not proper counterclaims in such an action." *Ferris v. Armstrong Mfg. Co.* (Sup.) 10 N. Y. Supp. 750; *Chambers v. Lewis*, 11 Abb. Prac. 210; *People v. Dennison*, 84 N. Y. 272, 59 How. Prac. 157; *Pattison v. Richards*, 22 Barb. 143; *Smith v. Hall*, 67 N. Y. 48. In *Lehman v. Griswold*, 40 N. Y. Super. Ct. 100, the court says: "The words 'the subject of the action' mean the facts constituting plaintiff's cause of action." The remedy of the defendant, in the event of a judgment being taken



against him in this case, is by bill in equity, or other appropriate proceeding to offset the one judgment against the other. *Russell v. Conway*, 11 Cal. 93; *Duff v. Hobbs*, 19 Cal. 659; *Lyon, Adm'r, v. Petty*, 65 Cal. 822, 4 Pac. 103; *Duncan v. Bloomstock*, 13 Am. Dec. 728; *Hovey v. Morrill*, 61 Am. Rep. 815; *Quick, Adm'r, v. Durham*, 115 Ind. 302, 16 N. E. 601; *Puett v. Beard (Ind.)* 44 Am. Rep. 280; *Green v. Conrad*, 114 Mo. 651, 21 S. W. 839.

The assignment of the note and mortgage to defendant being made by operation of law, Wadsworth is not a necessary party to the suit in order to give the defendant complete protection as against the plaintiff, and the court therefore did not err in refusing to make Wadsworth a party at the instance of the defendant over the objection of plaintiff.

Plaintiff's instruction No. 1, given by the court, is as follows: "The jury are instructed that in this case the action is one which is called conversion—that is, the plaintiff alleges that the defendant Lohse has taken plaintiff's property from him, and converted the same to his (Lohse's) own use. If you find that the plaintiff was the owner of the property at the time of the taking of said property by the said Lohse, and that Lohse had knowledge of the plaintiff's rights therein and thereto, then you will find for the plaintiff and against the defendant for such amount as you find the value of the property under the evidence to have been, at the time of the said taking, in the market at Meaderville." This instruction entirely ignores all question as to the plaintiff's right of possession, and is therefore erroneous.

Plaintiff's instructions Nos. 2 and 3 were given by the court upon the theory that the defendant was not entitled to be subrogated to the rights of the mortgagee, and would therefore be inapplicable upon a retrial of this case. Instruction No. 3 is also erroneous in that it instructs the jury that the taking of the mortgage by Wadsworth was equivalent to an acknowledgment of plaintiff's title by the defendant. This mortgage was executed on the 11th of January, and the purchase by the defendant from Wadsworth was not made until the 5th and 6th of March following.

Defendant's instruction No. 1, as given by the court, is also erroneous. The words therein, "and you further find that said Wadsworth owned the same," should be stricken from the instruction, and the words "was present at and" should be inserted in the instruction immediately following the name "Potter" and before the word "knew."

Defendant's instruction No. 2, which the court refused to give, is incomplete. To make it sufficient, there should be inserted therein the word "plaintiff's" immediately preceding the word "title," where the same occurs in the phrase "notice of title"; also the phrase "but in plaintiff" should be inserted immediately following the name

"Wadsworth," and preceding the word "and," where the same occurs in the phrase "said Wadsworth, and unless he has done so."

The other errors complained of can hardly arise upon a retrial.

We think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

CALLAWAY, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

BRANTLY, C. J., not having heard the argument, takes no part in this decision.

(30 Mont. 484)

HEINZE et al. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.

(Supreme Court of Montana. June 13, 1904.)

MINES—OWNER OF SURFACE—PRESUMPTION OF OWNERSHIP OF ORES BENEATH THE SURFACE — EVIDENCE TO OVERCOME — SUFFICIENCY — PRELIMINARY INJUNCTION — DISCRETION OF COURT.

1. The presumption that an owner of the surface is also the owner of ores found beneath the surface is not overcome by the opinion of an engineer that, if a vein having its apex in ground owned by another continues to dip at the same angle as it dips where it is exposed in upper levels, it will reach the point where the owner of the surface is conducting operations.

2. The granting of an injunction pendente lite is within the discretion of the trial court, and, in the absence of a clear abuse of it, the Supreme Court will not interfere.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Suit by F. Augustus Heinze and another against the Boston & Montana Consolidated Copper & Silver Mining Company. From an order denying an application to modify an order directed by the Supreme Court (67 Pac. 1134) to be made, plaintiffs appeal. Affirmed.

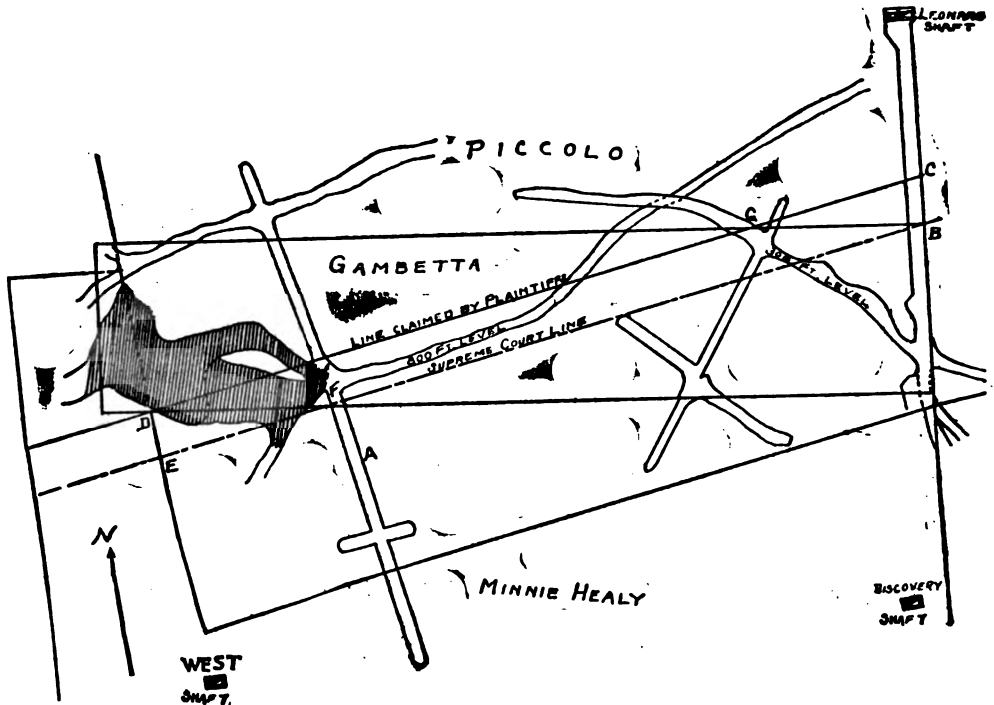
John J. McHatton and James M. Denny, for appellants. A. J. Shoers, C. F. Kelley, and Forbis & Evans, for respondent.

BRANTLY, C. J. This cause was heretofore before this court on appeal by the defendant from an order granting an injunction pendente lite. Upon consideration of the facts exhibited in the record, the order of the district court was modified. 26 Mont. 205, 67 Pac. 1134. Afterward an application was made to the district court to extend the scope of the order so as to include ore bodies expressly excluded from its operation by the order of this court, it being alleged that subsequent developments made in the disputed territory demonstrated that these ore bodies belong to a vein having its apex in plaintiffs' ground. Charges were also made that the defendant, though enjoined from mining within plaintiffs' boundaries and removing;

ore therefrom, burnt powder and other material in its own workings adjacent to the place where plaintiffs' operations are carried on, for the purpose of obstructing the plaintiffs by producing illness in their employees and rendering it dangerous for them to remain in the vicinity, and that the smoke so created entered into the workings of plaintiffs and produced the intended effect. The district court denied the application. The plaintiffs appealed.

The situation of the property involved, and the controversy with reference to it, is illustrated by the following diagram:

ant is engaged in stoping and removing this ore. The contention of the defendant is that these ore bodies are a portion of the Leonard vein, having its apex in the defendant's ground to the north. Upon the former hearing the same contention was made, and this court, upon the evidence adduced, concluded that it did not tend to show that the plaintiffs had any ground for their contention. Accordingly the district court was directed to modify its order so as to exclude these ore bodies from its operation. This it was directed to do by limiting the scope of the order to the workings south "of a plane de-



The legal title to an undivided six-eighths interest in the Minnie Healy lode claim is admitted to be in the plaintiffs. The claims to the north, the Piccolo and Gambetta, belong to the defendant. The contention of plaintiffs is that the apex of the discovery vein in the Minnie Healy is found near the east boundary of the claim, at the discovery shaft, and passes through the claim from the east to the west nearly parallel with the south boundary line of the Piccolo, and crosses the west end line of the claim immediately west of the west shaft; that it dips to the north at an angle of about 70°; and that the defendant is trespassing upon the exterior portions of it beneath the surface of the Piccolo and Gambetta claims. The particular portion of the workings involved here is indicated by the irregular shaded figure near the southwest corner of the Gambetta, and consists of large bodies of ore on the eighth and lower levels of the defendant's workings down to the twelfth. The defend-

scending vertically into the earth on a line parallel with the south side line of the Piccolo lode claim, and passing through the point at which the north side line of the Gambetta lode claim intersects the third or 300-foot level south of the Leonard shaft." The line of this plane is indicated by the letters E, B. The workings where the nuisance is alleged to have been committed are in the Minnie Healy ground, and are connected with the plaintiffs' workings by a crosscut extending south from the point F. It is charged that a fire was built in this crosscut near the point F, and that the smoke created by it was carried by the natural draft through the crosscut south into plaintiffs' workings.

The evidence in the record fails to disclose any additional development by the plaintiffs, tending to connect these excluded ore bodies with the apex of the Minnie Healy vein. Much mining has been done by the defendant on the various levels from the 800

down to the 1,200 since the order was modified, but none of this development tends to support the conclusion that the ore bodies in controversy belong to the Minnie Healy vein. Furthermore, the plaintiffs have not by their operations so developed their own workings from the apex of their vein down to the disputed territory as to furnish substantial evidence that their claim is probably well founded. Indeed, while they concede that there is a vein in the defendant's ground dipping to the south, their own contention is based exclusively upon the opinion of their engineers that, if the vein having its apex in the Minnie Healy ground continues to dip at the same angle from certain points where it is exposed in the upper levels in their workings, it will reach the point where the defendant is conducting its operations. This is not sufficient to overcome the presumption that the defendant owns the ores found beneath its own surface. This presumption may not be overturned by speculative conjecture or even intelligent guess. In any event, we do not think that, upon the showing made, we are justified in saying that the district court abused its discretion in refusing to enlarge the scope of the order. A large discretion is lodged in that court in such matters, and, unless in a particular case it appears that there has been a clear abuse of it, this court will not interfere. *Parrot S. & C. Co. v. Heinze*, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386, and cases cited.

There is no substantial ground for controversy as to the meaning of the order made by this court upon the former appeal. It is said by counsel for plaintiffs that it is ambiguous, in that there are two points at which "the north side line of the Gambetta lode claim intersects the third or 300-foot level, south of the Leonard shaft," and that, as this court evidently intended to so fix the position of the dividing plane as to preserve the property pending the litigation, a proper construction of the order would make the plane pass through the point G, instead of B. It is further said that, as a vertical plane passing through the point G cuts through the ore bodies, and leaves a portion of them to the north, to be mined out by the defendant, the injunction order should, in any event, be extended to prevent this result. After consideration of the facts then before the court, the order was made. The word "south" was used intentionally to indicate exactly the point through which the plane should pass. It is not ambiguous, but clear and explicit, as it was intended to be, and evidently the district court did not misunderstand its import. The point named in the order is due south, while the point contended for by the plaintiffs is nearly due southwest; and it is only by a misinterpretation of the order that the plane of division between the parties is supposed, by reason of a misapprehension of

the facts by this court, to have been so placed as to cut through the ore bodies.

There is some evidence in the record that, about the time the injunction was applied for, certain employes of the defendant were engaged in creating smoke in the crosscut extending south from the disputed ore bodies, and that by natural draft through this opening this smoke found its way into the workings of the plaintiffs within the Minnie Healy ground. It created discomfort to plaintiffs' employes, and temporarily stopped operations. It appears, however, that there was a controversy between the parties over the use of that crosscut; the plaintiffs' employes having attempted to put in a bulkhead near the point A to exclude the defendant's employes from the workings to the south. The smoke seems to have been created for the purpose of preventing the completion of this obstruction, and not to interfere with plaintiffs' mining. This crosscut is one of defendant's workings, and, by the terms of the modified order made by this court, the defendant and its employes were entitled to use it as a passageway to all the workings in the Gambetta and Piccolo claims south of the vertical plane for the purpose of inspection and repairs. 26 Mont. 265, 67 Pac. 1134. The district court doubtless entertained the view that the occurrence was one of the incidents of a squabble for the possession and control of this opening, and was not intended to be a continuing nuisance, so as to interfere with the plaintiffs in the prosecution of their ordinary mining operations. As the evidence of the circumstances attending the incident is not very clear, and as the conclusion drawn from it by the district court is probably correct, this court will not reverse its action.

Let the order be affirmed. Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

#### HAYES v. BUZARD et al.

(Supreme Court of Montana. July 2, 1904.)

WATERS AND WATER COURSES—WATER RIGHTS — APPROPRIATION — CONVEYANCES — EVIDENCE—SUFFICIENCY—APPEAL—REVIEW.

1. Where a person rents land and uses a portion of the water on it, and it does not appear what portion was used, it cannot be inferred that he intended to make it or any portion of it appurtenant to the land.

2. A person asserting that a water right and a ditch are appurtenant to certain land must prove that they are appurtenances and must connect himself with the title of the prior appropriator.

3. A deed of land, together with all appurtenances, water rights, and water ditches belonging thereto, and all interest of the grantor, conveys all rights which were appurtenant, but does not affect a right belonging exclusively to the grantee.

4. Where plaintiff in a suit to determine water rights asserted rights under a deed conveying all the appurtenances, water rights, and water ditches, and all the interest of the gran-

tor, evidence showing the exclusive use of the water by defendants for 10 years, during which time neither plaintiff nor his immediate predecessor asserted any right thereto, justified the conclusion that plaintiff's claim was not well founded.

5. Under Laws 2d Extra Sess. 1903, p. 7, authorizing the Supreme Court to review all questions of fact and of law in equity cases, in a suit to determine water rights the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.

**Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.**

**Action by Joseph A. Hayes against Walter Buzard and another. From a judgment for defendants and an order denying his motion for a new trial, plaintiff appeals. Affirmed.**

**John A. Luce, for appellant. Hartman & Hartman, for respondents.**

**BRANTLY, C. J.** This action was brought to determine plaintiff's right to the use of 100 inches of water in Cotton Wood creek, in Gallatin county, Mont., together with a certain ditch conveying the same to and upon plaintiff's land, to wit, the northwest quarter of section 20, township 3 south, of range 5 east of the Montana meridian. The defendant Leonora Herron is the owner of the southwest quarter of section 17 of the same township, and the defendant Walter Buzard is the owner of the northwest quarter of the same section. William Herron, the deceased husband of Leonora Herron, in 1878 made a timber-culture entry of plaintiff's land. This claim he relinquished in 1881. In 1882 he made a desert entry of it, which was, upon relinquishment by him, canceled by the department in 1885. On the same day Joseph Herron, a brother, made a declaratory statement for it as a pre-emption claim, and finally secured a patent by cash entry in 1887. In 1889 Joseph Herron conveyed it to his brother William Herron by warranty deed, "together with all tenements, hereditaments, appurtenances, water rights and water ditches to the same belonging, and all the estate, title, interest, claim or demand of said party of the first part therein." By a similar deed William Herron and his wife, a few days before the death of the former, in 1891, reconveyed to Joseph Herron. In 1892 Joseph Herron and wife conveyed to one John Hays. In 1895 John Hays and wife, Joseph Herron and wife joining in the deed, conveyed to plaintiff. These latter three deeds contained a clause substantially the same as that in the deed from Joseph to William Herron. From 1878 to the time of his death, William Herron was also in possession of the west half of section 17, and cultivating it. The southwest quarter being within the terms of the grant by the United States to the Northern Pacific Railroad Company, the title to it was secured by him by conveyance from that company. He held the northwest quarter under a contract from the railroad company, but, by reason of a settlement

made upon this quarter by one Towne prior to the taking effect of the grant, it was held by the land department that it was excluded from the grant and remained open to settlement under the laws of the United States. This holding was the result of a contest with the railroad company by Leonora Herron after the death of her husband. She was granted a preference right to enter it as a homestead. This she relinquished in favor of the defendant Walter Buzard, a son-in-law, who obtained patent for it as his homestead. His settlement was made in 1896, and final entry in 1901. By an order of the district court of Gallatin county, Leonora Herron had set apart to her the southwest quarter of section 17 as her probate homestead. Subsequently, in 1897, the heirs of William Herron by deed relinquished all their interest to Leonora Herron, with 200 inches of water in Cotton Wood creek, described as appurtenant to the land, with the ditches conveying the same. A few days afterwards Leonora Herron by deed conveyed to defendant Buzard the right to use 100 inches of the same water. In the spring of 1882 William Herron constructed a ditch from Cotton Wood creek to and over all these lands. The creek runs in a northwesterly direction through the southwest quarter of section 17. Most of this quarter section and also of the land of the plaintiff is upon the bench, and, in order to convey water to this portion of it, the ditch was constructed from a point on the creek some distance above, and passes almost entirely around the plaintiff's land in such a way as to make it convenient to irrigate the plaintiff's land from it. In 1883, owing, probably, to the fact that all the water in the creek during the irrigating season had already been appropriated, and also to the fact that the ditch could not be used on the lands on the north side of the creek, including a part of the southwest quarter and all of the northwest quarter of section 17, William Herron purchased an undivided one-third interest in a ditch on the north side of the creek known as the "Brown Ditch," and the water conveyed thereby, amounting to 600 inches. In the record this water right is referred to as the "Roy Hunter water right," and is the one in which the plaintiff claims an interest to the extent of 100 inches. The 200 inches thus acquired had been appropriated by Hunter by two different diversions, one in 1870 and the other in 1878, thus making Herron's right, according to the record, date one half from 1870 and the other from 1878. It was the latter right which the defendant Leonora Herron conveyed to Buzard in 1897. From and after its purchase William Herron used the water from his own ditch on the south side, or from the Brown ditch and other ditches from the north side, as best suited his purposes. The complaint alleges, in substance, that the water right in question, to the amount of 100 inches, together with the

ditch constructed by William Herron in 1882, belongs to plaintiff as an appurtenance to his land; that the water is necessary to make the land productive; and that it has been continuously used for agricultural purposes by the plaintiff and his grantors since its acquisition by the said Herron. It is further alleged that the defendants assert some interest therein adverse to the plaintiff; that in July, 1901, without right, they diverted it away from the ditches of the plaintiff and deprived him of the use of it, and that they threaten to continue this diversion, to the irreparable injury of the plaintiff. The defendants filed separate answers denying that the ditch and water right claimed by the plaintiff are or ever were appurtenant to the lands of the plaintiff, or that the plaintiff or his grantors or predecessors in interest ever used the ditch in controversy and the waters conveyed therein to the amount of 100 inches, or any amount, to irrigate plaintiff's lands, except by permission of the grantors and predecessors of the defendants, or that the plaintiff or his predecessors ever had any right to the use of said water in any amount. As affirmative ground of relief, they then allege title to their lands respectively, and allege that it is necessary to use all the water thereon in order to make them productive; that William Herron made continuous and uninterrupted use of it upon the lands of the defendants from the date at which he acquired it down to the date of his death; and that from that time down to the bringing of this action they themselves had been making continuous and uninterrupted use of it. The court found the issues for the defendants, and entered judgment accordingly. From the judgment and an order denying him a new trial, plaintiff has appealed.

Plaintiff seeks a reversal of the judgment upon the grounds (1) that the evidence does not support the findings, (2) that the findings do not support the judgment, and (3) that the court erred to his prejudice in the admission of certain evidence. The controversy between the parties is indicated by the synopsis of the pleadings, and presents the sole question: Did the interest claimed by plaintiff in the Herron ditch and Hunter water right pass to the plaintiff under the conveyances from Joseph Herron and his grantees to the plaintiff as an appurtenance to his land?

William Herron was never vested with the legal title to this land until he took under the conveyance from his brother Joseph. He then took it with such rights appurtenant thereto, and only such, as Joseph had. Joseph had no right in the water whatever, for there is nothing in the evidence tending to show that he had obtained any interest theretofore by virtue of any contract or agreement made with William at the time of his settlement upon the land or at any time thereafter. William abandoned his inchoate rights in the land in the year 1885.

But the presumption, if any, which might otherwise be indulged in, that he intended also to abandon his right to the water, is overturned by the fact, conceded by all parties, that he used it continuously down to the date of his death. Indeed, plaintiff's assertion of his right is founded upon the fact of such use by William Herron, and, if it be conceded that William Herron abandoned his right to the water at the time his desert entry was canceled, he thereafter had no title which he could convey, and the plaintiff's right, in so far as it is based upon his appropriation, must fail. When he permitted his desert entry to be canceled, he was still in possession of the west half of section 17, and this, under the evidence, required the use of the water to render its cultivation possible. So that, assuming the fact to be, as plaintiff claims, that the ditch of 1882 was constructed for the purpose of reclaiming plaintiff's land, and that the interest in the Hunter right was purchased in order to effect this purpose, yet this fact does not establish the plaintiff's claim, when considered in the light of his subsequent conduct and the assertion of the right by William Herron to the exclusive use of the water up to the time he acquired Joseph Herron's title. Section 1882 of the Civil Code recognizes the right of an appropriator or owner of a water right to change the place of diversion, as well as the use and the place of use. It therefore does not follow that, because water has been appropriated for a particular use, it forever thereafter must be applied to that use. "The legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the bona fide intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated. Section 1882, Civ. Code; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472 [60 Am. St. Rep. 777]." *Smith v. Denniff*, 24 Mont., at page 29, and page 401, 50 Pac., 81 Am. St. Rep. 408. The evidence shows that, during most of the years subsequent to the settlement by Joseph Herron in 1885 until the death of William, the latter rented the land from his brother, and used a portion of the water upon it. What portion was thus used is not made to appear. But this evidence does not furnish any ground for the inference that William Herron intended to make it, or any part of it, appurtenant to the land. If this could be so, then by using a water right upon leased lands the owner would incur the risk of losing it. The right was originally acquired upon the public domain. If the title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land,

will not of itself determine its character as an appurtenance. "One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator." *Smith v. Denniff*, supra. The right of the plaintiff must therefore depend upon the interpretation to be given to the deeds furnishing the chain of title from William Herron to the plaintiff, for, as we have seen, the use of the water had not become appurtenant to plaintiff's land prior to the date of Joseph Herron's deed to William Herron. This deed purported to convey, and did convey, all rights which were appurtenant. *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Kimpton v. Jubilee Placer Mfg. Co.*, 16 Mont. 379, 41 Pac. 137, 42 Pac. 102. But the right in question, being the exclusive property of William Herron, was not affected by it. What rights, therefore, does the plaintiff appear to have acquired in the water under that deed, in the light of the facts as they then existed, and the behavior of the parties with reference to it down to the commencement of this action? This deed does not, nor does any of the others following it, describe any particular right. They only purport to convey such rights as were appurtenant. The evidence tends to show that William Herron used the water upon the Joseph Herron (the plaintiff's) land during the time he held title to it, just as he did during the years when he was renting it. After the execution of the deed, and down to the commencement of this action, his widow used it upon the west half of section 17 until she relinquished the northwest quarter to the defendant Buzard in 1897, and that thereafter she and Buzard used it exclusively upon the same land. Buzard claimed his right under his deed from the widow. The evidence, it is true, is somewhat conflicting, and some of the witnesses testify that the plaintiff and his predecessors and tenants have used it continuously from the date at which William Herron executed the deed. The findings of the court, however, we think are fully justified by all the facts appearing in evidence, and should not be disturbed.

Without attempting to analyze the evidence and to state in detail our reasons for this conclusion, we shall briefly refer to one fact which seems to us significant. In 1890, just after the deed executed by Joseph Herron to his brother William, the latter, with others, brought an action to have the relative priorities to the rights in the water of Cotton Wood creek settled and determined. This action resulted in a decree under which William Herron was adjudged to have the title to the use of 100 inches by an appropriation made in 1870, and 100 inches by an appropriation made in 1878. Thereupon the parties employed a ditch tender to distribute the water during the irrigating season in accordance with the terms of the decree. This

ditch tender was a witness, and testified that, from the date of the decree until the bringing of this action, he had distributed the water from year to year until the bringing of this action, awarding the 200 inches in controversy here to William Herron and to the defendants as his successors, and that the use made of any part of it by the plaintiff or his tenants, or any of his predecessors under the deeds subsequent to William Herron's deed to Joseph, was by permission of William Herron or the defendants. This exclusive use of the water by the defendants during all the years of 1891 to 1901, when this action was commenced, together with the fact that in the meantime neither plaintiff nor John Hays, his immediate predecessor, asserted any right to it, justifies the conclusion that plaintiff's claim is not well founded.

The findings of the court upon the evidence are very full. Some of them are immaterial. This fact, however, does not impair the effect of such as are material and upon the issue actually involved in the controversy. The findings upon the material issue fully sustain the judgment.

The particular items of evidence of the admission of which complaint is made are alleged declarations made by William Herron, at the time he executed the deed to Joseph, that there was no water right appurtenant to the land conveyed, and that he did not intend to convey any water right, and also certain testimony by Joseph Herron that he never had or claimed any interest in the Hunter water right. It is urged that this testimony was incompetent and prejudicial to the plaintiff. Without pausing to determine the question whether the evidence was in fact incompetent, but assuming it to be so, we do not think its admission sufficient to warrant a reversal of the judgment. This is an equity case, and was tried by the court sitting without a jury. In such case the result will not be overturned merely on the ground that some irrelevant or incompetent evidence was admitted at the hearing. In such case, if the incompetent evidence is so unimportant and trifling, as compared with the competent evidence introduced and considered, that it is apparent that the result reached was probably not based upon the incompetent evidence, it will be presumed that such evidence was disregarded by the court when it came to make its findings. *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805. But, conceding that the trial court was probably influenced in its conclusions by the evidence alleged to be incompetent, yet this court is authorized by the act of the Second Extraordinary Session of 1903 (Laws 2d Extra Sess. 1903, p. 7) to review and determine all the questions of fact as well as of law in equity cases, and to render such judgment therein as the circumstances may justify, if upon the record it appears that it is not necessary to remand the cause for another

er hearing. It appears from this record that the parties had ample opportunity to introduce, and probably did introduce, all the evidence applicable, and that a hearing of other evidence is not necessary in order finally to settle and determine the rights of the parties. Excluding the evidence complained of, and weighing the remainder of it in the record in order to determine the rights of the parties thereon as an original proposition, we think that the findings of the trial court should not be disturbed, as the evidence preponderates in favor of the conclusions reached by it.

The judgment and order are affirmed.

MILBURN, J., concurs. HOLLOWAY, J., being disqualified, takes no part in this decision.

### MARTIN v. HEINZE.

(Supreme Court of Montana. July 2, 1904.)

ACCOUNT STATED—PLEADINGS—COPY OF ACCOUNT—RIGHT OF ADVERSE PARTY.

1. Code Civ. Proc. § 743, providing that it is not necessary for a party to set forth in his pleading the items of the account therein alleged, but he must deliver to the adverse party, after demand, a copy of the account, applies to actions on open, unsettled accounts, and not to actions on accounts stated.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by Samuel D. Martin against F. Aug. Heinze. From a judgment for defendant, plaintiff appeals. Reversed.

Forbis & Mattison, for appellant. Jas. M. Denny, for respondent.

BRANTLY, C. J. In this action the plaintiff seeks to recover from the defendant the sum of \$12,665, balance alleged to be due upon an account stated. It is alleged that on September 8, 1900, in Butte City, Mont., an accounting and settlement was had between the plaintiff and the defendant; that then and thereupon an account was stated between them; that upon such statement a balance of \$20,665 was found due to the plaintiff from the defendant; and that the defendant then and there agreed to pay the same to plaintiff. It is further alleged that on the same day the defendant paid to plaintiff the sum of \$8,000, leaving a balance due of \$12,665, no part of which has been paid. Defendant answered by general denial of all the allegations of the complaint. The action was commenced on February 5, 1901. The answer was filed on June 13th. In the meantime, on March 15th, the defendant served upon plaintiff a written demand, of which the following is a copy: "The defendant in the above-entitled cause hereby demands an itemized account of the items of indebtedness which the plaintiff claims against the defendant—said items of account to be dis-

tinctly set out separately—and, upon failure to receive the same, defendant will object to the introduction of proof." The plaintiff having failed to comply with this demand, the defendant on October 3, 1901, after notice to plaintiff, filed with the clerk a motion asking the court for an order requiring the plaintiff to do so. On January 28, 1902, after a hearing upon this motion, the court caused to be entered in the minutes the following: "This day defendant's motion for itemized account herein is by the court sustained." On October 23, 1902, the cause came on regularly for trial. A jury was called and sworn. The plaintiff was sworn as a witness, and an objection by the defendant to the introduction of evidence, on the ground that the plaintiff had failed to comply with his demand, and the order of the court to furnish the itemized account, was sustained. The court thereupon directed a verdict for the defendant. Judgment was entered accordingly. The plaintiff has appealed from the judgment, and also from an order made denying him a new trial.

The only question presented arises out of the action of the court in sustaining defendant's objection. Section 743 of the Code of Civil Procedure reads as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days, or such further time as the court may allow, or may be agreed to by the parties, after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular."

A considerable portion of appellant's brief is devoted to a discussion of the demand and the minute entry. It is said that both mention an itemized account, instead of a copy thereof, for which only the statute authorizes a demand. It is also said that the minute entry contains no direction to the plaintiff to furnish anything, and therefore is not in substance an order. We shall not consider these technical objections, but assume, for the purpose of this case, that the demand was sufficiently accurate to be held as a compliance with the statute.

The theory upon which the district court proceeded was that the statute applies to actions on accounts stated as well as to those upon open, unsettled accounts. In suits upon the latter class of accounts the defendant is entitled to know the specific demand or demands made against him, and, when the complaint does not set forth the items of the charges making up the sum total, he is entitled to a bill of particulars to inform him of them, so that he may make proper defense. A copy of the account as kept by the plaintiff is the bill intended by the statute. In an action upon an account stated, the situation

is different. An account stated is an agreement between the parties, either express or implied, that all the items are correct. *Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; 1 *Waite's Actions & Defenses*, 191. The action is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract. This contract is the cause of action, and the plaintiff must recover upon it, or fail in the action. *Volkening v. De Graaf*, 81 N. Y. 268; *Holmes v. Page* (Or.) 23 Pac. 961; *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Estee's Pleadings* (4th Ed.) vol. 1, 616. It is therefore not necessary, nor is it permissible, to prove the items of the original account. They may not be inquired into or surcharged, except upon the ground of fraud, error, or mistake in the ascertainment of the balance (*Auzerais v. Naglee*, supra; *Hawkins & Co. v. Long*, 74 N. C. 781), and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer (*Auzerais v. Naglee*, supra; *Coffee v. Williams*, supra; *Kronenberger v. Binz*, 56 Mo. 121). Section 743, supra, can have no application to such a case. It, in terms, applies only to actions upon open, unsettled accounts, in which it is necessary to examine and establish the items going to make up the sum total, or an alleged balance which is disputed in whole or in part. The requirement is that the plaintiff shall furnish the copy upon notice within a time specified or fixed by the parties or by order of the court, or be precluded from giving evidence in support of his claim. When the copy furnished is not specific or is indefinite, the court or judge may order an additional statement. If the copy is not furnished at all, the penalty may be exacted. If the further account is not furnished in obedience to the order, the penalty is not a refusal to hear evidence in support of the claim, but punishment as for a contempt. If, in an action upon an account stated, it should become necessary that the defendant have a bill of particulars, or otherwise ascertain the facts, in order that he may prepare his defense, the appropriate remedy would seem to be an application to the court for such a bill, or for an inspection of plaintiff's accounts, under section 1810 of the Code of Civil Procedure. But however this may be, we have seen that section 743 has no application to actions on accounts stated. It follows that the action of the court in sustaining the objection to evidence was error.

The judgment and order are therefore reversed, and the cause remanded, with directions to the court below to grant a new trial. Reversed and remanded.

HOLLOWAY, J., concurs. MILBURN, J., not having heard the argument, takes no part in this decision.

### QUINLAN v. CALVERT.

(Supreme Court of Montana. July 8, 1904.)

TRIAL—FINDINGS—SUFFICIENCY—REQUEST FOR FINDINGS.

1. Where the court stated that it would make findings of fact, defendant was relieved from making any request for findings, and the submission of written findings had the effect of requesting findings in writing on the material facts involved.

2. Under Code Civ. Proc. § 1112, requiring the court to state the facts found, the conclusions of law, and to order judgment thereon, where affirmative matter is set out in the answer, a finding that all the material allegations of the complaint are true, and directing that judgment be entered for plaintiff is insufficient.

Commissioners' Opinion. Appeal from District Court, Deer Lodge County; *Welling Napton*, Judge.

Action by Harry J. Quinlan against Ed. Calvert. From a judgment for plaintiff, and an order overruling his motion for a new trial, defendant appeals. Reversed.

H. R. Whitehill, for appellant. W. H. Trippet and J. H. Duffy, for respondent.

POORMAN, C. In this action plaintiff seeks to obtain a perpetual injunction restraining the defendant from interfering with a ditch constructed by plaintiff for the purpose of draining marsh lands owned by plaintiff. The trial was by the court sitting without a jury, and judgment was entered in accordance with the prayer of the complaint. From this judgment, and from an order overruling defendant's motion for a new trial, defendant appeals.

Much of the evidence appearing in the record is indefinite, for the reason that witnesses continually made use of the terms "here" or "there," as though indicating on a map or plat; but the maps put in evidence contain no marks, nor does the evidence contain any statement, by which the particular locations meant by the witnesses in the use of these terms can be ascertained. It sufficiently appears, however, from the pleadings and the evidence, that the plaintiff is the owner of certain lands, a part of which is rendered marshy by water coming to the surface; that this water drains into Dry Modesty creek, the channel of which extends in a northeasterly direction; that the ditch or drain constructed by plaintiff extends in a southeasterly direction, and has the effect of preventing the water flowing from this marshy land from entering the Dry Modesty channel, except to cross the same in plaintiff's ditch. Many of the material allegations of the complaint are denied by the answer, and defendant sets up an affirmative defense to the effect that the waters from this land formed a running stream which flowed into Dry Modesty channel; that defendant had made location thereof, and was using the same in irrigating lands which it is admitted defendant owned. "At the close of the evidence, and after the same had been argued by coun-



sel, the court stated that it would make findings of fact, and ten days \* \* \* were granted by the court to defendant to submit in writing his findings, and which [order] was entered in the minutes of the court. That thereafter, \* \* \* before any findings were made by the court, and before judgment was rendered thereon, defendant submitted certain findings in writing on the questions embraced in the pleadings in said action, to the court to find thereon; the said finding so presented to the court [being] as follows." The findings are then set out in full in the record. Some of these findings submitted were on material issues. The court considered these findings submitted, acted thereon, and refused the same, and defendant excepted.

It is claimed by respondent that appellant did not "request findings in writing and have such request entered in the minutes of the court," as required by section 1114 of the Code of Civil Procedure. But it does appear "that the court stated that it would make findings of fact." The defendant had the right, in view of this statement, to presume that the court would make findings on all the material issues, and was thereby relieved from making any request for findings at all. Furthermore, it appears that the court gave the defendant ten days "to submit in writing his findings"—not requests for findings, but the findings themselves, which he desired the court to make. The court was not bound by either the form or the substance of the findings submitted, but the submission of written findings, under such circumstances, had the effect of requesting "findings in writing" on the material facts involved therein, and the findings submitted show the particular point or issue upon which the defendant required a finding. The exception taken therefore complies with section 1115, Code Civ. Proc.

In the record appears this entry:

"Findings and Conclusions of Law by the Court.

"Conclusions of Law.

"The court finds all the material allegations of plaintiff's complaint are true.

"Findings.

"Let judgment be entered for the plaintiff according to the prayer of his complaint."

This is dated and signed by the judge.

The first statement is not a conclusion of law, but a general finding of fact, as the same appears in the allegations of the complaint. The second statement is neither a finding of fact nor a conclusion of law, but an order that judgment be entered for the plaintiff. A general finding of facts in this form was held sufficient in *Sutter County v. McGriff*, 130 Cal. 124, 62 Pac. 412, but the reasons for the decision are not stated in the opinion. A general finding was also held sufficient in

*Bitter v. Moant Lumber, etc., Co.* (Colo. App.) 51 Pac. 519, but in this latter case no answer had been filed, and the facts were not in dispute. In *Moore v. Clear Lake Waterworks*, 68 Cal. 146, 8 Pac. 816, a finding to the effect that all the allegations of the complaint are true, and the allegations of the answer are untrue, was held sufficient. This form of finding, however, could not be sustained in this case, for some of the affirmative allegations of the answer were admitted by the replication. If the doctrine of implied findings in force in this state (*Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447), can be invoked in aid of the general finding herein, such implied finding can go no further than that all the allegations of the answer inconsistent with the allegations of the complaint and not admitted in the reply are untrue. The general finding made by the court, by its terms, applies only to the allegations of the complaint. The affirmative matter set up in the answer is not included therein, and no finding can be implied as to an independent issue raised for the first time in the answer, where a specific finding was requested thereon. *Estill v. Irvins*, 10 Mont. 509, 26 Pac. 1005. This brings this case directly in conflict with the decision in *Krug v. Lux Brewery Co.*, 129 Cal. 322, 61 Pac. 1125, and cases cited. The doctrine of implied findings is not followed in California, but where the statute requires findings to be made the principle is the same. Section 1111, Code Civ. Proc., requires findings to be given in writing and filed with the clerk. Section 1112 of the same Code requires the court to state (a) the facts found; (b) the conclusions of law; and (c) to order judgment entered thereon. The same Code also specifies the circumstances under which the findings of fact may be waived: (1) By failing to appear at the trial; (2) by consent in writing filed with the clerk; (3) by oral consent in open court, entered in the minutes (section 1113); (4) by an agreed statement of facts (section 1117); (5) in case of judgment by default (section 1020). This case does not fall within any of these enumerations. The evident meaning of the statute is that a party litigant is entitled to a specific finding on each material issue, but that he cannot be heard to complain where no finding is made unless he has complied with the statute in requesting the same.

Very material issues were presented by these pleadings. The mere fact that this water has its source on land now owned by plaintiff does not of itself necessarily give him the exclusive right thereto, so as to prevent others from acquiring rights therein under the laws of this state. Section 1239, 5th Div., Comp. St. 1887 (section 1880, Civ. Code, Sess. Laws 1901, p. 152); *Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723.

A discussion of the general principles involved may be found in the following cases, and the notes thereto: *Willow Creek Irrigation Co. v. Michaelson* (Utah) 60 Pac. 943, 51

L. R. A. 280, 81 Am. St. Rep. 687; Southern Pac. R. Co. v. Dufour (Cal.) 30 Pac. 783, 19 L. R. A. 92; Gray v. McWilliams (Cal.) 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Sullivan v. Northern Spy M. Co. (Utah) 40 Pac. 709, 30 L. R. A. 186; Cairo, etc., R. Co. v. Brevortt (C. C.) 25 L. R. A. 527, 62 Fed. 129; Jose Maria De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

The maxim of jurisprudence announced in section 4605 of the Civil Code, that "one must so use his own rights as not to infringe upon the rights of another," is a principle of substantive law, peculiarly applicable to equity actions, and is not to be entirely overlooked in passing upon the relative rights of parties in suits of this character, provided the facts appearing, in the judgment of the court, make the principle applicable.

For the failure of the court to make proper findings in this case, we think the judgment and order should be reversed.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

MILBURN, J., not having heard the argument, takes no part in this decision.

**BOTTEGO v. CARROLL et al.**  
(Supreme Court of Montana. July 8, 1904.)  
MONEY PAID—MISTAKE OF LAW—RECOVERY—VARIANCE.

1. Civ. Code, § 2123, provides that a court of equity will relieve against a mistake of law when it arises (1) from a misapprehension of the law by all parties by supposing that they knew or understood it, and by making substantially the same mistake, or (2) a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify. *Held*, that where plaintiff brought suit under the second subdivision to recover an overpayment made on a repurchase of property sold under foreclosure, and alleged that she made the payment under misapprehension as to her legal right to redeem, and that the payment was caused to be made through the fraud, conspiracy, and deceitful practices of the defendants, but the proof showed that whether plaintiff had a right of redemption at the time was a mooted question of law, and that defendants acted in good faith in their contention that her right of redemption was barred, there was a fatal variance.

Commissioner's Opinion. Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by Mary H. Bottego against Michael Carroll and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

C. M. Parr, for appellant. Jno. W. Stanton, for respondents.

CALLAWAY, C. Appeal from a judgment of nonsuit, and from an order denying plaintiff's motion for a new trial.

Plaintiff alleged the execution of a mortgage by her to defendant Carroll on April 5, 1899, and his subsequent sale of the property therein mentioned, by virtue of a power of sale contained in the mortgage, to his co-defendant Morgan on January 29, 1900, her attempt on January 31, 1900, to redeem the property from the sale, Morgan's refusal to permit a redemption, his claim that plaintiff had no further interest in the property, and his offer to sell the property to her for \$850. Paragraphs 8 and 9 of the complaint are as follows:

"That plaintiff, laboring under the statements of the said defendants and their attorneys that this plaintiff had no rights in the premises and was barred of the right of redemption, and laboring under a misapprehension of her rights and remedies, did on the 6th day of February, 1900, pay to the said defendants the sum of eight hundred and fifty (\$850) dollars, and received from said defendants a deed to said property. And plaintiff alleges that said defendants had no right to demand or receive from this plaintiff any amount in excess of \$588, and that the amount so paid in excess of \$588, to wit, \$262, was an overpayment, and paid through mistake on the part of plaintiff, and said payment was made and caused to be made by and through the fraud, conspiracy, and deceitful practices on part of the defendants.

"Plaintiff alleges that her right of redemption under the said sale had not expired at the time of said payment of the said eight hundred and fifty (\$850) dollars, and that said time of redemption would not expire until the 29th day of January, 1901."

No defects in the method of procedure adopted by the mortgagee in foreclosing the mortgage under the power of sale are alleged by plaintiff. Practically her sole contention is that she had the right to redeem the property within one year after the sale, but because of a mistake of law on her part, which was induced by fraud, conspiracy, and deceitful practices on part of the defendants, she purchased the property instead of enforcing her right of redemption.

A mistake of law from which a court of equity will relieve is defined and governed by section 2123 of the Civil Code, which reads: "Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from: (1) A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." It is readily perceived that plaintiff's action is attempted to be brought under subdivision 2 thereof. The testimony on part of plaintiff discloses that, after the

property had been purchased at the foreclosure sale by defendant Morgan, plaintiff's agent, John B. Bottego, and her attorney, Mr. Maury, applied to Morgan to be allowed to redeem the property, but Morgan refused, claiming that the right of redemption was barred by the sale. He offered the property to plaintiff for \$1,000, but after some negotiations took \$850 for it. Concerning this transaction Maury testified: "I advised him [Bottego] that our firm, Judge Pemberton and myself, both advised him that in our opinion the question was a very mooted one and difficult to determine either way, but in our opinion there was no right of redemption. They acted on that advice in the payment of the money. I was present when the deeds passed from Mr. Carroll to Bottego. This advice that I gave them was after the negotiations with Mr. Morgan in an attempt to redeem the property, which had been sold for the amount of the mortgage, interest, and costs of sale." And again he said: "Mr. Morgan claimed that he had the fee-simple title absolute, and we agreed with those views." There is no testimony in the record showing, or tending to show, that the defendants did not at all times firmly believe that the plaintiff's equity of redemption was totally cut off by the foreclosure sale; and neither is there any testimony indicating in the slightest degree that defendants, or either of them, procured the plaintiff to purchase the property through fraud, conspiracy, or deceit. As above noticed, it is not contended that the sale was not fairly conducted. The sale having been completed, the defendant Morgan took the position that he was then the absolute owner of the property by virtue of the foreclosure sale, and the defendants are now contending for that same position in this court. It thus plainly appears that, if it be true that plaintiff had one year from and after January 29, 1901, in which to redeem the property from the foreclosure sale, there was a misapprehension of the law by the defendants as well as by plaintiff, "all supposing that they knew and understood it, and all making substantially the same mistake as to the law." It also becomes apparent that there is a fatal variance between plaintiff's allegations and her proof, and she did not ask leave to amend the pleading to conform to the proof, as she might have done. She alleged a cause of action, which, if it comes within section 2123 at all, comes within subdivision 2 thereof; the proof she adduced, if it comes within section 2123 at all, comes within subdivision 1 thereof; both her allegations and proof must come within one and the same subdivision, or she may not recover at all because of a mistake of law. Her allegation of mistake on her part and fraud on part of the defendants utterly excludes the idea of a mutual mistake. Thus the court did not err in granting the nonsuit.

This excludes any consideration of the in-

teresting question as to whether plaintiff's equity of redemption was barred by the foreclosure sale.

It follows that the judgment and order should be affirmed.

CLAYBERG, C. C., and POORMAN, C. concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MILBURN, J., being absent, takes no part in this decision.

### SATHRE v. ROLFE et al.

(Supreme Court of Montana. July 2, 1904.)

PAROL EVIDENCE — VARYING WRITTEN CONTRACT — FRAUD — SALES — VALIDITY — PURCHASE-MONEY NOTES — ASSIGNMENT — BONA FIDE PURCHASER — DEFENSES.

1. Code Civ. Proc. §§ 2186, 3132, provide that a written contract supersedes all oral negotiations, and no evidence of the terms of an agreement other than the contents of the writing shall be received, except where a mistake or imperfection is in issue, and the validity of the instrument is in dispute, and to establish fraud; and sections 2117, 2123, declare that actual fraud consists in a promise made without any intention of performing it, or any act fitted to deceive, and that mistake of law constitutes a misapprehension of the law by a party, of which the others are aware at the time of contracting, but which they do not rectify. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease. *Held*, that evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract.

2. Where plaintiff purchased a leasehold interest, paid the consideration, and went into possession of the premises with defendants' consent, and the promise to obtain the transfer of the lease was the inducement to sign a contract, omitting mention of the lease, on the sale of a business, defendants, without placing plaintiff in statu quo, could not assert that the promise to procure the lease was void under the statute of frauds.

3. Where a contract of sale of a business omitted reference to a leasehold interest by fraudulent representations of defendants as to the lease being a separate writing, evidence showing the purchase of the leasehold interest was admissible, as being independent and collateral to the portion which was reduced to writing.

4. Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a bona fide holder, and the notes were subject to all the defenses which might have been urged against them in the hands of defendant.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

¶ 4. See Bills and Notes, vol. 7, Cent. Dig. § 924j.

Action by Sophie Sathre against Christina Rolfe and others. From a judgment for plaintiff, defendants appeal. **Affirmed.**

B. S. Thresher, for appellants. Geo. M. Borquin, for respondent.

CLAYBERG, C. C. Appeal from a judgment against defendants. The facts as disclosed by the record are, briefly, as follows: Defendant Rolfe was proprietress of the Red Boot lodging house, in the city of Butte; she occupied the premises under an unexpired written lease from O'Rourke. Defendant Wilson was a real estate agent, having his office in this lodging house, and negotiated an oral agreement for the sale of the business of defendant Rolfe to plaintiff, Sathre, for the sum of \$1,850. By this oral agreement the sale included the leasehold interest in the property, as well as the furniture and fixtures used in the business. Wilson undertook to reduce the oral agreement to writing, but fraudulently omitted therefrom all mention of the leasehold interest. Plaintiff testified as to this transaction as follows: "Mr. Wilson asked me to sign the agreement, or the contract, and read it over, and when I saw the lease was not mentioned in it I said, 'Why, hadn't the lease ought to be mentioned in this?' and he said: 'No, that is not necessary; that is a separate paper by itself; I will get that paper, and will give it to you.' He says: 'This don't amount to anything anyhow, and it is just a custom that real estate men have and use;' and I believed I could rely on what he said, and signed it." The complaint alleges, among other things, that said defendants, "with intent to deceive and defraud the plaintiff, did knowingly, falsely, and fraudulently represent to her that they had the right to and could sell said lease and vest plaintiff with a good title thereto, and promised plaintiff that, if she would purchase the property aforesaid, they would procure the consent of the lessor to the sale of said lease to plaintiff. That the plaintiff, believing and relying on said representations and promise, and induced thereby, and without knowledge to the contrary, purchased said lease and the contents of said lodging house from said defendants, and paid them therefor the sum of \$1,850. \* \* \* That, on or about the time aforesaid, said defendants procured plaintiff to sign an agreement to purchase, intended to express said contract, in which the said lease and its sale to plaintiff was not set out. That she signed said agreement, relying on and believing said defendants' assurances then made, viz., that the said lease, being a separate writing, need not be mentioned in said agreement, but itself would be delivered to her when received by said defendants from the lessor, and thereby induced thereto, and by said defendants' promise to secure and deliver said lease to her, which promise was made by them with no intent to perform the same." It is also alleged that the lease

was not assignable without the consent of the lessor, and that he refused such consent, and that the promise of defendants to procure the lessor's consent to the agreement of sale was made "without any intent to perform the same, and to deceive and defraud plaintiff." That plaintiff paid \$1,300 in cash, and gave defendant Rolfe her promissory notes for the remaining \$550, secured by chattel mortgage upon the furniture so purchased. Plaintiff prayed for the surrender and cancellation of these notes and chattel mortgage, and for a recovery of a portion of the consideration paid. She succeeded in obtaining such decree, and defendants appeal.

Upon the trial of the case plaintiff offered testimony to show the original purchase of this leasehold interest, and the fraudulent acts, representations, and conduct of defendants Rolfe and Wilson as alleged, which was objected to on the ground that it varied the terms of the written contract, and was inadmissible under section 2186 of the Civil Code, which reads as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supercedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Section 3132 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 3136, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties." Section 2117 of the Civil Code provides: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: \* \* \* (4) A promise made without any intention of performing it; or, (5) any other act fitted to deceive." Section 2123 of the Civil Code provides: "Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from: \* \* \* (2) A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." It is apparent that the complaint alleges a mistake or imperfection in the writing, fraud, and the invalidity of the written agreement. It is equally apparent

that the oral evidence was offered to establish such mistake, imperfection, illegality, and fraud. The allegations of the complaint and the testimony offered by plaintiff show that the defendants Rolfe and Wilson well knew that the original lease from O'Rourke to Rolfe was not assignable without the consent of O'Rourke; that plaintiff at the time she made the purchase and signed the written contract had never seen the lease, and had no knowledge that it contained such provision. Plaintiff alleges that they promised her to procure the consent of O'Rourke to the assignment and transfer of the lease to her without any intention of performing said promise, and the testimony offered in the case tends to support that contention. Proof was also introduced which tended to show acts on the part of defendants Rolfe and Wilson "which were fitted to deceive" and did deceive the plaintiff. Both Rolfe and Wilson had knowledge of the fact that the lease from O'Rourke was not assignable without his consent, and the proof shows that the plaintiff at the time she signed the agreement knew nothing of the contents of the lease. There is no proof that the defendants honestly tried to obtain the consent of O'Rourke to the transfer of the lease. In their answer they deny that the leasehold interest was ever to be transferred to the plaintiff. So we must conclude that the record discloses actual fraud on the part of defendants Rolfe and Wilson in obtaining plaintiff's signature to the contract; that they made a promise which they did not intend to fulfill; that they knew the contents of the lease, and that it could not be transferred to plaintiff without the consent of O'Rourke; that plaintiff was ignorant of its contents; that they never honestly attempted to obtain such consent; that the inducement held out to plaintiff to sign the agreement was based upon the fraudulent representations of defendants Rolfe and Wilson to the effect that the leasehold interest need not be mentioned in such contract, but that they would obtain it and deliver it to plaintiff. By these facts the plaintiff has shown a clear right to the equitable relief demanded, and under the above sections of the statute she had a right to make such showing, and the court did not err in admitting the testimony objected to.

Appellants' counsel insist that the oral sale of the leasehold interest was void under the statute of frauds. Under the facts and law above stated, we deem this proposition entirely immaterial. Plaintiff purchased the leasehold interest, paid the consideration therefor, and went into possession of the premises with the full consent of the defendants. The promise to obtain the transfer of the lease was the inducement for plaintiff's signing the contract. It would be extremely inequitable to hold that, after defendants had procured the consideration from the plaintiff and put her in possession of the

property, they could come in, without placing plaintiff in statu quo, and assert that, notwithstanding such facts, their promise to procure the lease was void under the statute of frauds. They cannot thus benefit by their own fraudulent and wrongful acts and conduct.

The admissibility of the parol proof offered is so clear under the above statutes that we have not considered the question as to whether this proof was not also admissible upon the theory that an oral contract had been entered into, a portion of which had been reduced to writing and a portion of which had been fraudulently omitted from the writing, the omitted portion being independent of and entirely collateral to that portion which was reduced to writing. In the judgment of the writer of this opinion, this parol proof was equally admissible under this theory.

This leaves but the question as to the validity of the judgment against Beck. Four of the notes given were assigned to Beck as security for the payment of a pre-existing debt of defendant Rolfe. They were not indorsed to Beck, but assigned to him by a separate instrument. He was in no sense a bona fide holder, and the notes were therefore subject to all the defenses which might have been urged against them had they remained in the hands of defendant Rolfe. 2 Randolph, Neg. Insts. 788, 789; 1 Daniels, Neg. Insts. 741. There can be no doubt but that the plaintiff had a right to have the notes and chattel mortgage canceled in the hands of defendant Rolfe, and, inasmuch as defendant Beck simply stands in her shoes, they were subject to cancellation in his hands.

We advise that the judgment be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

MILBURN, J., not having heard the argument, takes no part in this decision.

HUMBIRD LUMBER CO. v. MORGAN,  
Judge.

(Supreme Court of Idaho. July 7, 1904.)

APPEAL—JURISDICTION—ORDERS OF BOARDS OF  
EQUALIZATION.

1. An appeal taken when not authorized by law confers no jurisdiction on the court to which such appeal is taken, except to make its order and judgment dismissing such appeal.

2. There is no authority in this state for an appeal from an order of a board of equalization. *Feltham v. Board of County Commissioners*, 77 Pac. 332, approved and followed.

(Syllabus by the Court.)

¶ 2. See *Taxation*, vol. 45, Cent. Dig. § 879.

Application by the Humbird Lumber Company for writ of mandate to R. T. Morgan, Judge of the First Judicial District. Writ denied.

H. M. Stephens and Charles L. Hiernaux, for petitioner. Thomas H. Wilson, Co. Atty., and C. W. Beale, for defendant

**AILSHIE, J.** The Humbird Lumber Company, a corporation organized and existing under the laws of the state of Washington, and doing business in the state of Idaho, filed its application with the board of county commissioners, sitting as a board of equalization, for a reduction of valuation of certain of its timber lands located and situated in the county of Kootenai. The application came on regularly for hearing at the July, 1903, meeting of the board of equalization, and witnesses were sworn and examined both in support of and in opposition to the application, and the board thereafter made and entered its order granting a portion of the relief sought. From that order the plaintiff appealed to the district court. The appeal appears to have been taken in due and regular form, and at the following term of the district court in and for Kootenai county the county attorney made a motion for a dismissal of the appeal on various grounds, one of which was that an appeal does not lie from an order of the board of county commissioners while acting in the capacity of and performing the duties of a board of equalization. This motion was denied by the district judge, and thereafter the case went to trial, and the plaintiff produced its evidence, and the court thereupon continued the case to enable the county to procure and produce further evidence. The case was subsequently called, and the county introduced its evidence, and the case was submitted for the consideration of the court. After having examined into the matter, the judge appears to have notified the attorney for the plaintiff that he would find in favor of the plaintiff, and for the attorney to prepare findings and judgment. Before the findings and judgment were made, however, the county, through its attorney, made and filed another motion for dismissal upon various grounds, among which it was alleged that no appeal lies from an order of the board of equalization, and that, therefore, the court was without jurisdiction to enter any judgment except one of dismissal of the appeal. After a hearing on this motion the judge sustained the same, and dismissed the appeal. The plaintiff thereupon applied to this court for a writ of mandate requiring the district judge to proceed to make his findings and to render a judgment in the case. An alternative writ was issued, and the district judge, through his attorneys, appeared, and demurred to the petition upon the grounds that it does not state facts sufficient for the issuance of a writ of mandate.

Numerous questions have been very ably and elaborately discussed by counsel in this case, but the conclusion we have reached makes it necessary for us to consider only one question, namely, the right of the plaintiff to appeal from an order of the board of equalization in equalizing assessments. If an appeal will not lie from such an order, then the district judge was without jurisdiction to enter any judgment in the premises except an order and judgment dismissing the appeal, which order he has already made. This question has been decided by this court at the present term adversely to the contention of petitioner in *Feltham v. Board of Commissioners*, 77 Pac. 332. In that case we held that an appeal will not lie from an order of the board of equalization. We have given this question a further and careful examination in the present case to satisfy ourselves as to the correctness of our former decision, and are convinced of the soundness of the position taken in that case. We therefore rest our decision in this case upon the principles there announced. The right of appeal from such boards is purely statutory. Independent of statutory enactment, no such right would exist. We cannot extend this right by interpretation to the orders and decisions of any board from which the right of appeal is not clearly granted. If the Legislature desires to allow an appeal from the orders of boards of equalization, they have that power, but we are without authority to extend such remedy. The demurrer to the petition will be sustained, and the writ denied.

Costs awarded to defendant.

**SULLIVAN, C. J., and STOCKSLAGER, J., concur.**

#### **HUNTER v. PORTER.**

(Supreme Court of Idaho. May 27, 1904.)

**NOTICE TO PAY RENT OR SURRENDER POSSESSION—OPTION TO TERMINATE LEASE—UNLAWFUL DETAINER—DEFENSES IN UNLAWFUL DETAINER—COUNTERCLAIM—CROSS-COMPLAINT—WHEN EACH AVAILABLE—BREACH OF COVENANT BY LESSOR—IMPLIED COVENANT OF FITNESS OF PREMISES.**

1. A notice by the landlord to his tenant, under sections 5093, 5094, Rev. St. 1887, requiring him to pay rent due or surrender possession—describing the premises and naming the amount due—is a substantial compliance with the statute, and is held sufficient.

2. Where the lessor, by the terms of a lease, reserves to himself an option to terminate the lease upon service of a 30-days notice after breach by the tenant of some covenant thereof, he is not thereby precluded from pursuing his remedy under section 5093, Rev. St. 1887, in case the tenant fails to pay rent when due.

3. The service of notice and commencement of action under sections 5093, 5106, Rev. St. 1887, for failure to pay rent when due, does not primarily terminate or forfeit the lease; but

a payment of the rent, together with interest, damages found, and costs, at any time within five days after judgment, keeps the lease alive and saves it from forfeiture.

4. Chapter 4 of title 3 of the Code of Civil Procedure, Rev. St. 1887, provides a "summary proceeding for obtaining possession of real property"; and an action prosecuted thereunder by the landlord for an unlawful detainer by the tenant is not subject to counterclaim or cross-complaint, the same as ordinary actions.

5. In an action for unlawful detainer, a claim for unliquidated damages arising out of a breach of a covenant made by the lessor is not a proper matter for counterclaim or cross-action under sections 4184, 4188, Rev. St. 1887.

6. A cross-complaint, under section 4188, Rev. St. 1887, must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants.

7. A counterclaim, while it must exist in favor of the defendant and against the plaintiff, may, in other respects, go further than a cross-complaint, and, if the cause of action arose on contract, may set forth any other cause of action arising on a contract as a counterclaim thereto.

8. Where an agreement of lease refers to the premises demised as a "cold storage building," not merely as a description of the situs, but as a designation of its character, and contains a stipulation restricting its use to such articles as are ordinarily required to be stored for preservation in such a place as is commonly known and designated as a "cold storage building," an implied warranty of fitness for such use and purpose will arise therefrom.

#### On Rehearing.

9. The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal.

(Syllabus by the Court.)

Appeal from District Court, Latah County; E. C. Steele, Judge.

Action by Lewis Hunter against L. A. Porter. Judgment for plaintiff, and defendant appeals. Affirmed.

I. N. Smith, for appellant. Forney & Moore and G. W. Supplinger, for respondent.

ALLSHIE, J. On the 23d day of August, 1901, the plaintiff and defendant entered into a written agreement of lease, whereby the plaintiff let to the defendant a cold storage building in the city of Kendrick, Latah county, for a period of one year. It was agreed that, in addition to doing certain work and making certain improvements, the lessee should pay the sum of \$300 as rental for the premises; \$100 to be paid on or before the 15th day of September, 1901, and \$200 on or before the 15th day of January, 1902. Defendant, the lessee, entered into possession of the premises, and paid the first installment of rent, but failed to make the payment which fell due January 15, 1902. After the defendant made default in the payment of rent, and on the 18th day of January, 1902, the plaintiff served notice on him, under the provisions of subdivision 2 of section 5003 and section 5004, Rev. St. 1887, requiring defendant to pay the rent due, or surrender

possession of the premises. The defendant neglected and refused to pay the rent or to deliver the possession of the premises, and on the 24th day of April, 1902, the plaintiff commenced his action in the district court in and for Latah county, alleging his cause of action in the usual form, and charging the defendant with an unlawful detainer of the property and premises after default in payment of rent, and the service of the statutory notice for the payment of the same, or delivery of possession. The defendant answered this complaint, setting up as an exhibit a copy of the lease, and specially pleading certain covenants and options therein contained, and, after pleading several separate defenses, filed a cross-complaint alleging that the plaintiff had violated and broken various of his covenants with reference to the construction and condition of the premises demised, and that by reason thereof the defendant lessee had sustained damages in the aggregate amount of \$2,050, and prayed judgment against the plaintiff for that sum. The case went to trial, and the evidence was introduced both on the part of the plaintiff and defendant, and findings of fact and conclusions of law were made and filed, finding that the defendant was guilty of unlawful detainer, and also finding against him on all the allegations of his cross-complaint. Thereupon judgment was entered in the usual form for the rents and damages, and for cancellation of the lease, and the restoration of the plaintiff to the possession of his premises. Defendant prepared and had settled his statement and bill of exceptions, and thereafter moved for a new trial, and has appealed from the judgment and the order denying his motion for a new trial.

In the first place, it is contended that the notice served by plaintiff upon defendant for the payment of rent or delivery of possession is not a sufficient notice, under sections 5003, 5004, Rev. St. 1887. We have carefully examined the notice, and compared it with the requirements of those provisions, and are satisfied from such examination that it is a sufficient and substantial compliance therewith. The notice is as follows:

"To L. A. Porter, Tenant in Possession: You are hereby required to pay the rent of the premises hereinafter described, and which you now hold possession of, amounting to the sum of two hundred dollars, being the amount now due and owing to me by you as the balance of the rent due for the term from the 1st day of September, A. D. 1901, until the 1st day of September, 1902, or deliver up possession of the same to me, or I shall institute legal proceedings against you to recover possession of said premises, with treble rent.

"Said premises are situated in the town of Kendrick, Latah County, Idaho, and are described as follows:

"All that certain brick storage house situate in Block B, Addison's addition to the

Town of Kendrick, Idaho, designated and known as 'Hunter's Cold Storage.'

"Dated at Kendrick, Idaho, January 18, A. D. 1902.

"Respectfully,

"[Signed] Lewis Hunter."

The next and most serious contention urged by appellant is that this action could not be maintained, under the express terms of the lease and the statutes applicable thereto, until a 30-days notice had first been given, notifying the tenant of the lessor's intention to exercise his option to terminate such lease, and thereafter, and upon the expiration of the 30-days notice, the service of a further notice of three days to quit and surrender the premises. This position rests upon the following provision found in the lease: "And it is further covenanted that if said payments of rent or either of them, whether the same be demanded or not, are not paid when they come due, or if said leased premises be appropriated to any other purpose or use than as herein specified, except by written consent, or waste of any kind shall be made or committed thereon, or if any part of said demised premises be underlet without the consent of the said first party, as herein provided, or if this lease is assigned by act of the said second party or by operation of law, or if said party of the second part shall fall or neglect to perform any of the covenants by him to be kept and performed, then said party of the first part shall have the right, at his option (and such right is hereby expressly reserved by him) to terminate said lease, and any and all rights, interest or estate the said party of the second part may have in or to said premises or any portion thereof, by giving said lease or the occupant of said premises thirty days' notice in writing, signed by the first party or his agent, or attorney of his intention to so terminate said lease." It is argued by the appellant that since the lessor has never served a 30-days notice, in the exercise of his option to terminate the lease, and has in fact never terminated the lease under that option reserved to himself in the lease, the tenant was therefore in possession by the permission of his landlord, and that the service of the 3-days notice could not operate as a withdrawal of such permission and convert him into an unlawful detainer. The respondent, on the other hand, urges that this stipulation did not take from the landlord his right to pursue the statutory remedy in case of a default in payment of rent, and that, even though the tenant failed to pay the rent when due, the landlord was not obliged to exercise his option to terminate the lease unless he should see fit so to do. In other words, he contends that the lessor might pursue the statutory remedy, and leave the lessee to the exercise of his statutory privilege of paying the rent due, and thereby saving the lease from lapse or forfeiture. Plaintiff contends that if he chose not to exercise his

option, and to be more lenient in this respect toward the lessee than he might have been, the lessee had no right of complaint. We are unable to see wherein this stipulation is in any way violated by the landlord pursuing his statutory remedy, as he has done in this case. In such a proceeding as this it is not contended that the lease is terminated, and it is not upon that theory that such an action, founded upon failure to pay rent, is prosecuted. Here the landlord seeks primarily to secure payment of the rent due, and, as an alternative, in case the rent is not paid, to secure the possession of the premises. The law has provided that the tenant cannot retain the rental value of the premises, and also the possession of the premises after completion of the service of the statutory notice. It should be observed that the stipulation over which this controversy arose was not a stipulation extending the time for payment of rent. Neither does it grant to the tenant any immunity from the payment thereof. It simply gives to the lessor the right, upon breach of any of the covenants on the part of the lessee, to absolutely terminate the lease, but provides that, in case he shall choose to exercise this option, he shall give a 30-days notice of such election. This is presumably for the purpose of giving the tenant an opportunity to secure other premises, and, in the event of the exercise of such option, the tenancy would not be terminated until the expiration of the 30 days, and the tenant would not be an unlawful detainer until a further notice of 3 days should be served upon him, requiring him to vacate. We think the plaintiff pursued the proper remedy in this case.

The other questions argued upon this appeal present to our minds an unusual and novel situation in the matter of practice and procedure, and this is accentuated by the fact that the party who urges them is the lessee. No objection was made by the plaintiff in the lower court to the consideration of the cross-complaint, nor was any question raised as to defendant's right to introduce his evidence in support thereof. The plaintiff, however, succeeded upon the trial as to all the issues raised, and defendant has appealed. In this court the plaintiff, who is respondent here, argues as one of the reasons why the judgment should be sustained that, under the statute and decisions of the courts, the defendant had no right to be heard either upon a counterclaim or cross-complaint in the lower court, and that therefore whatever error might have been committed against the defendant in the introduction of evidence on his cross complaint, or as to the findings of the court thereon, cannot become grounds of reversal in this court. The appellant has neither raised nor argued the point in this court that the plaintiff in the lower court, having neglected to present these objections there, cannot be heard to urge them here. If the plaintiff



had lost in the lower court, and were the appellant here, we should certainly not permit him to raise this question for the first time in this court on appeal; and, indeed, if the consideration of that issue here could result in prejudicing the defendant in any manner upon his appeal, we would not consider it as here presented. Entertaining, however, the view we do of this case, we are of the opinion that it is our duty to consider and pass upon the defendant's right to be heard upon his cross-complaint. If, after an examination of the many errors assigned by appellant, both as to the construction of the lessor's covenants contained in the lease and the introduction of evidence upon the cross-complaint, we should find error, and reverse the judgment and remand the case for a new trial, this question might then be raised by the plaintiff, and the defendant would be in a worse position upon a new trial than he will be after our having settled this issue.

Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887, treats exclusively of forcible entry and unlawful detainer, and the remedies therefor. The title to that chapter is: "Summary Proceedings for Obtaining Possession of Real Property." A study of the various provisions of this chapter of 19 sections satisfies us that it was the purpose of the Legislature to provide a summary method whereby a landlord might collect his rent, or, in default thereof, obtain possession of his property. The statute requires that both the complaint and the answer shall be verified, and section 5102 provides that "if, at the time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint." This section seems to only contemplate a defense to the charge of forcible or unlawful detainer, and does not appear to provide for the defendant seeking affirmative relief or becoming a cross-actor in such action. Section 5106 provides the character of judgment that may be entered, and the manner and method of enforcing the same; and every provision of that section looks to the trial of only one issue, namely, whether the defendant is either a forcible or unlawful detainer of the premises. To allow the issue of unliquidated damages growing out of an independent covenant contained in the lease, and made by the lessor, to be set up either by way of cross-complaint or counterclaim in such an action, would frustrate the purposes and object of the statute, and at the same time give the tenant an advantage over the landlord, in that he would be allowed to both retain the premises and the rental value thereof, while litigating with his landlord a minor issue as to some real or fancied grievance which he might never be able to establish in court. If a defense of this kind could be maintained, a landlord would never know how much rent was due him, or how much he could safely demand.

In other words, so soon as his tenant began to complain of some real or imaginary grievance growing out of the terms of the lease, the landlord would be unable to say how much was due him on rents from his tenant until a court had passed upon the tenant's claim for damages. Such a claim could generally be expected to appear as an issue in the case. This question has been frequently considered by the courts, and in one of the late authorities on the subject (*Phillips v. Port Townsend Lodge*, No. 6, F. & A. M., 36 Pac. 476) the Supreme Court of Washington say: "The very object the Legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. The statute prescribes that a tenant is guilty of unlawful detainer after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice in writing requiring its payment, or possession of the property, shall have been served upon him (*Laws 1891*, p. 180); and, when these facts are made to appear to the satisfaction of the court or jury upon the trial, the landlord is entitled to judgment for restitution of the premises, and also to judgment declaring the forfeiture of such lease or agreement, together with damages and the rent found due. In such proceedings counterclaims and offsets are not available." In *Ralph v. Lomer*, 3 Wash. St. 401, 28 Pac. 763, the same court said: "We have been cited to no cases holding that in an action for an unlawful detainer a counterclaim or set-off is admissible. On the contrary, the courts seem to entertain the opposite doctrine, generally, and lay down the rule that no such defense can be interposed." These cases have both been approved and followed in *Owens v. Swanton*, 25 Wash. 112, 65 Pac. 921, and *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808. In *Owens v. Swanton* the Supreme Court approved the action of the trial court in sustaining a demurrer to a cross-complaint in a similar case. The same doctrine seems to have been maintained in California by a uniform line of authorities, from *Warburton v. Doble*, 38 Cal. 619, down to *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560. In *McSloy v. Ryan*, 27 Mich. 109, Judge Cooley says: "The defendant offered evidence to show that complainant had not performed his covenants in the lease in regard to improvements and repair. As these covenants were independent of the covenant to pay rent, and this proceeding was not one in which, even if the amount of rent was in issue, there could be any deduction of offsets, or by way of recoupment, the court did not err in rejecting this evidence."

Appellant contends that under sections 4183, 4184, Rev. St. 1887, *Stevens v. Home Savings & Loan Ass'n*, 5 Idaho, 741, 51 Pac. 779, 986, and *Murphy v. Russell* (Idaho) 67 Pac. 427, it was not only his legal right, but his duty, to present his cross-complaint in this case, and have it litigated in this action, and that by failure to do so he would have lost his remedy. He also admits that in an action of this kind there cannot properly be any counterclaim. In his reply brief, he says: "The matters set forth in the cross-complaint are not counterclaims. What claim is it possible to 'counter' against an unlawful act of any nature—whether it be an 'unlawful' detainer, an 'unlawful' assault, an 'unlawful' battery, an 'unlawful' attempt to murder, an 'unlawful' libel or slander? It is readily seen that it is absolutely impossible to have a counterclaim to an unlawful act; hence the matters set up in the cross-complaint are not counterclaims." In this case, where there was only one plaintiff and one defendant, if the facts here pleaded could not be set up by way of counterclaim, we fail to see how the same facts could be pleaded by calling them a "cross-complaint." The scope of pleading for a cross-complaint, under section 4188, is not as comprehensive as for a counterclaim, under section 4184. A cross-complaint, under section 4188, must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants. On the other hand, a counterclaim, while it must exist in favor of the defendant and against the plaintiff or plaintiffs, may go further, and, if the cause of action arose on contract, may set forth any other cause of action arising on contract as a counterclaim thereto. As to subject-matter, the counterclaim is the more comprehensive and liberal; but for relief against individual plaintiffs or defendants, or bringing in new parties against whom a defendant claims relief growing out of the subject-matter of the action, the cross-complaint is the available procedure. See *Stevens v. Ass'n*, supra.

Aside from the fact that the Legislature have provided by the unlawful detainer act a summary remedy which they did not mean to be subject to the same defenses, counterclaims, and cross-actions as ordinary litigation, such a defense as the one here interposed does not, strictly speaking, "arise out of the transaction set forth in the complaint." A tenant does not become primarily an unlawful detainer upon breach of the covenant in the lease to pay rent, but, rather, upon failure to pay after demand by a legal notice in the statutory time. This constitutes him "an unlawful detainer" of the premises. This he would never become, but for service of the notice, although he should never pay rent. Indeed, the landlord might forego this remedy, and maintain his action

on the contract for the payment of rent. It cannot truly be said that a breach of a covenant by the landlord to improve or repair the demised premises arises out of, or is connected with, a failure to pay rent after service of notice to pay or surrender possession. A breach of a covenant made by the landlord does not result in making him guilty of an unlawful act in the same sense that a tenant becomes guilty of unlawful detainer upon failure to pay rent after notice. A claim for unliquidated damages arising out of a breach of a covenant on the part of the lessor is neither a proper matter for counterclaim nor cross-complaint, as authorized by sections 4184 and 4188. The matters set up by defendant's cross-complaint were not proper matters to be litigated in the case, and the findings and conclusions of the trial court thereon will not preclude the defendant from litigating any such claim as he may have for damages in an independent action.

The lease pleaded by the cross-complaint was for a cold storage building in the town of Kendrick, which was in course of construction at the time the lease was executed, and was to be completed in "as short time as possible" thereafter. The premises were described as "the cold storage building now in course of construction, on lots one and two of block 'B' in Addison's addition to the town of Kendrick, Idaho, and known as the Hunter Cold Storage House." The lease also contains this provision: "The party of the second part agrees that he will use said cold storage building only for the purpose of handling fruit and produce, and not for hay, grain or feed." Appellant maintains that these various designations and references to the demised premises as a "cold storage building," read in connection with the stipulation that the premises should not be used by the tenant except for the handling of fruit and produce, from which hay, grain, and feed was excluded, is an implied warranty that the building, when completed, should be such a structure as would be suitable for the storage and preservation of fruits at all times during the year for which it was let. We are of the opinion that the appellant is correct in this contention. It is clear to us, from an examination of the instrument itself, that the lessor knew and understood the purpose for which the lessee was securing the premises; and, not only that, but by the terms of his lease he restricted and confined the lessee to the use of the premises for those purposes only. At the time this agreement of lease was entered into, the building was not completed, and was therefore not in a condition that the tenant could enter and examine the same to ascertain whether it met all the requirements for which he was leasing it. On the other hand, the landlord, by the implied terms of the lease, represented the building as a "cold storage building," and that term must be understood to have a meaning peculiar to a class or kind of build-

ing designed for the preservation and safe-keeping of such articles and products as it was understood that the tenant meant to keep in the building. *Vaughan v. Matlock*, 23 Ark. 12; *Jordan v. Dyer*, 34 Vt. 104, 80 Am. Dec. 608; *Allen v. Somers*, 73 Conn. 355, 47 Atl. 653, 52 L. R. A. 106, 84 Am. St. Rep. 158; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *Lane v. P. & I. N. Ry. Co.* (Idaho) 87 Pac. 656; *Porter v. Allen* (Idaho) 69 Pac. 105; *Wolfe v. Arrott*, 109 Pa. 473, 1 Atl. 333; *Young v. Collett* (Mich.) 29 N. W. 850. This was more than a location and designation of the property, and amounted to a representation as to its character.

The judgment for rents and costs, and possession of the property described therein, will be affirmed, and the defendant will not be barred by the findings of the trial court from litigating in an independent action any claim he may have for damages. Under all the facts and circumstances of this case, as disclosed by the record, each party will be required to pay one-half of the total costs incurred by reason of this appeal.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

#### On Rehearing.

(July 8, 1904.)

PER CURIAM. We devoted a great deal of time to an examination and investigation of the questions involved in this case before the writing of the original opinion, but the evident time and labor counsel for appellant has given to the preparation of a petition have induced us to again consider the matters complained of in the petition. Such further examination and discussion convince us of the correctness of the conclusion first reached.

Complaint is made in the petition that the principal point decided was upon an error committed in appellant's favor, rather than against him. This is only partially true. Upon consideration of the case, we found that the judgment against defendant on plaintiff's allegation of unlawful detainer was sustained by the evidence, and was properly rendered and entered. At the same time we found that error was committed against defendant, wherein the court found that the lease contained no implied covenant of fitness of the demised premises. Entertaining these views, we could not reverse the judgment in unlawful detainer against defendant. To grant a new trial upon defendant's cross-complaint and the answers thereto would afford him no more relief than we have granted him. Since the case was not properly tried in the first instance on a cross-complaint or counterclaim, it could not properly be so tried upon a new trial. Counsel complains of the following sentence contained in the opinion: "If, after an examination of the many errors assigned by appellant both as to the constructions of the lessor's covenants contained in

the lease, and the introduction of evidence upon the cross-complaint, we should find error, and reverse the judgment and remand the case for a new trial, this question might then be raised by the plaintiff, and the defendant would be in a worse position than he will be after our having settled this issue." That language was intentionally used, and expresses our view. When a new trial is granted, it is done for all purposes. A party who seeks and obtains a new trial cannot avail himself of the chance of gaining more, without incurring the hazard of getting less, than upon the former trial. This is true as to all questions of both law and fact not directly passed upon by the appellate court on the appeal. The doctrine of "law of the case" extends only to the questions squarely presented and distinctly passed upon on the former appeal. *Hall v. Blackman* (Idaho) 75 Pac. 608; *McKinlay v. Tuttle*, 42 Cal. 571; *Klauber v. San Diego St. Car Co.*, 98 Cal. 105, 32 Pac. 876; 2 Ency. P. & P. 379. The appellate court has no power or authority to direct the action of a trial court upon any matters not before the appellate court on the appeal. With these principles in view, suppose we should not pass upon the question of filing a counterclaim and cross-complaint in a case like this, and send the case back for a new trial, and the question should then be raised; upon what theory could it be said that the law of the case has been settled as to that question? None, we apprehend. For this reason, and entertaining the view we do of the law as to the counterclaims in such case, we were entirely correct in saying defendant would be in a worse position for us to reverse the case, and send it back, without deciding this question, than he is after we have decided it upon this appeal.

The other questions presented by the petition are disposed of by the original opinion. The petition is denied

#### JONES et ux. v. BOWMAN.

(Supreme Court of Wyoming. July 6, 1904.)

INFANTS—RIGHT TO CUSTODY—HABEAS CORPUS—RELIGIOUS OPINIONS—STATUTES—GUARDIAN—APPOINTMENT—CONCLUSIVENESS—CONFLICTING CLAIMS—EVIDENCE—SUFFICIENCY.

1. Under the provisions of the statutes of Wyoming prohibiting any distinction being made on account of religious belief, the courts will give no weight to evidence of religious opinions in a proceeding to determine the custody of a minor child, the difficulties and disagreements as to which arose between those concerned from their differences in religious matters.

2. In a proceeding involving the right to the custody of a child, the courts will be guided by what they deem the best interest of the child.

3. The action of the probate court of a foreign state, which was the domicile of a parent at the time of his death, in appointing a guardian for his minor child, who was in his custody at the time of his death, does not preclude the courts of another state to which the child was

subsequently taken from appointing a guardian for the child.

4. Where it is possible, in proceedings involving the right to the custody of children, the courts will give consideration to keeping the children with the surviving members of the family to which they belong.

5. In a habeas corpus proceeding involving the right to the custody of an infant, evidence examined, and held sufficient to warrant the court in denying petitioner the right to custody of the child on the ground that it would be to the best interest of the child, and save a separation of those remaining of the family, though it involved the practical annulment of an appointment of petitioner as guardian of the child by the probate court of another state.

Error to District Court, Johnson County; Joseph L. Stotts, Judge.

Habeas corpus proceedings by Margaret H. Bowman against John A. Jones and wife for the custody of Ida May Bowman, a minor. From a judgment for petitioner, defendants bring error. Reversed.

Parmelee & Hill and John W. Lacey, for plaintiffs in error. Gibson Clark, for defendant in error.

KNIGHT, J. The defendant in error, Margaret Bowman, plaintiff below, under the habeas corpus act by petition alleged that Ida May Bowman, at that time—May, 1900—of the age of five years, was unlawfully restrained of her liberty by J. A. Jones and Ella Jones, plaintiffs in error here, at their residence in the town of Buffalo, in Johnson county, Wyo., without legal justification, they having caused said Ida May Bowman to be forcibly abducted and spirited away from said petitioner, Margaret Bowman, in the city of St. Paul, Minn., on or about February 15, 1900, said petitioner being at the time the qualified and acting guardian of said Ida May Bowman, an orphan, and the child of her brother, John J. Bowman, who on his deathbed gave said child into her charge; and that subsequently and within a few days thereafter said petitioner was duly appointed the guardian of said child by the probate court of Ramsey county, state of Minnesota. In obedience to a writ of habeas corpus, the defendants there, John A. Jones and Ella Jones, his wife, brought the child, Ida May Bowman, into the district court of Johnson county, Wyo., where the testimony of witnesses then present and the depositions of others then absent was heard at great length, and the court found for the petitioner, Margaret Bowman, awarding to her the custody of said child, Ida May Bowman, and gave its judgment to that effect, and for costs. To that judgment plaintiffs in error, John A. Jones and Ella Jones, his wife, duly excepted, and come here on error.

It seems to be necessary and proper to say, to start with, that it is evident throughout this case that most of the difficulties and disagreements have arisen from differences in religious opinions, and as the statutes of this state not only fail to make any distinction as to religious belief, but abso-

lutely prohibit any distinction being made on account thereof, we cannot and will not give such evidence the slightest weight in our decision, which will be an attempt to decide what shall be best for the welfare of the child, Ida May Bowman, independent thereof, as we fully believe we are authorized to do by all the authorities, when not otherwise directed by statute. We say this because in discussing the facts as shown it might, without this statement, appear that this unfortunate condition might have some consideration in our determination, especially since some reputable courts, by reason of local statutes, have considered such differences of religion. The facts appear to be substantially as follows: John J. Bowman, prior to his death on February 5, 1900, had sought to remove the child, Ida May Bowman, from the care, control, and influence of his sister, Margaret Bowman. Evidence of this fact is beyond dispute, and prior to his death he charged his son Oscar to carry out this wish. Immediately after the funeral the petitioner, Margaret H. Bowman, informed the boy Oscar that if he and the other relatives insisted on interfering with her care and custody of his sister, Ida May Bowman, she would take her away where he would not see her again; and he says that, believing she would keep her word good, and remembering his promise to his father, he took counsel of a witness, produced by deposition, and was told that the court should order otherwise; he had as much right to care for his little sister as had her aunt; and on the 15th day of February he took the child to his mother's sister, and related to her his promise given his father, and the child was brought to Wyoming by another sister of the mother, and he and a younger brother followed; and the plaintiff in error Ella Jones, and her husband, J. A. Jones, are presented and declared to have illegally received the child, and assisted her little brother Oscar in carrying out the wishes of his dead father, as he had promised to do.

On the 16th of February letters of guardianship were issued to Margaret H. Bowman out of the probate court of Ramsey county, Minn., but the child had been or was being taken out of the state of Minnesota when these letters of guardianship were issued. The father, John J. Bowman, just before his death, had requested one William F. Beck, who was his friend, to act as guardian of his three children, which included the little girl, Ida May; and the little boy Oscar, in his distress, appealed to Mr. Beck, who, on the 14th day of February, 1900, filed his petition to be appointed the guardian of said Ida May Bowman and of her brothers, J. Oscar Bowman and Charles D. Bowman; and the brother Oscar testifies that, relying on this petition, and upon the advice of the attorney, as above recited, he took the child to his aunt, his mother's sister, as aforesaid. A letter from this little boy to his other aunt, the plaintiff in error here, explains her ac-

tion in receiving the child Ida May Bowman, and is in evidence:

"Dear Aunt Ella: Papa died Monday morning. We buried him yesterday. Aunt Marguerite had all the money in the house and wouldn't let us telegraph you. I went to work and Chas to school and just got home about half an hour before he died. Just before I went to work Aunt Marguerite went to get breakfast and I was left alone with Papa. He asked me to remember what he had told me about taking care of Ida and said dont let Aunt Marguerite bring her up. You know I do not wish it and Mama wouldn't like her to. I dont know what to do. I must get her away from Aunt Marguerite and am going to ask Cousin Ida to take care of her. Cousin Eugene can get me a job I think. I haven't made any plans yet but I must have some one else appointed Guardian. I may bring her out there. I wish you were here, for I know mama would like you to have Ida. With love to all I remain.

"Your nephew Oscar Bowman.

"P. S. Please excuse the pencil as I was in a hurry.

"2/8/1900

O. B."

Upon receipt of the above letter, as shown by the evidence, and without information of any action of any court, the plaintiff in error Ella Jones proceeded to the assistance of the boy Oscar, who had already interested his cousin Ida Saunders to take the child Ida May, and save her from being taken where he could never see her again. It is not necessary to recount all that was done. The boy Oscar bravely kept his promise made his father, and, if any further wrong could be done him and his young sister than that already received in this case, it would be for this court to affirm the decision rendered herein, and separate them, which we find the law will not permit us to do.

Margaret H. Bowman, who seeks the custody of this child, is, by her own evidence, without a home, and entirely dependent upon her needle for support; a maiden lady past middle age; and she admits the possibility of her return to Pennsylvania. Upon reaching Wyoming with the child here in controversy, and her brothers Oscar and Charles having followed, plaintiff in error John A. Jones, the husband of Ella Jones, the child's aunt, was duly appointed guardian of the child Ida May Bowman by the district court of Johnson county, Wyo., and the evidence discloses him to be a man of means, and willing and able to perform the duties thereof. The foregoing statement of facts by no means includes all, but it is sufficient to show that the interest of the child Ida May Bowman should be the sole consideration here. And, while other questions were raised by defendant in error in the brief, it was admitted that the sole question should be that above stated. The trial court seems to have been of the opinion that the action

of the probate court in Ramsey county, Minn., where Margaret Bowman was appointed guardian of the child Ida May Bowman, precluded the making of the appointment of John A. Jones as her guardian in his court after the child had been brought into the jurisdiction of his court, and at first that question was urged here; but the authorities do not support such a contention.

A leading case in point, and one which calls attention to many others, is found in *In re Stockman*, 71 Mich. 180, 88 N. W. 876, and in that case the court say, among other things: "Guardians for infants may be appointed by the last will of the parent, instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward. The powers of a testamentary guardian are just the same precisely as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons. Who shall or may be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the question to be determined in making the selection is, and always should be, what will be for the best interest of the ward under all the circumstances? It should control everything else." And again, in the same case, the court says: "Comity cannot be considered in a case like this, when the future welfare of the child is the vital question in the case. The good of the child is superior to all other considerations. It is the polar star to guide to the conclusion in all cases of infants, whether the question is raised upon a writ of habeas corpus or in a court of chancery."

The Missouri Court of Appeals, in the case *In re Delano*, 37 Mo. App. 185, says: "It has become a settled principle in the jurisprudence both of England and America that the interests of the child is the paramount consideration." In *Townsend v. Kendall*, 4 Minn. 412 (Gil. 315), 77 Am. Dec. 534, Justice Flandrau says: "When a foreign guardian or anybody else attempts to exercise any restraint over the person of any one within this state, the writ of habeas corpus or any other appropriate remedy will always be effectual to inquire into the propriety of such attempted restraint, and upon such inquiry the proper court can make such order or judgment as the case may require. If the facts stated in the answer in this case had been interposed as a return to a writ of habeas corpus, and nothing else had been made to appear, there can be very little doubt that they would have been a good answer to a discharge under the writ. The courts of this state have full powers to investigate the whole subject of the guardianship, and may, upon a proper showing, refuse the guardian the custody of his ward, or restore him to such custody." In New York the question is to how much im-

portance should be placed upon foreign judgments where the welfare and interests of children are under consideration, and in the case of the *People ex rel. Lucy Allen, Respondent, v. William H. Allen, Appellant*, 105 N. Y. 628, 11 N. E. 143, the court says: "We dismiss this appeal for the reason that the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children, and in so doing gave to the Illinois decree not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it."

An interesting case, and one in point here, is that of *James H. Woodworth v. Azubah Spring*, 4 Allen, 321, and from the opinion of Chief Justice Bigelow we quote: " \* \* \* If the right to the possession and control of the person of the child depended on his domicile, the right of the petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another state, and that he has never by an act or election of his own or of his guardian obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory, and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens while they are residing on the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other states and countries; but, *ex proprio vigore*, they cannot have any extraterritorial force or operation. The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came, or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found." Further on in this same opinion this court says: "An administrator appointed under the laws of a foreign state cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another state exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with the office. *Story, Conf. Laws, § 499; Morrell v. Dickey*, 1 Johns. Ch. 153; *Kraft v.*

*Wickey*, 4 Gill & J. 332, 23 Am. Dec. 569; *Johnstone v. Beattie*, 10 Cl. & Fin. 42, 113, 145. So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth by virtue of his appointment as guardian in the state of Illinois, it is not supported either on principle or authority. He cannot assert his tutorial power *de jure* in our courts or within our territory. \* \* \* But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicile of the infant. The jurisdiction of this court to decide, on habeas corpus or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. *Commonwealth v. Briggs*, 16 Pick. 203. The result is that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed." While in this case it was admitted by the respective counsel that the consideration that should govern the court is that of the welfare of the child, we are unable to return this case for final determination without references to some of the rulings on that subject, and to some showing that the courts have always held that, where it is possible, a family, or those remaining, should be kept together; and this latter consideration becomes of great importance in the case here under consideration for the reason that the plaintiff in error *John A. Jones* has shown by undisputed evidence that during the lifetime of *John J. Bowman*, the father of the child, he assisted with money in the care of his family; that he has the means to support and educate the child, and is willing to keep the family together, not only because they are the children of his wife's sister, but because it was the wish of their dead father. We will refer to only a few of the authorities in point. *Bennett v. Byrne*, 2 Barb. Ch. 216; *Holley v. Chamberlain*, 1 Redf. Sur. 333; *Watson v. Warnock*, 31 Ga. 718; *Albert v. Perry*, 14 N. J. Eq. 540; *Commonwealth v. Addicks and Wife*, 5 Bin. 520; *Underhill v. Dennis*, Guardian, etc., 9 Paige, 202; *English v. English*, 32 N. J. Eq. 738; *Lusk v. Lusk*, 28 Mo. 91; *Commonwealth v. Addicks and Lee*, 2 Serg. & R. 174; *Coffee and Wife v. Black*, 82 Va. 567; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 302; *Warren v. Hofer*, 13 Ind. 167; *Markwell v. Pereles*, 95 Wis. 406, 69 N. W. 798; *In re Laura Doyle*, 18 Mo. App. 159; *Schiltz v. Roenitz*, 86 Wis. 31, 56 N. W. 194, 21 L. R. A. 483, 39 Am. St. Rep. 873; *Cozine v. Horn*, 1

Brad. Sur. 143; *Henry D. Rust v. Mary E. Vanvactor*, 9 W. Va. 600. But the case which would seem to more than sustain the argument of counsel for plaintiff in error, and appeal to the human feelings of any court, and where the rule that the interests of the child must be found and followed, is that of *In re Bullen*, Petitioner, etc., 28 Kan. 78.

And this court, under the authorities cited and others too numerous to set out (while it may appear that we practically annul an appointment made by the court in Minnesota, not because of its illegality, but because of the interests of the child, under the evidence submitted), believe that we can make a wiser arrangement, and one authorized by law, and direct that this case be remanded to the district court of Johnson county, Wyo.; that the appointment of Margaret Bowman, so far as she has been appointed in this state, be annulled; and that John A. Jones be appointed guardian of Ida May Bowman, subject to the further order of that court; and that the plaintiffs in error, John A. Jones and Ella Jones, have judgment for their costs herein expended.

CORN, C. J., and POTTER, J., concur.

In re McDOUGALD'S ESTATE. (Sac. 1,290.)

In re BOGGS' WILL.

(Supreme Court of California. June 6, 1904.)

EXECUTORS AND ADMINISTRATORS — SETTLEMENT OF ACCOUNTS—ORDERS—APPEAL —NECESSARY PARTIES.

1. On the settlement of the account of an administrator or executor, only those persons interested in the estate who appear in the superior court and make objection to the account, or in some way make themselves parties of record to that proceeding, are necessary parties to an appeal from orders made therein.

2. An order for the payment of a dividend on an accounting by an administrator, required by Code Civ. Proc. § 1647, is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims reported therein, so that the parties to whom the dividends are payable do not thereby become parties to the accounting.

On Rehearing.

3. The making of an order for the payment of a dividend is a part of the duty of the court, when the appropriate stage of administration is reached, without application being made therefor or notice given.

4. Where an order for a dividend is made on the same day that an order is made settling the account of an administrator, the order for a dividend is properly included in the same entry in the minutes with the order settling the account, and immediately following.

5. The court has as much power to make an order for a dividend on a day subsequent to that on which an order settling the account of an administrator is passed as it has on the day the account is settled.

6. The order for a dividend is in many respects dependent on the order settling the account of an administrator, so that, when an appeal is taken from an order settling the account, it suspends the effect of the order for a divi-

dend, and prevents its enforcement, against the will of the administrator, until the order settling the account becomes final; and hence there would be no impropriety in deferring the making of the order for a dividend until the time for appeal from the order settling a contested account had expired, or where an appeal is taken, until the appeal is determined.

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

On an account being filed by Carrie B. McDougald, administratrix of the estate of J. D. McDougald, deceased, Louise E. Boggs, as executrix of the estate of John Boggs, deceased, appeared and filed written objections; and from an order surcharging the account, and an order that a dividend be declared on the claims reported, the administratrix appeals. On motion to dismiss appeal. Motion denied.

Budd & Thompson, for appellant. Louttit & Louttit and Buck & Middlecoff (Minor & Washington, J. B. Webster, and C. H. Fairall, of counsel), for respondent.

SHAW, J. The appellant, Carrie B. McDougald, as administratrix of the estate of J. D. McDougald, deceased, filed an account in the superior court. The usual notice of the hearing was given, and upon the hearing the respondent Louise E. Boggs, as executrix of the estate of John Boggs, deceased, a judgment creditor of the estate of McDougald, appeared and filed written objections to the account. Upon the contest thus raised the court surcharged the account with the sum of about \$5,500, and settled the account accordingly. In connection with the account the administratrix reported that claims had been allowed in favor of some 16 creditors, including that of the respondent Boggs, and a claim in favor of the administratrix. Upon the order thus settling the account the court further ordered that a dividend be declared upon the claims reported, and that the administratrix should pay the same out of the balance so adjudged to be on hand. Carrie B. McDougald has taken separate appeals from these orders—one in her capacity as administratrix of the estate, and the other as a creditor. None of the creditors, other than Louise E. Boggs, filed any objections to the account; but two of them appeared at the trial of her contest, and seem to have taken part therein, though the record does not show whether they favored or opposed the objections made by her. The notices of appeal were served on the creditor who filed the objections, and also on the two creditors who appeared at the hearing, but they were not served on any of the other creditors nor on any of the heirs of the deceased. The respondent moves to dismiss the appeals for the failure to serve the notices on the persons who did not appear on the hearing. The contention is that these creditors who did not appear, nor make any objections to the account as rendered, are directly interested in the

result of the appeal; that the dividend accruing to them on their claims under the terms of the order will be diminished if the appeal is successful; and hence that they are adverse parties, who must be served with notice of appeal in order to give this court jurisdiction. It is also urged that under section 1649, Code Civ. Proc., an order for the payment of a dividend has the effect of a several judgment in favor of each creditor against the administratrix, and that this makes each creditor a party of record to the proceedings.

If these contentions prevail, it is obvious that difficulties will arise in many cases. If a nonappearing creditor is an adverse party, so also would be a nonappearing heir or legatee, and, if one must be served with notice of appeal, so much the other. In all solvent estates the heir or legatee is more vitally interested in the balance on hand than is a creditor. If all the parties thus interested in the fund are to be deemed adverse parties, within the meaning of that term as used in section 940, Code Civ. Proc., requiring service of notice of appeal, then, in every appeal from a probate proceeding, all such interested parties must be served with notice, in order to give this court jurisdiction. Creditors and heirs are not required to appear by attorney in the administration of an estate, and, indeed, they may never appear at all, either in person or by attorney. They may be out of the jurisdiction, or their names and residences may be unknown. The statute provides no method of constructive service of notice of appeal in case of nonresidents who have not appeared, or unknown parties. The time for taking the appeal from orders of this character is limited to 60 days. In such cases the right of appeal secured by the statute would prove unavailing in many cases, and it would be effectual only in those cases where the deceased left no heirs, legatees, or creditors residing out of the state, and none residing in the state whose names and residences were unknown. The construction contended for would defeat the purpose of the statute giving the right of appeal. The word "party" should not be given so broad a meaning. That a person interested in an estate, although his name and his interest are disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will, any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. So, with the petition for administration, there may

be many persons who are entitled to letters, and who are interested in the matter of the appointment. But if they fail to appear or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and, as such, has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding. The only effect of such a notice, so far as this question is concerned, is to give them an opportunity to become parties, so that, if they desire, they may appear and make themselves parties in some appropriate manner. Unless they do so appear, they are to be considered as having no objections to the account as rendered, and as consenting that it may be settled accordingly. If thereupon other interested persons do appear, and by virtue of a contest secure a decision which inures to the benefit of those persons who do not appear, this does not make the nonappearing persons parties to the contest, notwithstanding their failure to appear, so that it becomes necessary to serve upon them notice of an appeal from the order made upon the contest. They are deemed to have consented to a settlement of the account without their intervention, and to be willing that the proceedings should be conducted in their absence until the order becomes final after appeal. Having allowed the other interested persons to conduct the proceedings for their benefit, they must be considered as having consented that they should be represented by these other persons in any appeal that may be taken from the order thus procured.

The order for the payment of a dividend required by section 1647, Code Civ. Proc., is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims reported therein. It follows thereon, but it is not a part thereof. It may, of course, be made immediately after the account is settled, but this does not make it a part of the proceeding. On the other hand, it cannot be made until after the account is settled, and it may be deferred to a considerable time thereafter, and made without notice. It is a part of the proceeding for the administration of the estate, considered as a whole, but it is not specifically a part of the proceeding for the settlement of the account. The persons in whose favor such order for dividend is made do not thereby become parties to the proceeding for the settlement of the account, in cases where they did not appear or make any objection or contest upon such settlement.

The decisions of this court are in harmony with these conclusions. In *re Ryer's Estate*,



110 Cal. 538, 42 Pac. 1083, was a case of an appeal from an order denying a motion for a new trial of a petition for partial distribution. Upon the hearing, some of the persons interested appeared and presented objections to the petition. Other persons equally interested did not appear or object. The petition was denied. A motion for new trial was also denied, and from the order denying the same an appeal was taken. A motion was made to dismiss the appeal upon the ground that certain interested persons who did not appear at the hearing were not served with the notice of appeal. The court, in denying the motion, said: "The fact that the judgment or order may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal. \* \* \* The only parties to the record are those who appeared and resisted the application. \* \* \* The only issues of fact to be tried in the court below were those presented by the parties who had filed their answers to the application, and as, upon the original trial of those issues, only the parties thereto could claim the right to be heard, so only the parties to those issues are necessary parties to the hearing of an appeal from the order of the court refusing to re-examine the issues." This case was followed and approved in *In re Calkins' Estate*, 112 Cal. 297, 44 Pac. 577. The case of *In re Bullard's Estate*, 114 Cal. 462, 46 Pac. 297, is, in principle, precisely the same as the case at bar. The administrator filed an account in which, as provided in section 1628, Code Civ. Proc., a claim in favor of the Hibernia Savings & Loan Society was reported as an allowed claim against the estate. One of the heirs appeared at the hearing and contested the validity of this claim, as he was authorized to do under section 1636, Code Civ. Proc. His objections were overruled, the claim allowed, and the account settled. The Hibernia Savings & Loan Society did not appear at the hearing, or otherwise participate in the contest. The heir appealed from the order, but did not serve notice of appeal upon the Hibernia Savings & Loan Society, and for this failure a motion was made to dismiss the appeal. Necessarily the interest of the society appeared from the account as rendered, and the decision of the appeal would directly adjudicate the validity of its claim. Nevertheless the court denied the motion, saying: "It does not appear from the bill of exceptions in the present case that the Hibernia Savings & Loan Society was in any respect a party to the proceeding in the superior court from which the present appeal is taken, and, unless it was a party thereto, it was not necessary to serve notice of appeal upon it." The following authorities are from other states, and are to the same effect: *Smith v. Craft* (Ky.) 58 S. W. 500; *Succession of Ty-*

son, 21 La. Ann. 117; *Patten v. Powell*, 16 La. Ann. 128.

In the light of these authorities, and for the reasons above given, we are of the opinion that, upon the settlement of the account of an executor or administrator, only those persons interested in the estate who appear in the superior court and make some objection or exception to the account, or in some way make themselves parties of record to that proceeding, are necessary parties to an appeal from any order made therein, and that other persons equally interested and equally affected by the order, but who do not see fit to make any contest or objection to the account, or to any matters stated therein, need not be served with notice of appeal. Having failed to make themselves parties to the proceeding, they must, for the preservation of any advantage to themselves accruing from the order appealed from, depend upon the efforts of those who made the contest for their benefit.

The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

#### On Petition for Rehearing.

(July 6, 1904.)

PER CURIAM. The respondent, in a petition for rehearing, claims that the opinion in this case is in conflict with the decisions in *Estate of Smith*, 117 Cal. 505, 49 Pac. 456, *Estate of Spanier*, 120 Cal. 698, 53 Pac. 357, and *Estate of Smith*, 122 Cal. 462, 55 Pac. 249. We think it proper to explain that there is no conflict. The cases cited do not hold that notice must be given of an application for an order for the payment of a dividend, nor that there must be such an application. The making of such an order is a part of the duty of the court when the appropriate stage of administration is reached. The court there held that, with the exception of interest-bearing claims provided for in section 1513, Code Civ. Proc., there could be no valid order for the payment of a claim until after an order for the settlement of an account, in which the validity, rank, and amount of the claims, and the balance on hand, has been adjudicated. The notice referred to in those decisions is the notice of the time and place of settling the account, and not a notice of the time of making the order for a dividend. The latter notice is not held necessary. Nor do the decisions declare that the order for a dividend must be made at the same time as the order settling the account. In substance they decide that the first-mentioned order must follow the latter. Doubtless the order for a dividend is in practice usually included in the same entry in the minutes with the order settling the account, and immediately following, and this is proper when the order is made on the same day. But there may be

reasons for delay in ordering the dividend, and the court has as much power to make it on a subsequent day as it has on the day the account is settled. It is, indeed, evident that the order for a dividend is in many respects dependent on the order settling the account, so that, if an appeal is taken from the latter, it must perforce suspend the effect of the former, and prevent its enforcement against the will of the administrator, until the latter becomes final. Hence there would be no impropriety in deferring the making of the order for a dividend until the time for appeal from the order settling a contested account had expired, or, if an appeal is taken, until such appeal is determined.

It is proper to add that the decision of this case does not affect the question whether or not a creditor who does not appear at the hearing of an account has the right of appeal from the order, or from an order for the payment of claims. The rules governing the question of who must be served with notice of appeal are not identical with those which control the question of who may have the right of appeal.

7 Cal. Unrep. 187

In re SCOTT'S ESTATE. (S. F. 3,894.)  
(Supreme Court of California. June 6, 1904.)  
EXECUTORS—SETTLEMENT OF ACCOUNT—APPEAL—PARTIES.

1. It is only necessary for an executor to serve notice of appeal from an order settling his account on the persons who appeared and contested the account.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings for the settlement of the account of the executors of the estate of Angella R. Scott, deceased. From the order entered after hearing objections of legatees under will of deceased, the executors appeal. On motion to dismiss appeal. Motion denied. See 75 Pac. 44.

A. E. Bolton (Philip G. Galpin, of counsel), for appellants. Houghton & Houghton, L. Seidenberg, and R. P. Clement, for respondents.

SHAW, J. Motion to dismiss the appeal. Upon the hearing of the account of the executors of the estate of Angella R. Scott, deceased, certain legatees under the will appeared and filed objections to the account, and, upon the contest ensuing thereon, items for which the executors had claimed credit, amounting to over \$7,000, were rejected, and an order was made settling the account accordingly. From this order the executors appealed. Notice of appeal was served on all the legatees who had appeared at the hearing, and attempt was made also to serve the same upon all the parties interested in the estate, including a number of other legatees who did not appear at the hearing, or other-

wise make themselves parties to the proceeding. As to some of these parties the notice was defective, and, for the failure to properly serve these parties, the respondents who filed the objections move to dismiss the appeal upon the ground that it is necessary to serve the notice of appeal upon all the parties interested in the estate, whether they made themselves parties to this proceeding or not. The question involved in this case is substantially the same as that involved in the Estate of McDougald (this day decided by the court in bank) 77 Pac. 443. Upon the authority of that case, it must be held that the only parties upon whom it is necessary to serve notice of appeal in proceedings of this sort are those who make themselves parties in the court below by appearing at the time of the settlement and contesting the account. The motion is denied.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

143 Cal. 507

In re TOWNE'S ESTATE. (S. F. 3,420.)  
(Supreme Court of California. June 10, 1904.)  
EXECUTORS—COMPENSATION—SERVICES RENDERED DECEDENT—AGREEMENT AS TO PAYMENT.

1. Under Code Civ. Proc. § 1618, providing that an executor shall be allowed a commission of 3 per cent. on the value of the estate over \$20,000, but that where the property is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of \$20,000 at one-half the rates fixed in the section, an administrator who, in the course of administration, obtained a license from a probate court in another state to collect moneys deposited by the deceased in five different savings banks there, and who took charge of the estate in the county where the will was probated, collected rents, paid taxes, insured buildings, made necessary repairs, went over a large part of the estate, and cared for the trees, etc., was entitled to commission at 3 per cent., though he had the estate ready for distribution within a year.

2. A decedent agreed to convey to a person who afterwards became his executor a city lot of a certain value as a compensation for services rendered, and died after the services were rendered, but before conveying the lot. Held, that the value of the lot was to be regarded as the measure of compensation, so that the executor was entitled to be allowed a claim for the value of the lot against the estate, and was not required to present the claim for the reasonable value of his services.

Department 2. Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Judicial settlement of the estate of Asa P. Towne, deceased. From an order settling the final account of the executor, the devisees under the will appeal. Affirmed.

Lennon & Hawkins, for appellants. E. B. Martinelli, for respondent.

LORIGAN, J. This is an appeal by the devisees under the will from an order settling

the final account of the executor. But two points are presented—one involving the commissions allowed the executor, the other relative to the payment of a claim presented by the executor against the estate.

1. The executor accounted for \$26,834.77, which was the appraised value of the estate less something over \$1,600, consisting of rents of the real property, and interest on deposits in eastern banks, collected by the executor during his administration. The court, in fixing the commissions, allowed him the regular rate of 3 per cent. upon the value of the estate over \$20,000, as provided in section 1618 of the Code of Civil Procedure. Appellants insist, however, that the court should have allowed him but one-half of such regular rate under a further provision of said section which requires that: "Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of \$20,000, at one-half of the rates fixed in this section." It appears from the record that the executor proceeded with commendable dispatch in the administration of this estate, and had it ready for distribution within a year. During such administration it became necessary for him to obtain a license from the probate court of Essex county, Massachusetts, to collect moneys deposited by the deceased in five different savings banks therein. The only witness as to what attention was given the estate by the executor was the executor himself. From his evidence it appears that, as to the estate in Marin county, where the will was probated, he took charge and control of it, collected the rents, paid the taxes, insured the buildings, made necessary repairs, went over a large part of the estate therein, and cared for the trees thereon, and, quoting his own expression, "looked after the property, and done everything I could to make the estate all right." All this involved attention, time, and labor on the part of the executor in behalf of the estate; something more than mere custody and distribution. It was active management and supervision, which was only not more extensive because there was no delay in settling the estate. It was management and attention, however, beyond the mere labor of custody and distribution of the estate, and entitled the executor to commission at the regular rate, as the court properly allowed him.

2. As to the allowance of the claim. The executor duly presented a claim against the estate for \$1,500, which was approved and allowed by the judge of the superior court and filed. In his account the executor returned this as paid by himself to himself, and the appellants objected to the approval of this item in the account. The claim presented, approved, and filed recites that it is for various specified services rendered decedent in his lifetime at his special instance

and request, and states further that, "as compensation for all of which said services said decedent agreed to convey to claimant that certain real property firstly described in the inventory and appraisal, filed herein on the 11th day of April, 1901, which said real property is of the value of \$1,500, and the value of which said real property was expressly agreed upon between said decedent and said claimant as being the compensation for said services and which conveyance was never made, \* \* \* \$1,500." The real estate referred to in the claim is a lot of land in the city of Oakland, appraised at \$1,500. The only objection urged by appellants against the payment of this claim is a purely technical one. They insist that the payment credited in the account should be rejected because the claim on which it was predicated was not the proper kind of claim to have presented against the estate; that the claim presented is upon express contract for the payment of \$1,500, which they contend was not the agreement, but that the agreement was in fact that the decedent was to convey to the claimant a lot of land in Oakland as compensation for his services; and that, under such circumstances, the claimant should have presented his claim for the reasonable value of his services. It is not pretended that there was any fraud, misrepresentation, or deceit on the part of the claimant, or that the contract to pay for the services was not made by the decedent, or that they were not fully rendered, or were not fair and just. Nor is it questioned that the value of the real estate referred to in the inventory is \$1,500. The objection solely is as to the sufficiency of the claim in point of law. Upon the hearing of the objections the executor was also the only witness sworn, and appellants insist that it affirmatively appears from his evidence that their position as to the terms of the agreement between the decedent and the claimant is correct, and they quote in their brief excerpts from his testimony to support their assertion. But the excerpts do not fairly present the testimony of the witness, and when his testimony is considered all together it cannot be said to support their position. In fact, a reasonable construction of it is to the contrary. Upon this testimony the lower court was satisfied (and we find no reason for reaching a different conclusion) that the agreement between the claimant and decedent was, as stated in his claim, that the value of the Oakland lot—\$1,500—was to be the measure of the compensation that he was to receive for his services; that this value was the standard by which the compensation was estimated. Now, while it is true that decedent agreed to convey said lot in payment, still, having died without doing so, this omission amounted simply to a failure of payment in that particular way. It did not otherwise interfere with the terms of the contract. The land was intended to serve a

dual purpose: First, by its value to fix the value and amount of the compensation to be paid the claimant; and, secondly, by its transfer to pay it. It never served the latter purpose on account of the death of the deceased. It had, however, served the first purpose, as an element in fixing the amount in money which it was agreed between the parties the claimant's services were worth. Its value was taken to determine and fix the amount the claimant was to be paid, independent of whether the land was transferred in payment or not.

We think the conclusions reached by the lower court were correct upon both propositions, and the order appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

143 Cal. 605

PEOPLE v. GONZALES. (Cr. 1,079.)

(Supreme Court of California. June 17, 1904.)

HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—EFFECT—DILIGENCE—VERDICT—APPEAL—CONCLUSIVENESS.

1. Where legal evidence was introduced to prove all the elements of a crime charged, the verdict of the jury is conclusive on appeal.

2. Where, in a prosecution for murder, witnesses for the prosecution testified that it occurred between 1:15 and 1:20 a. m., but it did not appear that they had any occasion to note particularly the hour, newly discovered evidence that at that time, and until after 1:30 a. m., defendant was present at a saloon four or five blocks (the length of which was not stated) from the scene of the homicide, was not such as would require the granting of a new trial.

3. A homicide occurred August 31st, and defendant's trial therefor was begun December 5th following. On the night of the homicide defendant had been in a saloon attending a dance for several hours, drinking with several companions, who called him by his full name. An application for a new trial for newly discovered evidence to prove an alibi was filed; two proposed witnesses being officers of the law who attended the dance for the purpose of preserving order. Defendant averred that numerous persons attended the dance, and that their names were unknown to him, and that he was unable to procure any of them on account of his being confined in jail. He did not explain, however, his unfamiliarity with the names of any of his companions, who called him by name, nor his failure to ascertain the testimony of the officers present. The saloon keeper stated that those present in the saloon were composed mainly of Mexicans employed as laborers and railroad track layers, but no inquiry appeared to have been made among them to ascertain who were present at the dance. *Held*, that an order denying the new trial for lack of diligence was not erroneous.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Sevariano Gonzales was convicted of murder in the first degree, and he appeals. Affirmed.

Wm. T. Blakely and R. F. Del Valle, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of murder in the first degree, and sentenced to imprisonment for life. He appeals from the judgment, and from an order denying his motion for a new trial.

In support of his appeal the defendant's counsel urge that the verdict is contrary to the evidence, and that a new trial should have been granted because of newly discovered evidence. This court cannot interfere with the verdict of a jury, nor with the action of the court below in refusing a new trial, on the ground that the evidence is insufficient to justify the verdict, unless there was such a lack of evidence as to satisfy us that the court below abused its discretion in denying the new trial. A careful reading of the record shows that there was legal evidence to prove all the facts constituting the crime alleged. "The decision of a jury upon legal evidence, in so far as this tribunal is concerned, is absolutely final." *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; *People v. Hotz*, 73 Cal. 242, 14 Pac. 856. We cannot say that the new trial upon that ground was not properly refused, or that the verdict was not sustained by sufficient evidence.

Applications for new trial upon the ground of newly discovered evidence are regarded with distrust and disfavor. *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Freeman*, 92 Cal. 359, 23 Pac. 261. The homicide in question took place in the city of Los Angeles early in the morning of August 31st. The witnesses for the prosecution testified that it was at about 1:15 or 1:20 in the morning; but it does not appear that they had any occasion to note particularly the hour. The newly discovered evidence consisted of the proposed testimony of three witnesses tending to prove that, at the exact time when the witnesses for the prosecution say the offense was committed, the defendant was at a saloon some four or five blocks from the scene of the homicide. The length of the blocks is not stated. One of the proposed new witnesses testified that he looked at his watch at 1:30 a. m., when the defendant was present at the saloon in question. A difference of half an hour, or even less, in the estimates of the respective witnesses as to the time of the night, would sufficiently explain the apparent inconsistency. It does not appear that the witnesses for the prosecution had any means of ascertaining the exact time. We cannot say that a new trial would change the result, nor that upon the showing made the court below was bound to grant the new trial, conceding that sufficient diligence had been shown in the endeavor to procure testimony at the trial. The homicide took place on August 31st, and the trial upon the 5th of the following December. Upon the question of diligence the affidavits show that the defendant had been at a dance in the saloon for several hours previous to the time of the killing, and had been drink-

ing there with some half-a dozen companions, who knew him well enough to call him frequently by his full name. It also appeared that the two proposed witnesses whose affidavits are produced were officers of the law, attending the dance for the purpose of preserving order. The defendant in his affidavit says that there were numerous persons at the dance, and that their names and addresses were unknown to him, and that on account of being confined in jail he was unable to procure any of said persons at the trial. He makes no attempt to explain how it was that he did not know the names of any of his companions, who knew him so well as to frequently call him by his full name, nor is there any satisfactory explanation of the cause of the failure to ascertain the testimony of the officers present at the dance, who must have been known to those in charge of the saloon, of whom inquiry was made. The saloon keeper, in answer to inquiries, stated that those present in the saloon were composed principally of Mexicans employed as laborers and track layers by the various railway companies. No inquiry appears to have been made among the railway employes to ascertain who were present at the dance. Under these circumstances we cannot say that the new trial was not properly denied because of the lack of diligence in endeavoring to procure the witnesses in time for the trial.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

143 Cal. 507

PEOPLE v. SMITH. (Cr. 1,094)\*

(Supreme Court of California. June 17, 1904.)

LARCENY—FORMER ADJUDICATION—FELONY—REMARKS OF COUNSEL—EVIDENCE—SUFFICIENCY—JUSTICE OF THE PEACE.

1. Pen. Code, § 1385, providing that the court may, either of its own motion or on the application of the district attorney, and in furtherance of justice, order an action or indictment dismissed, authorizes the dismissal of a criminal proceeding by a justice of the peace.

2. Pen. Code, § 666, providing that the punishment for petit larceny committed by one who has before been convicted of burglary shall be imprisonment in the state prison not exceeding five years, makes petit larceny in such case a felony.

3. Pen. Code, § 1387, provides that the dismissal of an action is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if the offense is a felony. Section 666 provides that the punishment for petit larceny committed by one who has before been convicted of burglary shall be imprisonment in the state prison not exceeding five years. Defendant was charged with the misdemeanor of petit larceny on an information before a justice of the peace. The information was dismissed, on motion of the district attorney, pursuant to Pen. Code, § 1385, and a new information was filed in the superior court,

charging defendant with the same petit larceny and with a prior conviction of burglary. Held, that the dismissal was not a bar to the prosecution.

4. In a prosecution for petit larceny by one who was charged with having before been convicted of burglary, while the district attorney was arguing the question of the admissibility of the record of dismissal of the information for petit larceny by a justice, which had been pleaded as a bar to the prosecution, he said: "The question turns essentially on whether or not the offense is a misdemeanor, or whether it is a felony. Our contention is that by reason of a former conviction, and the statute making (your honor is familiar with it) a second conviction of petit larceny—" Here the defendant's attorney objected, and the judge admonished the jury fully to pay no attention to what the district attorney had said. Held, that as it did not appear that the district attorney was acting in bad faith when he made the remark, and as the court promptly admonished the jury that it was not evidence, the remark was not cause for reversal.

5. In prosecution for larceny, held, that the evidence was sufficient to support a conviction.

Commissioners' Decision. Department 2. Appeal from Superior Court, Merced County; M. L. Short, Judge.

Charles Smith was convicted of petit larceny, and appeals. Affirmed.

Jones & Berry, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

COOPER, C. The defendant was charged with the crime of petit larceny and with a prior conviction of burglary. He entered his plea admitting the charge as to the prior conviction, but to the charge of petit larceny he pleaded not guilty, and he also pleaded a former acquittal of the petit larceny charged in the information. He was convicted, sentenced to two years and ten months in San Quentin, and prosecutes this appeal from the judgment and order denying his motion for a new trial.

In support of his plea of former acquittal he offered in evidence a complaint in the justice court, charging him with the same petit larceny charged in the information, a warrant of arrest issued upon the said complaint, and a judgment of dismissal of the charge against him; said judgment having been made on motion of the district attorney. The judgment of dismissal recites: "E. H. Hoar moves the court to dismiss the complaint on file herein and to file a new complaint charging a felony. F. W. Henderson, attorney for defendant, objects to the dismissal of the complaint on file and to the filing of a new complaint. Objections overruled. Complaint herein dismissed, and defendant discharged." The court sustained the objection of the district attorney to the evidence offered, for the alleged reason that, the dismissal being for the purpose of charging a felony, the dismissal was not a bar, and did not amount to an acquittal. It was admitted "that the information charging said defendant with felony, and upon which the defendant was then on trial, embraced the

\*Rehearing denied July 12, 1904.

same charge contained in the complaint charging the defendant with petit larceny, filed in the justice court of No. 2 township, county of Merced, and subsequently dismissed in said court on the 20th day of July, 1908, and also related to the same person, place, and facts." The ruling of the court presents the question as to whether or not the judgment of dismissal in the justice court amounts to a bar or acquittal of the same offense in the superior court.

We are of opinion that the judgment of dismissal was not a bar, and that the court did not err in excluding the offered evidence. Pen. Code, § 1385, provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes." The above provision is general in its nature, and authorizes an action to be dismissed in a justice court in a case where a defendant is charged with a misdemeanor of which the justice's court has jurisdiction. It is provided in section 1387, *Id.*, that "an order for the dismissal of the action as provided in this chapter is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony." This case comes within the terms of the section last cited. It was never intended that the dismissal should be a bar to a prosecution for a felony. The defendant has never been in jeopardy for the felony, if the act charged against him be a felony. A felony is a crime punishable with death or imprisonment in the state prison. Pen. Code, § 17. Defendant had before been convicted of the crime of burglary, which crime is punishable by imprisonment in the state prison. Pen. Code, § 461. The punishment for petit larceny committed by one who has before been convicted of burglary is imprisonment in the state prison not exceeding five years. Pen. Code, § 666. Therefore, when the defendant committed the crime of petit larceny, he committed a felony. It was necessary to allege and show that he was one of the class of persons mentioned in section 666, and, this being done and the petit larceny being proven, the crime was a felony. The question as to whether or not the crime is a felony depends upon the punishment. If the punishment is imprisonment in the state prison, the crime is a felony.

Appellant claims that the district attorney was guilty of such misconduct in referring to the prior conviction of the defendant as to demand that the judgment be reversed. It appears that, while the district attorney was arguing to the court the question of the admissibility of the record of dismissal in the justices' court, he said: "The question turns essentially upon whether or not the offense is a misdemeanor, or whether it is a felony. Our contention is that by reason of a former

conviction, and the statute making (your honor is familiar with it) a second conviction of petit larceny—" Here the defendant's attorney objected, and the judge promptly admonished the jury and said: "I do not think the jury understands what is meant by that remark. The jury will not pay any attention to anything the district attorney has now said, because he is making his address to the court, and there is nothing for the jury to consider at the present time. This is a question of law for the court to pass upon, and anything the district attorney may have said you are instructed not to consider at all at the present time. Anything he has now stated to me is not evidence in the case, you understand." It does not appear that the district attorney was acting in bad faith. His remarks were addressed to the court, and he was attempting to show that defendant was charged with a felony, in order that his objection to the record offered in evidence might be understood by the court. The reference to a former conviction was not definite. The court plainly and promptly told the jury that the remark was not evidence, and was not to be considered by it. While it would have been the better course for the district attorney to have refrained from making the remark, we do not think, under the circumstances, it was injurious. If the district attorney had been acting in a manner to indicate bad faith, if he had willfully stated the fact that defendant had before been convicted of burglary, or if he had stated anything material as being true, without support in the record, we would not hesitate to reverse the case. But we think the ends of justice and the due administration of the laws do not demand of us a reversal on account of an inadvertent sentence, which as matter of law should not have been made, where the court promptly endeavors to correct the matter. The rule in support of the above is well stated in *People v. Molina*, 126 Cal. 505, 59 Pac. 34. The cases cited by appellant are all of them easily distinguished from this. The principal one is *People v. Sansome*, 84 Cal. 449, 24 Pac. 143. In that case the clerk by direction of the court, and in face of the statute, read to the jury the portion of the indictment charging a prior conviction, after defendant had admitted the prior conviction. In the opinion the court said: "The learned judge did not tell the jury that he had erred in allowing the charge of a previous conviction and the confession thereof to be brought to their attention, and that in determining as to defendant's guilt they should wholly discard this knowledge from their minds." In *People v. Thomas*, 110 Cal. 42, 42 Pac. 456, the court, under defendant's objection, admitted evidence of a prior conviction, which the defendant had admitted. This was a direct violation of subdivision 1 of section 1003 of the Penal Code, and the court so held.

Finally it is urged that the evidence is in-

sufficient to support the verdict. There is no conflict in the evidence as to the fact that defendant had the coat and vest in his possession, that he had taken them from the tailor shop of one Harris, and that he had gone some distance from the building. It was about 2 or 3 o'clock in the morning, and a fire was destroying the jewelry store adjoining the tailor shop. Defendant's claim is that he was taking the goods away, so that they would not be destroyed by fire. The intention of the defendant was for the jury, and might be inferred from all the circumstances in the case. *People v. Johnson*, 131 Cal. 514, 63 Pac. 842. In this case there was no direct proof as to the intention of the defendant. He did not testify as to his intention in taking the goods, nor did he explain his possession of them. The evidence supports the verdict, and there is no error in the record that would justify a reversal.

The judgment and order should be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: HENSHAW, J.; MCFARLAND, J.; LORIGAN, J.

143 Cal. 607

In re EDSON'S ESTATE. (S. F. 3,689.)

EDSON v. EDSON.

(Supreme Court of California. June 17, 1904.)

EXECUTORS AND ADMINISTRATORS—RIGHT TO ADMINISTRATION—RELATIVES—INTEREST IN ESTATE.

1. Where, after the death of a married woman intestate, leaving her husband, a son, and several daughters surviving her, the son, prior to the death of his father, conveyed all his interest in his mother's estate to the father, such son was not entitled to letters of administration on his mother's estate, as against one of his sisters, who was interested in such estate, under Code Civ. Proc. § 1365, providing that the relatives of the deceased person are entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof.

2. Where, after the death of a married woman, her son transferred all his interest in her estate to his father, the death of the father, leaving the son as one of his heirs, prior to the granting of administration on the mother's estate, did not reinvest the son with an interest therein, since whatever interest he acquired was as heir of his father and must come to him through the distribution of his father's estate.

Commissioners' Decision. Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Contest between Juan E. Edson and Evodia P. Edson for letters of administration on the estate of Cresencia R. Edson, deceased. From an order granting letters to Evodia P. Edson, Juan E. Edson appeals. Affirmed.

C. D. Wright, for appellant. John E. Richards, for respondent.

GRAY, C. This was a contest between a son and daughter for letters of administration upon the estate of Cresencia R. Edson, their deceased mother. The order was in favor of the daughter, and the son appeals.

The heirs of the deceased mother were her husband (the father of all her children), one son, several daughters, and several grandchildren. The son conveyed all his interest in the mother's estate to his father, and subsequently the father died intestate. Application for letters of administration on the father's estate were made of even date with the petition herein, and the father's estate was in process of administration at the time of the hearing of the contest.

We think the son not entitled to letters on the mother's estate, as against the daughter. Section 1365, Code Civ. Proc., provides that the relatives of the deceased are entitled to administer "only when they are entitled to succeed to his personal estate or some portion thereof." The son, having conveyed away all interest in his mother's estate, was not, at the date of the contest, entitled to succeed to any portion thereof. It is true that, upon the death of his father, he might possibly again come into some portion of the estate that he had conveyed to the father in his lifetime; but this would be as the heir of his father, and not as the heir of his mother. He had parted with all his rights as the heir of his mother, after her death and before the death of the father; and his former interest in his mother's estate must be distributed to his father's estate, and then, in case there is any of it left after his father's debts, funeral expenses, expense of administration, and any possible family allowance are paid, he may hope to receive his distributive share of it under a decree made in the estate of his father. This construction of the law finds support in *In re Davis' Estate*, 106 Cal. 453, 30 Pac. 756; *Estate of Wakefield*, 136 Cal. 110, 68 Pac. 499; *In re McLaughlin's Estate*, 103 Cal. 429, 37 Pac. 410; *Sarkie's Appeal*, 2 Pa. 160; and nothing further need be here added to those cases to make the question plain. The son not being entitled to administer, and the daughter being entitled, of course her appointment was proper.

We advise that the order appointing Evodia P. Edson as administratrix be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order appointing Evodia P. Edson as administratrix is affirmed: MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

143 Cal. 602

**PAGE v. PAGE et al. (Sac. 1,220.)**

(Supreme Court of California. June 17, 1904.)

**ACTION TO SET ASIDE DEEDS—LIMITATIONS—DELIVERY OF DEEDS.**

1. A widow seeking to set aside deeds executed by her husband before his marriage, on certain trusts alleged to be illegal, has only the rights which the husband had, and the statute of limitation runs from the delivery of the deeds.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Lillian H. Page against Solomon C. Page and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry E. Carter and H. Scott Jacobs, for appellant. T. E. Clark, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants rendered on the pleadings. The plaintiff is the widow of Samuel Page, deceased, whose estate is in course of administration. It is averred in the complaint that on December 9, 1896, said Samuel Page was seised in fee of certain described tracts of land, and on that day made deeds of conveyance of the same to his daughter Mary A. Garver, one of the defendants herein. These deeds are set forth as Exhibits A, B, and C, and made parts of the complaint; and they are, in form and substance, full conveyances in fee of the lands to the grantee, without any condition or limitation whatever. But it is averred that they were made upon certain trusts, which are set out in the complaint, and it is averred that said trusts "were and are invalid and contrary to law." It is averred that after the execution of these deeds, and on February 4, 1899, plaintiff was married to said Samuel Page, and continued to be his wife until his death, which occurred June 24, 1899. The defendants are the children of the said Samuel Page, deceased, and his administrator. The purpose of the action is, and the prayer of the complaint asks, that the said trusts be declared invalid, and said deeds be set aside and annulled; that the said lands be decreed to be the property of the estate of Samuel Page; that plaintiff's title, as widow, be quieted to one-third of said property; and that defendants be decreed to have no interest or title to the same, except as heirs of said Page, deceased. Defendants filed an answer and cross-complaint, but, under our views of the case, it is not necessary to consider any point except that raised by defendants' plea of the statute of limitations.

This action was not commenced until more than five years after the execution of said deeds. Any cause of action which Samuel Page, deceased, might have had to set aside the deeds, or to quiet his title to said lands, upon the grounds alleged by plaintiff in the case at bar, accrued at the date of the delivery of the deeds, and was barred, at least, in five years from that time; and plaintiff, as

his successor in interest, stands in his shoes, and is bound by the same limitation. This is not a case where the rule applies that the statute does not commence to run against an action by a beneficiary to enforce a trust until after the repudiation of the trust by the trustee. This is not an action by a beneficiary to enforce a trust. The alleged trust is declared to be no trust. It is an action to recover land, or to quiet title to land, and such an action is barred in five years after it accrued.

There is also an averment that on said 9th day of December, 1896, the said Samuel Page assigned and delivered to his son Solomon C. Page, one of the defendants herein, certain notes, bonds, and other evidence of indebtedness, upon certain trusts, alleged to be similar to those upon which the said deeds were executed to Mary A. Garver; but there does not seem to be any relief prayed for as to this matter, and at all events, it is covered by what is above said as to the statute of limitations.

Under the above views, we need not consider the validity of the trusts alleged to be void, or whether the fact that Samuel Page in his lifetime commenced actions to set aside said deeds and assignments, and judgments therein were rendered for defendants, is a bar to the present action by plaintiff, or other points which are somewhat elaborately argued.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

143 Cal. 596

**HAYES v. HAYES. (L. A. 1,408.)**

(Supreme Court of California. June 15, 1904.)

**APPEAL—SUBMISSION ON PRINTED POINTS AND AUTHORITIES.**

1. Sup. Ct. Rule 3 (64 Pac. viii) provides that the parties may at any time stipulate that a cause be submitted on printed points and authorities on file, and the clerk shall place such cause on a list of cases to be so submitted, and that the court may at any time thereafter order the submission of the same. *Held*, that where defendant in a suit never appeared, and plaintiff appealed on the judgment roll and bill of exception, and the transcript was filed in the Supreme Court, as well as the printed points and authorities of appellant, he was entitled to an order submitting the cause for decision.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Suit by Charles H. Hayes against Mayne A. Hayes. From a decree in favor of defendant, plaintiff appeals. Ordered that the cause be placed on a list of cases to be submitted on printed points and authorities.

John L. Fleming, for appellant.

ANGELLOTTI, J. The plaintiff brought this action to obtain a decree of divorce from defendant. Service upon defendant was



made by publication of summons. Defendant has never appeared in the action, either in this court or in the court below, and her default was entered in the superior court on February 3, 1903. The cause was heard by the court, and judgment was given denying plaintiff the relief sought, or any relief. From this judgment plaintiff has appealed to this court upon the judgment roll and a bill of exceptions. The transcript on appeal was filed herein on May 29, 1903, and the printed points and authorities of appellant were filed on July 2, 1903. Plaintiff now seeks an order submitting said cause for decision. Upon these facts, plaintiff is entitled to have said cause placed by the clerk upon the list of cases to be submitted, provided for by rule 3 (64 Pac. viii) of this court, and it is ordered accordingly.

We concur: BEATTY, C. J.; VAN DYKE, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

143 Cal. 553

Ex parte HELM. (Cr. 1,141.)

(Supreme Court of California. June 14, 1904.)

**MUNICIPAL CORPORATIONS—POWER TO IMPOSE  
LICENSE TAX—CITIES ORGANIZED UNDER  
SPECIAL ACT—MUNICIPAL AFFAIRS.**

1. Under Const. art. 11, § 6, declaring that cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws, a town incorporated by special act passed prior to the adoption of the Constitution is not subject to the control of general laws in municipal affairs.

2. Under Const. art. 11, § 6, providing that cities and towns shall be subject to and controlled by general laws, except in municipal affairs, the imposition of a license tax on a business or occupation is a municipal affair as to which a town organized by special act prior to the adoption of the Constitution is not controlled by general law, and hence Pol. Code, § 8360, restricting the licensing power of the Legislative bodies of all the cities and towns, does not prevent a town organized by special act before the adoption of the Constitution under a charter authorizing it to impose a license tax from so doing.

Beatty, C. J., and Lorigan, J., dissenting.

In Bank. Application for writ of habeas corpus by A. T. Helm against R. M. Kifer, as town marshal of the town of Santa Clara, to secure applicant's discharge from custody. Writ discharged, and petitioner remanded.

Jacob Samuels, for petitioner. W. A. Johnson, for respondent.

ANGELLOTTI, J. The petitioner seeks his discharge from the custody of the town marshal of the town of Santa Clara, by whom he is held under a warrant issued upon a complaint charging him with having engaged in and carried on the business of selling goods, wares, and merchandise at a fixed place of business in said town without having first paid for and procured a license

so to do, as required by an ordinance thereof. The question presented by this proceeding is as to the power of the board of trustees of said town to impose a license tax for revenue for municipal purposes upon persons carrying on business therein. If such power exists, the petitioner must be remanded.

The town of Santa Clara is a municipal corporation, existing under a special act of the Legislature entitled "An act to reincorporate the town of Santa Clara," enacted prior to the adoption of the Constitution of 1879. St. 1872, p. 251, c. 209. That act constitutes the "charter" of the town, and fully defines the powers of the "board of trustees," which is the legislative body thereof. It is conceded that this act expressly confers upon the board of trustees the power to impose a license tax for revenue purposes upon all and every kind of business authorized by law carried on in said town. Petitioner's claim is that this power was revoked by an act of the Legislature of the state, approved March 23, 1901, by which a new section, viz., section 3366, was added to the Political Code, the effect of which was to restrict the licensing power of boards of supervisors of counties and the legislative bodies of all cities and towns to matters of regulation alone, so far as the Legislature had the power to so do. St. 1901, p. 635, c. 209; *Ex parte Pfirrmann*, 134 Cal. 143, 66 Pac. 205; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Town of Santa Monica v. Guildinger*, 137 Cal. 658, 70 Pac. 732. It is, however, very clear that, since the amendment of section 6 of article 11 of the Constitution, in 1896, cities and towns existing under special acts of the Legislature, approved prior to the adoption of the Constitution of 1879, which have not elected to organize under the general laws relating to corporations for municipal purposes, are not in "municipal affairs" subject to or controlled by general laws.

It is conceded here, and it must be under the decisions, that the effect of such constitutional amendment was to exempt cities existing under freeholders' charters, framed or adopted by authority of the Constitution of 1879, from all interference by the Legislature in municipal affairs. There can be no distinction in this regard, in view of the language of the constitutional provision, between such cities and cities or towns existing under special legislative charters granted prior to the adoption of our present Constitution. The section of the Constitution, after providing that corporations for municipal purposes shall not be created by special laws, and that the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed, is as follows, viz.: "Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a gen-

eral election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, *except in municipal affairs*, shall be subject to and controlled by general laws"—the italicized words having been inserted by the amendment of November 3, 1896. Section 6, art. 11, Const. It is well settled that under this provision any city or town existing under a special act of the Legislature at the time of the adoption of the present Constitution continues to exist under such act until it elects to organize under the general laws enacted by the Legislature for the organization of municipal corporations, or obtaining a freeholders' charter under the provisions of section 8 of article 11 of the Constitution. *Desmond v. Dunn*, 55 Cal. 242, 246; *Staudé v. Election Commissioners*, 61 Cal. 313, 320; *Ex parte Armstrong*, 84 Cal. 655, 24 Pac. 598. Until it does one or the other of these things, the special act under which it exists, and which constitutes its charter, continues in force, and cannot be vacated or abrogated by any act of the Legislature. Cases last above cited.

Prior to the "municipal affairs" amendment of 1896 it was, however, repeatedly held that all cities and towns, however organized, were, by virtue of the concluding sentence of section 6, art. 11, of the Constitution, "subject to and controlled by general laws." *Staudé v. Election Commissioners*, supra; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413. This was expressly held to be as true of cities existing under freeholders' charters adopted under the provisions of section 8 of article 11 of the Constitution, as of cities and towns existing under special acts of the Legislature and those existing under the general municipal corporation act. *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433. The constitutional provision was, by these decisions, declared to be applicable to every city and town in the state. The amendment of this provision of the Constitution in the year 1896, by the insertion of the words "except in municipal affairs," was necessarily as far-reaching in its application as the original provision, except that, from the nature of things, it could not apply to cities and towns existing under the general municipal corporation act, which was adopted by the Legislature and by express provision of the same section of the Constitution is subject to alteration, amendment, and repeal by the Legislature. Such cities and towns have always been and still are necessarily subject to and controlled by general laws, in the sense that general laws applicable to them may be altered, amended, or repealed by the Legislature at its own pleasure, and new general laws in regard to them enacted, subject, always, to the lim-

itation that the Legislature must not enact "special laws" in regard thereto.

That the "municipal affairs" amendment is applicable to cities and towns existing under special acts of the Legislature was expressly held by this court in at least two cases, viz.: *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, and *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53. The controversy in each of these cases arose while the city and county of San Francisco existed under the provisions of the act of the Legislature known as the "Consolidation Act," and in each it was held that a general act of the Legislature relative to municipal affairs was, by reason of said amendment, not applicable to said city and county. In the former of these cases the court, through Mr. Justice Henshaw, said: "Under this constitutional amendment, such acts now apply only to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act." That the amendment is applicable to cities existing under freeholders' charters is, as said before, conceded. See *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433; *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780. The two classes of cities and towns last named include all cities and towns in the state except those organized and existing under the general municipal corporation act.

From what has been said it follows that cities and towns existing under special acts of the Legislature have not been, since the adoption of the "municipal affairs" amendment of 1896, subject to or controlled by general laws, so far as "municipal affairs" are concerned, and that the provisions of such special acts, so far as they relate to "municipal affairs," cannot be affected by any law enacted by the Legislature of the state. It was held in the recent case of *Ex parte Braun*, supra, that, where the power to impose a license tax for revenue for municipal purposes is conferred upon a municipality, that power becomes a "municipal affair," within the meaning of those words as used in section 6 of article 11 of the Constitution. Upon the authority of that case, it must here be held that section 3366 of the Political Code, enacted in 1901, has no application to the town of Santa Clara.

It follows that the writ heretofore issued must be discharged, and the petitioner remanded; and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.

VAN DYKE, J. I concur in the foregoing opinion, on the ground that *Ex parte Braun* has definitely settled the question that a license imposed by a city or town for revenue is a municipal affair, within the meaning of section 6, art. 11, of the Constitution, and, therefore, not subject to or controlled by general laws.

**BEATTY, O. J.** I dissent, upon the grounds stated in my dissenting opinion in *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780.

**LORIGAN, J.** I dissent.

143 Cal. 558

**Ex parte LEMON.** (Cr. 1,016.)

(Supreme Court of California. June 14, 1904.)

**MUNICIPAL CORPORATIONS—POWER TO COLLECT LICENSE—SPECIAL CHARTER—UNREASONABLE DISCRIMINATION.**

1. The special act incorporating the city of Marysville (St. 1875-76, p. 149, c. 149, § 1), declaring the territory therein described "to be a municipal corporation, with the powers and under the provisions of title 3 of the Political Code," made title 3 of part 4 of the Political Code, including section 4408, authorizing the common council of any city to impose and collect license taxes for revenue, a part of the charter.

2. A city ordinance, requiring a license fee of eight dollars per month of boarding houses where the meals are not cooked and served by the proprietor or members of his family, and of three dollars a month only where the meals are cooked and served by the proprietor or members of his family, is not void for unreasonable discrimination.

**Beatty, C. J., and Lorigan, J., dissenting.**

In Bank. Application for writ of habeas corpus by Sarah F. Lemon against J. A. Ma-ben, as marshal of the city of Marysville, to obtain petitioner's discharge from custody. Petitioner remanded.

Jacob Samuels and W. H. Carlin, for petitioner. Arthur H. Redington, City Atty., for respondent.

**ANGELLOTTI, J.** The petitioner seeks by this proceeding to be discharged from the custody of the marshal of the city of Marysville. It appears from the record that she is detained in custody by virtue of a judgment of the police court of said city, pronounced upon a conviction of a violation of the provisions of a city ordinance prohibiting the carrying on of certain kinds of business, therein named, without first having paid for and procured the municipal license thereby required and provided. The particular business alleged to have been so carried on by her was that of a restaurant, and the section of the ordinance relative thereto reads as follows, viz.: "Any person or persons keeping a hotel where the charge for single meals is in every case and for every meal less than twenty-five cents, shall pay a monthly license of eight dollars, all others ten dollars; and any person or persons keeping a restaurant, boarding-house or place where meals or board is furnished for pay, other than hotels and private boarding-houses, shall pay a monthly license of three dollars where the meals are cooked and served by a proprietor or members of his family, otherwise eight dollars; except that where the same is opened for one day or less the license shall be for three dollars. \* \* \* The petitioner was charged

with carrying on a restaurant where the meals were neither cooked nor served by said defendant or by any member or members of her family.

Petitioner contends that the ordinance in question, so far as it relates to the business of keeping a restaurant, is solely a revenue measure, and that, in view of the provisions of section 3366, Political Code, enacted in the year 1901 (St. 1901, p. 635, c. 209), the city has no power to impose a license tax for revenue. We consider it unnecessary to determine whether the license tax upon the business in question, imposed by this ordinance, was imposed solely for revenue purposes, or whether, as contended by respondent, the imposition of such tax is a valid exercise of the police power of regulation, as we are satisfied that the city of Marysville has the power, notwithstanding the provisions of section 3366, Pol. Code, to impose and collect license taxes for revenue for municipal purposes. The city of Marysville is a municipal corporation, existing under a special act of the Legislature entitled "An act to reincorporate the city of Marysville," approved March 7, 1876. St. 1875-76, p. 149, c. 149. In *Ex parte Helm*, 77 Pac. 453, we hold that cities and towns, existing under special acts of the Legislature adopted prior to the taking effect of the present Constitution, have not been, since the adoption of the "municipal affairs" amendment of section 6, art. 11, of the Constitution, subject to or controlled by general laws, so far as "municipal affairs" are concerned, and that the provisions of such special acts, so far as they relate to "municipal affairs," cannot be affected by any law enacted by the Legislature of the state. It was also held in that case, following *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780, that, where the power to impose a license tax for revenue for municipal purposes is conferred upon a municipality, that power becomes a "municipal affair." The question, then, is as to whether or not the special act under which Marysville exists, which is its legislative charter, confers upon it the power to impose a license tax for revenue purposes. That act does not specify the powers granted, except by reference to another statute, the provision being as follows, viz.:

"Section 1. The territory described in section two of this act, and the inhabitants therein residing, are hereby declared to be a municipal corporation, with the powers and under the provisions of title three of the Political Code of this state, to be known in law as the 'City of Marysville.'"

The Political Code has always contained five titles "three," one in each of the five "parts" of such Code; but the reference in question was clearly to title 3 of part 4 of said Code, the expressed title of which was "The Government of Cities." Title 3 of part 1 related to the "Political Rights and Duties of Persons," title 3 of part 2 to "Legal Distances in the State," title 3 of part 3 to "Ed-

ucation," and title 3 of part 5 to "Publication of the Codes," while part 4 related to "The Government of Counties, Cities and Towns," title 3 thereof being entitled as above stated. The legal effect of the reference contained in section 1 of the Marysville reincorporation act was, therefore, to make title 3 of part 4 of the Political Code a part of the charter of the city of Marysville. *People v. Whipple*, 47 Cal. 592; *Buck v. City of Eureka*, 109 Cal. 504, 508, 42 Pac. 243, 30 L. R. A. 409. By the provisions of section 4408, Pol. Code, contained within that title, as such section was originally enacted and as it existed at the time of the approval of the Marysville reincorporation act, the power to impose and collect license taxes for revenue for municipal purposes was clearly conferred upon the common council of any city or town coming within the provisions of such title. When that title was by legislative enactment made a part of the charter of Marysville, such power was necessarily conferred upon the common council thereof. It is unnecessary here to determine what would have been the effect of any subsequent amendment or repeal of any provision of this title relative to the power so conferred. Section 4408 has never been amended or repealed, and there has been no amendment of any section contained in the title, or any addition thereto, that in any way relates to the question under discussion.

It is further urged by petitioner that the provision of the ordinance relating to restaurants, boarding houses, and places where meals or board is furnished for pay, other than hotels and private boarding houses, is void, in that it unreasonably discriminates between such places where the meals are cooked and served by a proprietor or members of his family, and those where the meals are not so cooked and served; the license tax upon the former class being \$3 per month, and the tax upon the latter being \$8 per month. The method of classification here adopted is somewhat unique, but we cannot say that it was beyond the power of the council. The right to regulate the license tax to be paid by persons engaged in the same occupation according to the amount of business done is well recognized; in fact, it is often required by charter provision or legislative enactment that the license tax shall be proportionate to the amount of business. The amount to be paid by those engaged in a certain business may be made to depend upon the amount of receipts from the business (*County of San Luis Obispo v. Greenberg*, 120 Cal. 300, 52 Pac. 797), or upon the amount of sales or business transacted (*Ex parte Mount*, 66 Cal. 448, 6 Pac. 78), or upon the amount of stock on hand (*Saks v. Mayer*, 120 Ala. 190, 24 South. 728). It has been held that the amount of license tax to be paid by those engaged in the laundry business may be graded according to the number of persons employed or used, the court saying that this is one way of gauging the amount of business done by a

laundry. *Ex parte Li Protti*, 68 Cal. 635, 10 Pac. 113. It has also been held that a lower rate of license tax may be fixed for the man who sells liquor at retail at a tavern or public watering place outside of a village, town, or city than for the person elsewhere engaged in the same business; the court saying that "the difference between the quantum of sales made and the prospective profit to be realized \* \* \* is manifest to every one. This difference amply justifies the discrimination made by the ordinance." *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. 757. In *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527, discrimination between those selling certain articles at a fixed place of business and those otherwise selling the same articles was sustained; the court holding that the legislative body had the right to discriminate between different methods of conducting the same business.

License taxes on hotels, proportioned to the number of rooms therein, have been upheld (*St. Louis v. Bircher*, 7 Mo. App. 169); and in *Fulgum v. Mayor, etc.*, 8 Lea (Tenn.) 635, it was held that the exemption of hotels having less than ten rooms from the license tax of \$40 and 1 per cent. of the actual rental or estimated value thereof, imposed on hotels, did not render the law objectionable. The rule underlying the decisions upon the matter appears to be that while the state, county, or city cannot discriminate, in the imposition of those taxes, between persons exercising the same privilege, by imposing different taxes upon persons similarly situated, it may classify and tax occupations, grading the privilege tax by the amount of business done, that different methods of accomplishing this may be adopted, and that any classification reasonably designed to attain this object is within its power to make. It is clear that as a general rule a restaurant or boarding house where the meals are wholly cooked and served by the proprietor and members of his family must be a very small affair, hardly rising to the dignity of a "restaurant" or "boarding house." Ordinarily, the accommodations and service at such a place must necessarily be very limited, and the amount of business done must consequently be very small. There may be exceptional cases, it is true, where by reason of the magnitude of the proprietor's family a very pretentious and prosperous business might be conducted without the aid of a single employé. We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. Absolute uniformity in the practical application of laws relating to taxation can never be attained, and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation.

The classification here adopted is probably no more likely to practically result in unfair

discrimination between those similarly situated as to amount of business than a classification according to the number of rooms in a hotel, or the number of employes in a laundry, and the ordinary effect of the enforcement of the provision as it stands will be that those doing the greater amount of business will pay the higher tax fixed thereby. Speaking of a somewhat similar objection to an ordinance in *Ex parte Haskell*, 112 Cal. 412, 416, 44 Pac. 725, 32 L. R. A. 527, this court said: "It is urged \* \* \* that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. \* \* \* A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution or laws made in pursuance thereof." This declaration finds ample support in the authorities. In this case we cannot say that the provision in question was not a reasonable exercise of the power to fix the license tax of restaurant and boarding house keepers in proportion to the amount of business done.

The writ heretofore issued is discharged, and the petitioner remanded.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

I dissent, upon the grounds stated in my dissenting opinion in *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780: BEATTY, C. J.

I dissent: LORIGAN, J.

143 Cal. 564

Ex parte JACKSON. (Cr. 1,143.)

(Supreme Court of California. June 14, 1904.)

MUNICIPAL CORPORATIONS—LICENSE TAXES—STATUTES—VALIDITY—GENERAL LAWS—REPEAL—SPECIAL PRIVILEGES—INFORMATION—SUFFICIENCY—HABEAS CORPUS.

1. License taxes, imposed by a municipal corporation for revenue, are taxes, within Const. art. 11, § 12, and the power to collect them can be vested in municipalities only by general laws.

2. Act March 9, 1903 (St. 1903, p. 93, c. 86), amending Municipal Corporation Act, § 862, relating to the powers of the boards of trustees of cities of the sixth class, so as to confer on such cities the power to license for purposes of revenue as well as regulation, and operating uniformly on all cities of that class, was a general law, within Const. art. 11, § 6, authorizing the Legislature by general laws to pro-

vide for the incorporation and classification, in proportion to the population, of cities and towns, which laws may be amended, altered, or repealed.

3. Act March 9, 1903 (St. 1903, p. 93, c. 86), being a general law expressing the determination of the Legislature as to the needs of municipalities of the sixth class regarding revenue taxes, supersedes Pol. Code, § 3366, restricting the licensing power of boards of supervisors and city councils to matters of regulation alone as to municipal corporations of the sixth class.

4. An ordinance of a municipal corporation of the sixth class, imposing, under Act March 9, 1903 (St. 1903, p. 93, c. 86), a revenue tax on livery stable keepers, is not repugnant to Const. art. 1, § 21, providing that no citizen or class of citizens shall be granted special privileges, because others engaged in a similar business in some other cities cannot be subjected to a similar burden.

5. Where a municipal ordinance imposes a license tax on every livery or feed stable, a complaint charging accused with conducting a livery or feed stable without license does not entirely fail to state a public offense.

6. Where an accused is convicted of keeping a livery stable without license, under a complaint charging him with conducting a livery or feed stable without license, the defect in the complaint, because of the disjunctive, is not available on habeas corpus.

Beatty, C. J., and Lorigan, J., dissenting.

In Bank. Application by F. A. Jackson against Fred M. Foster, as marshal of the city of Whittier, for writ of habeas corpus. Writ discharged.

M. T. Owens (Henry M. Willis, amicus curiæ), for petitioner. George H. Woodruff, City Atty., and F. A. Leonard (Ralph E. Swing, amicus curiæ), for respondent.

ANGELLOTTI, J. The petitioner seeks by this proceeding to obtain his discharge from the custody of the marshal of the city of Whittier, in Los Angeles county, by whom he is held under a judgment of the recorder's court of said city, pronounced upon his conviction of the offense of engaging in the business of conducting or carrying on "a livery or feed stable" in said city without first having procured a license so to do, as required by the provisions of an ordinance adopted by the board of trustees thereof on April 6, 1903. An examination of the ordinance demonstrates that it is almost entirely a revenue measure, and that certainly, so far as the provisions applicable to the business carried on by petitioner are concerned, it fails to suggest any exercise of police power, and that its sole object in that regard was to impose a license tax for revenue only.

The ultimate question in this proceeding is as to the power of said city to impose license taxes for revenue purposes. The city of Whittier is a municipal corporation of the sixth class, organized and existing under the provisions of the act of the Legislature entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883 (St. 1883, p. 93, c. 49), commonly known as the "Municipal Corporation Act," and the amendments thereto. That act, after provid-

ing for the organization and incorporation of municipal corporations thereunder, provides a form of government and charter for each of the six classes of municipal corporations into which the municipal corporations of the state are classified, in proportion to population, by the act of the Legislature entitled "An act to provide for the classification of municipal corporations," approved March 2, 1883 (St. 1883, p. 24, c. 17), and the amendments thereto (St. 1901, p. 94, c. 80). By the municipal corporation act, as originally adopted, power to impose license taxes for revenue was conferred upon the municipal corporations of each of the six classes. The provisions conferring such power were, however, superseded by section 3366 of the Political Code, enacted March 23, 1901. St. 1901, p. 685, c. 209; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Santa Monica v. Guidinger*, 137 Cal. 658, 70 Pac. 732. On March 9, 1903, section 862 of the municipal corporation act, relating to the powers of the boards of trustees of cities of the sixth class, was amended by the Legislature, so as to confer upon such cities the power to license for purposes of revenue, as well as regulation (St. 1903, p. 93, c. 86); and, if such amendment was a valid exercise of the legislative power, it superseded section 3366 of the Political Code, so far as the application of such section to cities of the sixth class is concerned.

From the foregoing it will be perceived that the real question in this proceeding is as to whether the Legislature of the state, having classified the municipal corporations in the state in proportion to population, could, under the provisions of the Constitution, by amendment of the municipal corporation act, vest in the corporate authorities of the municipalities of the class composed of the cities and towns having the smallest population the power to impose and collect license taxes for municipal revenue purposes, while withholding such power from the municipalities of some or all of the other classes. Such license taxes for revenue are "taxes," within the meaning of section 12, art. 11, of the Constitution (*People v. Martin*, 60 Cal. 153), and the power to collect them can, therefore, be vested in municipalities only by general laws. The Constitution contains other provisions prohibiting special legislation in regard to many matters, and doubtless some of them cover the subject-matter of the legislation in question, and would render it invalid, if it be a special law in the sense contemplated in the Constitution. The fact, however, that the act of the Legislature is applicable to only one of the six classes of municipal corporations provided for by the municipal corporation act, does not necessarily make it a special law.

The classification act of March 2, 1883, and the municipal corporation act of March 13, 1883, were adopted by the Legislature under the provisions of section 6, art. 11, of the Constitution. Prior to the adoption of

the Constitution of 1879, municipal corporations had been created solely by, and existed under, special acts of the Legislature, which could be at any time amended or repealed by that body. It was designed by the framers of the Constitution to do away with the practice of creating such corporations by special laws, and to prevent the Legislature "from singling out a particular town or city and passing legislation affecting it and no other." Therefore it was provided by section 6, art. 11, of the Constitution as follows, viz.: "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, *except in municipal affairs*, shall be subject to and controlled by general laws." The italicized words were added by way of amendment in the year 1896. By this section a scheme was provided by which, in lieu of the old system of creation of municipalities by special acts of the Legislature, municipalities might be organized and exist under general laws to be adopted by the Legislature for that purpose, and any municipality already organized and existing under special act might, if its electors so desired, reorganize under such general laws.

It being recognized that cities containing different populations would, by reason thereof, require different powers and different legislation as to their municipal affairs, the section provided not only for general laws as to incorporation and organization, but also authorized a classification in proportion to population of such cities and towns; the plain object thereof being that the Legislature might thus be enabled to supply the general laws required by the varying needs of the municipalities so classified. As was said in *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691, the power to so classify, thus conferred, would be meaningless, unless the classifications made were to be so employed. See, also, *Pasadena v. Stimson*, 91 Cal. 238, 249, 27 Pac. 604. The purpose of the section, therefore, was to require the Legislature to provide, not only a general method of incorporation, but also the laws for the government of the municipalities so incorporated, and such other municipalities as might choose to organize thereunder, and to permit such differences in those laws applicable to such cities as the Legislature might deem necessary on account of varying needs caused by difference in population; in oth

words, to authorize the Legislature to first make such classification, in proportion to population, of the municipalities that might thereafter organize under the general laws to be provided, as it should consider necessary to enable it to supply appropriate laws for the government thereof, and, having made such classification, to provide for each class such a municipal charter as was considered by it to be necessary for cities of the population embraced within that class. That the laws to be provided for the government of the cities of the various classes might differ materially was thus expressly recognized, and it was to authorize such differences that the provision as to classification was inserted. It was left entirely to the Legislature to determine what differences in the laws relative to the municipal affairs of the corporations to be organized under the general laws of the state were made necessary by differences in population.

The Legislature has followed the method designed by the constitutional provision. The classification act was followed by the municipal corporation act. Under the provisions of the latter act, each class is given a separate and independent code of laws for the government of the municipalities that may come within its provisions. The forms of government provided by such act for the various classes, and the powers conferred thereby upon such classes, are materially different in many respects. The portion thereof entitled "Municipal Corporations of the Sixth Class," is also entitled "A Charter for Cities and Towns Having a Population of Not Exceeding 3,000," and, in fact, is a charter for any municipality incorporated thereunder, in the same sense that a special act incorporating a city, adopted prior to our present Constitution, or a freeholders' charter, adopted under section 8, art. 11, of the Constitution, is a charter; the only practical difference being that it is subject to the control of the Legislature, under the express provisions of section 6, art. 11, of the Constitution. It was enacted by the Legislature as a charter for such cities and towns, under the authority given by the last-named section, and so long as the matters regulated thereby are within the proper scope of a municipal charter it cannot be held that the Legislature has exceeded the authority so given, notwithstanding the fact that such regulations differ materially from those provided for other classes of cities and towns. As to such matters—i. e., matters coming within the proper scope of a municipal charter, or, in other words, municipal affairs—there is a distinction recognized by the Constitution between the various classes of municipal corporations, which justifies the varying legislation. So long as the legislation as to such matters contained in such a charter operates alike upon all municipal corporations coming within the class for which the charter exists,

it is, under our constitutional provisions, a "general law," fully authorized by section 6, art. 11, of the Constitution.

The cases relied on by petitioner are not in conflict with these views. The principal case is that of *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, where the question was as to the validity of provisions in the municipal corporation act, applicable to only two classes thereof, requiring, as a condition precedent to the exercise of the right to maintain an action of eminent domain by cities belonging to these classes, an unavailing effort on the part of the city to agree with the owner as to the price to be paid for the property. It was held that this was an attempt to make a "forbidden discrimination against two classes of municipal corporations, by imposing upon them alone a burdensome condition to the exercise of a right common to all public and private corporations and to all natural persons *sui juris* in the state." It was said in the opinion in that case that the mode of exercising the power of eminent domain, conferred by the laws of the state for any of the uses defined in section 1238, Code of Civil Procedure, upon all public and private corporations and natural persons, was no part of municipal organization, but was the subject of general laws applicable to every person alike, and that the Legislature has no power to make arbitrary distinctions in this respect between different classes of persons. The distinction between the provisions there invoked and provisions relating to a matter which is purely a municipal affair is manifest.

In *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530, the controversy was as to the validity of a provision of the municipal corporation act applicable only to cities of the fifth class, whereby it was provided "that it shall not be necessary in any action, civil or criminal, to plead or prove the \* \* \* existence or validity of any ordinance thereof, and courts shall take judicial notice thereof without proof." Such a provision could not be said to come within the proper scope of a municipal charter, but was an attempt to provide a special rule as to pleadings and evidence in courts of justice, and was clearly violative of at least two provisions of our Constitution.

The case of *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691, involved the question as to the validity of an act providing and regulating the manner of receiving and paying fees, etc., for official services in all cities and counties having a population of over 100,000 inhabitants, whether or not such cities had become organized under the general municipal corporation act as cities of the first class, to which class they would belong under the provisions of the classification act. Thus it was sought by the act to create a class of municipalities, for the purpose of providing a special and peculiar method therein for the collection of fees for official services per-

formed by county and other officers; the only distinction between those embraced in such class and other municipalities being one of population. Conceding the right of the Legislature, independently of the authority conferred to enact charters for the various classes of municipalities incorporated under general laws, to adopt an act applicable only to a class of municipalities created by the act itself, and including both those incorporated under general laws and those not so incorporated, it was held that, where a class was specially created for the purpose of applying certain legislation thereto, there must be some apparent natural, intrinsic, or constitutional distinction, warranting the distinction made. The court was not there dealing with legislation adopted under the power conferred to frame municipal charters for the various classes of municipalities organized under the general laws.

The case of *Darcy v. Mayor*, 104 Cal. 642, 38 Pac. 500, presented practically a similar question to that presented in *Rauer v. Williams*, supra; the act there involved being one relative to the salaries of police officers in all cities in the state having a population of not less than 10,000 and not more than 25,000. This was a new class, not provided for by the classification act, but created solely for the purposes of the act involved, and the act was made applicable to all cities of the designated population, regardless of whether or not they were organized under the municipal corporation act.

It is unnecessary to specially notice any of the other cases cited upon this point, but it may be said that, wherever a statute limited in its operation to a class of cities less than all has been held to be violative of the constitutional provisions against special legislation, it has been so held either on the ground that the rule prescribed did not relate to municipal affairs, or that the class to which the statute was intended to apply was arbitrarily selected, without regard to any natural or other classification contemplated by the Constitution. The right of the Legislature to enact different regulations as to municipal affairs for the various classes of municipalities organized under the municipal corporation act has never been denied.

It is now the settled law of this state that a provision in a charter authorizing a municipality to impose and collect a license tax for purposes of municipal revenue is a "municipal affair," and within the proper scope of a municipal charter. *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780; *Ex parte Lemon* (Cal.) 77 Pac. 455; *Ex parte Helm* (Cal.) 77 Pac. 453. This being so, it would appear to necessarily follow that the Legislature had the power to insert such provisions in regard thereto as it deemed necessary, in all or any of the charters contained in the municipal corporation act, and to "alter, amend, or repeal" the provisions as to all or any of the classes at will. It is for the Legislature

alone to determine what is needful for the respective classes in this regard, and with its determination the courts cannot interfere. The act of March 9, 1903, amending section 862 of the municipal corporation act (St. 1903, p. 93, c. 86), expressing the determination of the Legislature as to the needs of municipalities of the sixth class in this regard, and operating uniformly upon all cities of that class, is under the constitutional provisions already noticed a general law. The conclusion that such act is a general law, within the meaning of our constitutional provisions, practically disposes of all questions raised as to its constitutionality.

The fact that it is at variance with section 3366 of the Political Code, enacted March 23, 1901, restricting the licensing power of boards of supervisors and city councils to matters of regulation alone, is immaterial. That section was, it is true, a general law, and the Legislature having the absolute right to alter, amend, or repeal any provision contained in the municipal corporation act, the enactment of such section was a repeal by implication of the original provision in said act allowing municipal corporations of the sixth class to license for revenue. *City of Sonora v. Curtin*, 137 Cal. 583, 588, 70 Pac. 674. But by the express provisions of the Constitution the Legislature had the same right thereafter, that it had before, to still further alter, amend, or repeal the provisions of the municipal corporation act as to any municipal affair, and any statute enacted in pursuance of this power as to any provision, applicable to one or more classes, is a general law, which necessarily repeals by implication all prior acts of the Legislature as to the same subject-matter, so far as the provisions thereof are inconsistent with the later act. The power of the Legislature to make peculiar provision as to any municipal affair for any class of cities and towns existing under the municipal corporation act always exists, regardless of any prior action on its part. Section 3366 of the Political Code, although applicable by its terms to all municipalities in the state, was no more a general law within the meaning of our constitutional provisions than is the act of March 9, 1903, amending section 862 of the municipal corporation act. There are no degrees of generality. A law is general, or it is special. By virtue of the provisions of section 6 of article 11 of the Constitution, the amendment of 1903 fulfills all the requirements as to generality, and, being the latest enactment, supersedes the provisions of section 3366, so far as municipal corporations of the sixth class are concerned.

We are unable to perceive the applicability to this case of section 21, art. 1, of the Constitution, which provides that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. It is not questioned that the license ordinance enacted by the city authorities applies equal-



ly and uniformly to all persons engaged in the business of carrying on in the city of Whittier a livery or feed stable. There is no privilege or immunity granted to one engaged in such business therein that is not possessed by all similarly situated. The complaint appears to be that others engaged in a similar business in some other cities cannot be subjected to a similar burden. Whether this is so or not we do not know. It depends upon the provisions of the laws relating to the municipal affairs of such other cities. But it is entirely immaterial. It is enough to satisfy the provisions of section 21 of article 1 of the Constitution that any citizen of the state or United States may engage in the specified business in the city of Whittier upon the same terms as any other citizen may engage in such business therein.

It is suggested that the complaint against petitioner was defective, in that it charged him with having conducted and carried on a "livery or feed stable"; the ordinance providing a license tax for "every livery or feed stable." While the complaint was uncertain by reason of the use of the disjunctive "or," it did not entirely fail to state a public offense, and the defect is not available on habeas corpus.

From what has been said, it follows that the writ must be discharged, and the petitioner remanded; and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

I dissent, upon the grounds stated in my dissenting opinion in *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780: BEATTY, C. J.

I dissent: LORIGAN, J.

143 Cal. 389

IN RE McKENNA'S ESTATE. (S. F. 3,710.) (Supreme Court of California. June 15, 1904.)

WILLS—CONTEST AFTER PROBATE—EVIDENCE—MENTAL CAPACITY—OPINIONS—INSTRUCTIONS—FINDINGS—SEPARATION OF JURY—BURDEN OF PROOF.

1. In a will contest, the verdict on conflicting evidence is conclusive on the issues of the mental soundness of the testatrix and of undue influence in the execution of the will.

2. Under Code Civ. Proc. § 1870, subd. 10, permitting the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason being given, to be introduced in evidence, persons who had known testatrix for upwards of 20 years, who were on terms of social intimacy with her, and who had conversed with her immediately before and after the execution of the will, were competent to testify as to her mental condition.

3. The determination as to who are intimate acquaintances of a testatrix is within the trial court's discretion, and the exercise of its discretion will not be interfered with, unless it has been clearly abused.

4. Where certain witnesses were acquainted with a testatrix, had been associated with her, and conversed with her before and after the execution of her will, the court did not abuse

its discretion in permitting them to express an opinion as to her mental soundness, under Code Civ. Proc. § 10, subd. 1870, permitting intimate acquaintances to give their opinion respecting the mental sanity of a person.

5. In a will contest, the declaration of the husband of a devisee, with whom testatrix resided when the will was executed, that he knew the testatrix had made a will, and that he knew its contents, was inadmissible, as he had no interest, and his declaration could not bind those who had such interest.

6. In a will contest, witnesses may testify, as bearing on an issue of mental capacity, to general conversations had with the testatrix, embraced within a reasonable time before and after the making of the will, where they are limited exclusively to showing the condition of testatrix's mind.

7. Answers of witnesses on cross-examination, not responsive to the questions, are properly stricken out.

8. A requested instruction, which was merely cumulative of instructions previously given, was properly refused.

9. Where, in a will contest, evidence was admitted as to insane delusions of the testatrix, it was proper to particularly instruct the jury on the subject of insane delusions.

10. A temporary separation of a juror after they had retired is not cause for a new trial, where the affidavits raise no suspicion of any misconduct, and no showing is made that any substantial rights of the parties were affected.

11. Where, in a contest of a will after probate, the contestants failed to introduce any evidence on the issue of nonexecution, limiting their evidence to the issues of mental incapacity and undue influence, and the cause was remanded because the court failed to find on all the issues, the court was not required to continue the proceeding to afford an opportunity to present testimony on the issue of nonexecution.

12. In a contest of a will after probate, the contestants, by failure to introduce evidence before the jury on some ground of contest, cannot require the court to take evidence on it, and deprive the proponent of the right to have the verdict of the jury on it.

13. In a contest of a will after probate, the contestants have the burden of proof to show nonexecution, and, where they fail to introduce evidence on such issue, the court may find in favor of the due execution, on the presumption to that effect.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceedings in the matter of the contest of the will of Mary McKenna, deceased. From a judgment for the proponents, and from an order denying their motion for a new trial, the contestants appeal. Affirmed.

Wm. J. Herrin, for appellants. Gavin McNab, Frank J. Sullivan, E. H. Rixford, and E. Myron Wolf, for respondents.

LORIGAN, J. This is a will contest. The decedent was unmarried, had resided in San Francisco a great many years, and by her will, executed October 24, 1898, disposed of her estate in favor, mainly, of friends residing in that city. The will was duly admitted to probate, and within the time allowed by law this contest was inaugurated by cousins of the deceased, residing in Ireland,

¶ 10. See *New Trial*, vol. 37, Cent. Dig. § 863.

and was based upon alleged unsoundness of mind of the testatrix when the will was made, and undue influence exerted over her by divers persons (whose names are not mentioned in the complaint), under which the making of the will was procured. The evidence in the case was addressed to these two issues, and, the jury having found in favor of proponent on both, the contestants appeal, both from the judgment and from the order denying their motion for a new trial.

1. It is insisted that the evidence was insufficient to justify the verdict of the jury upon either issue; but, as might well be supposed, there was a conflict in the evidence upon these points, mainly upon the matter of the soundness of the mind of testatrix when the will was executed, as that seems to have been the main issue. As to the claim of undue influence, we doubt very much that any case was made by the contestants. There was nothing offered in their behalf which bore directly on the point; and any implication which might arise from such evidence as was offered was met by positive evidence upon the part of proponent of its nonexistence. Assuming, however, that there was some evidence for contestants upon this issue, it, like that upon the mental soundness of testatrix, raised a conflict, and under the familiar rule this court cannot disturb the verdict. From this conflict the jury resolved the matter in favor of proponent, and under such circumstances their verdict is determinative and conclusive upon the subject.

2. A number of errors are alleged to have been committed by the court in admitting and rejecting testimony. It is insisted, first, that it was error to permit a number of witnesses, called for the proponent, to testify, over the objection of contestants, as to the mental condition of deceased; it being claimed that they were not intimate acquaintances, within the requirements of section 1870, subd. 10, of the Code of Civil Procedure, which permits "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," to be given in evidence. With the exception of probably three of them, all these witnesses were old friends of the testatrix. The most of them had known her for upwards of 20 years, some for a longer period. They were on terms of social intimacy with her, and had seen and conversed with her immediately before and after the execution of the will. They were "intimate acquaintances," under any definition of that term, as employed in the section. As to the three others, their acquaintance was more limited in point of time; but they were acquainted with her, had met her on several occasions, and had had similar conversations with her about the same time. One—John Kelly—had known her 11 years, and insured her property for a long time, and conferred with her at intervals about it, up to the time of her death in 1899. He had talked to her three or four times during the last five

years of her life. Another—J. W. Lund—had, during the period it was claimed she was insane, seen and talked with her a dozen times. Another—Ellen Blangy—had known her over four years, and conversed with her on general subjects about the time the will was made. The testimony of all these witnesses showed that they were acquainted to some extent with the testatrix, and, as it is difficult to lay down any definite rule as to what constitutes an "intimate acquaintance," it has been repeatedly held by this court that the determination of that fact, under the statute, must be committed to the discretion of the trial court; and when that court has determined, from their testimony, that given witnesses were "intimate acquaintances," and permitted them to express an opinion, this court will not interfere with the exercise of that discretion, unless there has been a clear abuse of it; and, considering the evidence of these witnesses, we cannot say that there was any such abuse. *People v. Pico*, 62 Cal. 50; *Estate of Carpenter*, 84 Cal. 406, 29 Pac. 1101; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *In re Wax*, 106 Cal. 351, 39 Pac. 624.

Complaint is made because the court refused to permit contestants to inquire of one of their witnesses—Mrs. Anderson—whether one Thomas Daly had stated in her presence, immediately after the death of testatrix, that he knew she had made a will and that he knew its contents. Thomas Daly was the husband of Jane Daly, at whose house the testatrix was living when the will was made, and in which will she was named as one of the devisees and nominated as executrix. Daly himself was not a devisee or legatee under the will, and was not one of its proponents. The witness of whom these inquiries were made was one called in the main case of contestants, before the proponent had put in any evidence, or Thomas Daly had been called as a witness, as he subsequently was. From the tenor of the inquiry, it appears that it had reference to some conversation in which Thomas Daly participated, but at which Mrs. Daly was not present. We think the ruling of the court was correct, for the reasons shadowed forth in our statement of facts relative to the point.

Counsel contends that the evidence was admissible because contestants had alleged that Daly was one of the parties who exercised undue influence, and an affirmative answer might tend to show this, and that the declarations were also admissible as tending to show the condition of testatrix's mind. It was not alleged that Daly was one of such parties. In fact, as we have heretofore stated, there is no allegation that any particular person exerted such influence. The allegation is that divers unnamed persons exerted it. Neither is it at all apparent how proof of a declaration on Daly's part, of knowledge of the existence of a will or its contents, could tend to prove undue influence, or show the condition

of the mind of the testatrix. Nor was such evidence at all admissible against the proponent of the will. Daly was not a proponent, or devisee, or legatee. He had no interest in the will, and his declarations could not bind those who had such interest, either as proponent, or devisees, or legatees. He was a stranger, and his declaration, at best, would be but hearsay evidence and inadmissible.

It is apparent, from the questions asked, that the object of the contestants was to anticipate the defense of proponent, in as far as Daly's testimony might be concerned. This, however, was not proper, because at this stage of the case it could not be known that Daly would be called as a witness. If he was not, the evidence would be wholly irrelevant, and, if he was, the law afforded ample opportunity to the contestants to make these inquiries directly of him; and, if they were material, and he denied any statement which they claimed he made, they could prove it upon rebuttal. Daly was subsequently called as a witness for the proponent, and from the nature of his testimony counsel had, if he deemed the inquiries which he previously sought to make pertinent, ample opportunity, of which he did not avail himself, to cross-examine Daly upon the subject, and lay the foundation for the introduction of such evidence as he claims the court improperly excluded. Daly purported to give all the conversation he had with the witness—Mrs. Anderson—and on cross-examination counsel for contestants do not seem to have questioned its accuracy.

3. Exception is also taken to the ruling of the court permitting witnesses to state conversations had with the testatrix prior and subsequent to the making of the will. The court was quite impartial in this regard, and permitted them on the part of both contestants and proponent. These conversations were admitted, not for the purpose of proving that what the testatrix said to the witnesses was true, or to establish the matters referred to as facts, but simply to permit the jury to judge of the mental condition of the testatrix at those times, from the conversations had with her. Great liberality is allowed under the law as to the kind of evidence which may be admitted for this purpose and the period of time it may cover. The rule permitting the introduction of such conversations, or the declarations of a testator, is quite liberal, and much may be admitted under it which, if offered as testimony to prove facts, would be rejected. The primary, and it may be said the exclusive, purpose of allowing it, is to enable the jury to form an intelligent conception of the real state of mind of a testator, as disclosed by his conversations, declarations, acts, and conduct. This is the most satisfactory evidence. It would be difficult to formulate any general rule which could be applicable to all cases; hence much must be necessarily left to the discretion of the judge of the lower

court, both as to the period of time over which such testimony may extend and its character. In the case at bar, the evidence was confined to general conversations embraced within a reasonable period, both prior to and subsequent to the making of the will, and limited exclusively to the purpose of showing the condition of mind of the testatrix. In this connection it is to be remembered that there were two issues before the jury—mental capacity and undue influence—and that this evidence was offered on the question of mental capacity alone. We are not concerned with what the rule may be if the evidence were offered upon undue influence, or that, if offered on such issue, it would be inadmissible (*In re Calkins*, 112 Cal. 296, 44 Pac. 577; *Est. of Gregory*, 183 Cal. 137, 65 Pac. 815), because it was not offered upon that point; and, as so offered, on mental capacity, the conversations did not involve anything concerning the execution of the will, the circumstances attending it, or its terms or provisions, except in one instance, where incidental reference was made by the testatrix to the fact that she had lost a diamond ring, of which she had made a special bequest to a certain person in her will. This, however, was incidental, and a necessary part of the conversation, and, under these circumstances, no reasonable objection can be taken to it.

The court did not err in striking out portions of answers given on cross-examination of certain of contestants' witnesses. The portions stricken out were not responsive to the questions. While the rule may be somewhat stringent as to concluding a party by the answers of his own witnesses in general response to a question, or binding him by irrelevant answers to irrelevant questions, still it never has been held, or should be, that a party is bound by the irresponsible answers of his adversary's witnesses, and we cannot understand why it should seriously be contended for.

4. Upon the instructions: Both sides prepared instructions on the law applicable to the issues, and the court contented itself with confining its charge to the giving of such of them as it deemed correct. It refused one requested by contestants, defining what constituted a sound and disposing mind, which it is claimed should have been given. But, as the instructions of contestants which were given, as likewise those of proponent, fully and clearly enlightened the jury on that point, no complaint will lie because the court did not accumulate definitions on the subject.

Contestants also complain of a line of instructions, given at the request of proponent, on the subject of insane delusions. We do not understand counsel to question their legal accuracy, but rather to insist that they were inapplicable to any issue, and hence misleading and prejudicial. In their complaint contestants alleged that the decedent, at the

time of the execution of her will, was possessed of insane delusions concerning her relatives, and that her will was executed as a direct result of such delusions. They also had the court instruct the jury, upon their request, on the subject of insane delusions as an element in determining testamentary soundness of mind. These instructions were general. The instructions given at the request of proponent on the same subject were special. There was evidence in the case from which the jury might have been warranted in finding that the deceased was possessed, about the time when the will was made, of an insane delusion that one of her tenants intended to kill or grievously harm her, and possibly other delusions. There was not a particle of evidence, however, to show that she entertained any insane delusions as to the contestants—her second cousins—or that she ever saw them or knew of their existence.

It was doubtless argued to the jury (and this was the only theory upon which contestants could have asked for the general instruction) that these insane delusions were an important factor in showing that the testatrix was insane. As it is not the existence of any insane delusion which will invalidate a will, but only the existence of such as has actually influenced a testator in making a will, and which caused its production, to the prejudice and injury of contestants, it was proper for the court to particularly instruct the jury upon this subject, so that there might be no doubt in their minds as to the law, and to provide for a proper application of the evidence under it.

5. The point is made that the jury were permitted to separate after they had retired to deliberate upon their verdict. This matter was presented to the court on the motion for a new trial, upon affidavits from which it appears that, the jury, after retiring, having asked for further instructions, the bailiff proceeded to bring them into court for that purpose. On the way to the courtroom, some of the members of the jury expressing a desire to retire to a urinal, the bailiff proceeded with the jury to one which opened on the hallway leading to the courtroom, and close thereto. The bailiff, assuming that all of the jury had withdrawn from the urinal, proceeded with them to the courtroom, upon entering which it was discovered that one of the members thereof was absent. The bailiff immediately returned to the urinal premises, called the absent juror, and accompanied him to the courtroom. The affidavit of the bailiff shows that while the jurors were in the urinal he stood at the door thereof, that no person came in or left the same, and that no person had access to said jury or conversed with any of the members thereof; that no more than two minutes elapsed between the entry of the 11 jurymen into the court room and the coming in of the twelfth. It does not appear from any of

the affidavits who this juror was, and no affidavit is presented from him; but there is no pretense that in fact any communication was had by the juror with any third person. Application for a new trial on this ground was based solely on the fact of the temporary separation. But in civil cases proof of mere separation is not sufficient to set aside a verdict. It must appear in addition thereto that some prejudice to the moving party has occurred, and that some substantial right of his has been affected by the separation.

Counsel for contestants call our attention to several decisions in criminal actions upon this point, but they have no application, as a different rule applies in civil than obtains in criminal cases. The civil rule is announced in *Saltzman v. Sunset Tel., etc., Co.*, 125 Cal. 508, 58 Pac. 171, where it is said on the subject: "In criminal cases, our statutes have always provided, as now by section 1181 of the Penal Code, that a court may grant a new trial 'when the jury has separated without leave of the court after retiring to deliberate upon their verdict.' There is no such ground for granting a new trial in a civil case, except under the ground of misconduct of the jury 'materially affecting the substantial rights of a party.' \* \* \* The matter is fully discussed in a note to *McKinney v. People*, 43 Am. Dec. 65. The annotator says it is almost the universal rule that, in order to set aside the verdict, 'there must be some evidence of other misconduct, in addition to the mere fact of separation, which has operated to the party's prejudice.'" The affidavit of the bailiff negatives the presumption of any improper conduct upon the part of the jury, and none of the affidavits in the case state facts raising even a suspicion of any misconduct, and there is nothing to show that any substantial right of the contestants was affected. The bailiff had a right to take the jurors to the urinal at their request, and the extent of the matter appears to be that one of them merely delayed longer than the rest in leaving it and accompanying his associates, and this being the only circumstance shown, it is rather doubtful, except technically, whether there was a separation at all.

6. The last points urged by contestants arise under the following circumstances: This case was here before (*Estate of McKenna*, 188 Cal. 439, 71 Pac. 501), where it was held that the appeal then taken from the order denying the motion for a new trial was premature, because the court had failed to make any finding, order, or judgment upon all the issues made by the contest, and the cause was therefore remanded for further proceedings. The issue undisposed of, referred to in said opinion, was as to the execution of the will. The will was olographic, and in their petition for the revocation of its probate the contestants alleged, not only the unsoundness of mind of the testatrix and undue influence in procuring its execution

(matters we have already considered), but further alleged that the will was not written, dated, or signed by testatrix, and demanded a jury trial on all these issues. All these allegations were denied by the answer, and upon the trial contestants failed to introduce any evidence upon the issue of nonexecution, addressing themselves solely to the issues of mental incapacity and undue influence. After the cause was remanded, as above stated, on the ex parte application of proponent, the judge of the lower court signed a judgment in the case. Thereafter, on contestants' motion, and upon the ground that it was rendered through the surprise, excusable neglect, mistake, and inadvertence of contestants, this judgment was set aside. The lower court then fixed a time when further proceedings in the matter of said contest would be taken up, at which time the contestants demanded that the cause be again set for trial before a jury upon all the issues. This was denied. Counsel then asked for a continuance, that they might produce other evidence, which was denied, as was also a request that they be then permitted to introduce evidence in support of the issues raised by the pleadings. The court thereupon signed a judgment in the cause, approving the verdict of the jury upon the issues submitted to them, and, upon the issue of nonexecution, found that the will had theretofore been admitted to probate, that upon its contest no evidence had been offered by contestants on this issue therein made, that the will had been duly executed by testatrix, and denied revocation of its probate. There is some question made as to whether the judgment was signed before or after the denial of contestants' application for the continuance, or their request to be permitted to introduce testimony on the issues. But the view we take of the matter renders this unimportant.

Contestants complain of these orders denying all their applications. It is unnecessary to waste time in discussing their application for a resubmission of all the issues to the jury. Counsel claims he was entitled to it, because, he insists, the vacation of the former judgment, made on his motion, had the effect, also, of vacating and setting aside the verdict. It is hardly necessary to say that counsel has not pointed us to any authority supporting this contention, and we are satisfied none exists.

Neither was the court required to continue the matter to afford him an opportunity to present testimony on the issue of nonexecution; nor was he, in the then condition of the case, entitled to offer any. In the opinion upon the former appeal, above referred to, this court did not hold that it was necessary for the lower court to take any evidence with reference to this issue. It was simply held that it was the duty of the court to find on the issue, and under the law the court was fully authorized to make a finding on this subject without hearing further from

the contestants. In fact, they had no legal right to make any further showing. It is to be remembered that this was a contest of a will after probate. In admitting it to probate, the court had necessarily found the existence of all essential facts upon which the order admitting it had to be based, including due execution by the testatrix. The inauguration of the contest did not set the order admitting the will to probate at large. That could only be affected by a successful contest. If the contest had been on the sole ground of unsoundness of mind of the testatrix, and was unsuccessful, it certainly would not be necessary, in order to authorize the court to enter a judgment denying the petition for revocation, to take testimony upon matters which were not involved in the contest, to show due execution of the will, or the absence of undue influence, etc., because these matters stood already adjudicated, and were unaffected by the contest. And from a legal point of view this is the situation in this case. The court had originally found that this will was duly executed by the testatrix, as it had all other essential facts. The appellant contested it on three grounds, and on all the issues thus made demanded a jury trial. No issue was left to be subsequently submitted to the court. Upon the trial before the jury the issue of nonexecution was abandoned, and the case then stood, as to it, as if no such issue had been raised; and, as the court had theretofore found in favor of its due execution in admitting the will to probate, it was not required to take evidence upon the matter again.

Nor, in an attack upon a will after probate, can contestants, by failure to introduce evidence upon some ground of contest, require the court to take evidence upon such issue, and so deprive a proponent of the right to have the verdict of the jury upon it. The proponent is as much entitled to a jury trial on all the issues, if they are to be tried at all, as the contestants; and as the court has no right to submit an issue to a jury unless there is evidence introduced in support of it (*Estate of Nelson*, 132 Cal. 182, 64 Pac. 294), and as the proponent has no right to submit evidence to a jury in support of a denial by him of an allegation upon which contestant has offered no proof (*Estate of Wooten*, 56 Cal. 322), it would be depriving proponent of this right to have the jury pass on all the issues, if the failure of contestants to support an allegation made by them would only have the effect of withdrawing that particular issue from the jury and requiring the court to hear evidence on it. Aside from this, in a contest of a will which has theretofore been duly admitted to probate, the same rule governs with regard to issues framed by the pleadings, upon which no evidence is offered, as applies in actions generally, one of which is that, when the burden of proof is upon a party to sustain an allegation, which is made an issue in the case, and he fails to introduce

any evidence in its support, the presumption is against him as to the existence of the facts alleged and unproven, and the finding of the court should be in accordance with the presumption. *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700. Applying this rule in the case at bar, the contestants had the burden of proof to show nonexecution, and, as they failed to introduce evidence upon that issue, the presumption from this failure was against them, and it was the duty of the court to find in favor of due execution upon this presumption.

Some minor points are made by contestants, to which in this opinion we devote no attention, because we do not consider they call for it.

There is no error apparent in the record, and the order denying the motion for a new trial, and the judgment, are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

143 Cal. 593

PEOPLE v. DOUGHERTY. (Cr. 1,119.)  
(Supreme Court of California. June 15, 1904.)

EMBEZZLEMENT—WHAT CONSTITUTES—POSITION OF TRUST.

1. Pen. Code, §§ 503, 508, define embezzlement as the fraudulent appropriation of property by a person to whom it has been intrusted, and declare that a clerk, agent, or servant who fraudulently appropriates to his own use any property of another which has come into his control or care by virtue of his employment is guilty of embezzlement. Defendant informed witness that he could sell certain goods dealt in by witness to a certain person, and would do so for a certain commission. The witness was to collect the price and defendant to return for his commission. Witness shipped the goods, and defendant went with them, sold them as his own, and appropriated the proceeds. Witness testified that defendant was not in his employ and had no authority to collect the money. *Held*, that defendant was not guilty of embezzlement.

Department 2. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

John Dougherty was convicted of embezzlement, and appeals from the judgment. Reversed.

James L. Nagle, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

HENSHAW, J. The defendant was charged with, and convicted of, the crime of embezzlement, and appeals from the judgment and from the order denying his motion for a new trial. He insists that the verdict and judgment are against the law and against the evidence, in that the evidence, whatever else it may show, does not establish the crime charged. In this contention, the appellant must be sustained. "Embezzlement is the fraudulent appropriation of prop-

erty by a person to whom it has been intrusted." Pen. Code, § 503. "Every clerk, agent, or servant of any person, who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." *Id.* § 508. The above-quoted sections set forth the statutory crime with which the defendant was charged. It is of the essence of this statutory crime that the misappropriation be of property "intrusted" to the defendant. "Where the property is taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession and 'intrust' the property to another, in such cases there is no embezzlement." *People v. Johnson*, 91 Cal. 205, 27 Pac. 663.

The evidence in this case is peculiar. Defendant was charged with the embezzlement of \$78, the property of one L. Bercovich, which property, the information charges, came into the possession of the defendant as the clerk, agent, and servant of Bercovich. Upon the trial Bercovich testified that the defendant came to him and said that he could sell 1,500 sacks to one P. A. McDonald, of San Francisco, at 5¼ cents a sack, and explained that he (Bercovich) was to collect for the sacks, and the defendant would come back the next day or the day after and receive ¾ of a cent commission for securing the sale. As a result (so testifies Bercovich) the sacks were by him sold and shipped to McDonald in San Francisco. Defendant did not purchase the sacks. "We would not sell the sacks to him, because we did not know him. We shipped these sacks to P. A. McDonald. Mr. Dougherty (the defendant) went with them. I believe Mr. Dougherty paid the freight on these goods. We sold the sacks to Mr. McDonald. We did not give Mr. Dougherty any authority whatever to collect this money. He was never in our employ. He never worked for us, and never did anything for us. He was not authorized to collect any money. He was not the clerk, nor the agent, nor the servant of Bercovich." Such is the testimony of the complaining witness. McDonald, to whom the sacks were sold, testified that he bought 1,500 sacks from the defendant, and knew nobody else in the transaction. He did not see the defendant when the sacks were delivered, but he left instructions to pay the defendant upon the delivery of the sacks. They were delivered, and his cashier paid for them. Defendant did not in any way represent himself as the agent or servant or employé of any one in the transaction. Defendant's testimony is that he bought the sacks outright from Bercovich for transmission and delivery to McDonald in San Francisco, himself paid the freight, and took the shipping receipt, and in turn sold the sacks to McDonald. As a

result, he owed Bercovich for the sacks. He had intended to pay him with the money which he received from McDonald, but got drunk, and when he recovered his senses found that his money was all gone.

By no one of these separate accounts, nor yet by a consideration of all three of them, is the crime of embezzlement established. Bercovich testifies that the defendant was not his agent, and that he had not intrusted the goods to him, but had shipped them by the railroad company to McDonald in San Francisco. McDonald, in turn, knew nobody in the transaction but the defendant, and dealt with him as a principal and as the seller of the sacks. The defendant disclaims any agency, and contends that he purchased the sacks outright. As embezzlement, under our statute, is the fraudulent appropriation of property intrusted to an agent, it follows that the possession of the embezzler must in the first instance be a rightful possession; but, if the defendant's possession in this instance was rightful, that fact is established by his own testimony alone, and must be considered with his further evidence that he came into possession of them as purchaser and owner, in which case he is guilty of no crime at all, and the relationship of debtor and creditor is all that exists between himself and Bercovich. As under no other theory of the case did his possession become rightful, it follows that the crime of embezzlement, as known to our law, was not established.

The judgment and order appealed from are therefore reversed.

We concur: MCFARLAND, J.; LORIGAN, J.

143 Cal. 574

PEOPLE v. LEWANDOWSKI. (Cr. 1,027)\*  
(Supreme Court of California. June 15, 1904.)

ROBBERY—DEPOSITION OF ABSENT WITNESS—  
EVIDENCE—ADMISSIBILITY—DISCRETION OF  
COURT—QUESTION OF FACT—STATUTES—AP-  
PEAL AND ERROR—INSTRUCTIONS.

1. Under Pen. Code, § 686, subd. 3, providing that the deposition of a witness may be used in criminal actions on its being satisfactorily shown to the court that the witness cannot with due diligence be found in the state, the question as to whether a witness can with due diligence be found in the state is one of fact, to be determined by the court.

2. In a prosecution for robbery, the complaining witness appeared and testified on the preliminary examination of the defendant, but did not appear at the trial. The record showed that the witness, who was a Japanese, had left his place of employment six weeks before the trial, and his employer knew nothing of his whereabouts. A police officer, armed with a subpoena, testified that for a month he had been endeavoring to find the witness, and had visited various Japanese resorts in the city where the robbery occurred, where he thought it probable information could be obtained, also various employment offices, acquaintances of the witness, and the Japanese consul, and had been able to

learn nothing concerning him, except that one man had seen him in the city about two weeks before the trial. With this man he had made a search, but was unable to obtain any further information concerning witness. Two other witnesses testified to efforts to find the witness, and their failure to find him or to discover anything about him. Subpoenas had been sent to the sheriffs of various adjoining counties, and they had been returned unserved; the sheriffs certifying to their inability to find the witness. *Held* sufficient to show that there was no abuse of discretion on the part of the trial court in permitting the deposition of the witness to be read, pursuant to Pen. Code, § 686, subd. 3, providing that the deposition of a witness may be used in criminal actions, on it being satisfactorily shown that the witness cannot with due diligence be found in the state.

3. In a prosecution for robbery, subpoenas for an absent witness that had been issued and returned unserved are admissible for the purpose of showing what had been done toward making the service on the missing witness.

4. In a prosecution for robbery, where the complaining witness was absent and could not be found in the state at the time of the trial, but had testified on the preliminary hearing of the defendant, and his testimony, properly certified and filed by the shorthand reporter, was introduced and read in evidence, the defendant is in no position to predicate error on the fact that the shorthand reporter testified as to the correctness of the transcript of his notes and what was said in the preliminary examination by the witness, where no objection was made nor exception taken at the time on the part of the defendant.

5. Pen. Code, § 686, subd. 3, provides for the admission in a criminal case of testimony taken by question and answer in the presence of defendant at a preliminary hearing. Under section 869 the transcript in longhand of the shorthand notes of the testimony and proceedings, made and certified by the shorthand reporter appointed by the magistrate at the preliminary hearing to take the testimony, and who did take it, when it is filed with the county clerk, is put on the same footing as a deposition. *Held*, that the fact that the testimony was taken through an interpreter does not affect the admissibility of the deposition.

6. The deposition of a witness, taken at a preliminary hearing of defendant and read in evidence in a prosecution for robbery, pursuant to Pen. Code; § 686, subd. 3, showed that the witness, after testifying that three men attacked him, two of them pointing their pistols at him, was asked to state whether he saw two of the men in court, and according to the deposition his answer was, "There is one; that fellow (pointing)." *Held*, that defendant was in no position to predicate error on the admission of the testimony of the shorthand reporter, who took down the testimony, to the effect that witness pointed at defendant; no objection having been made to the question, nor motion made to strike out the answer.

7. Where testimony is admitted without objection or exception, or without motion to strike it out, error cannot be predicated on the court's instructing the jury that it should be considered.

8. Where it appeared in a prosecution for robbery that the complaining witness, whose deposition was read in evidence, testified in terms that defendant was the man who at the time of the attack put his hand into the pockets of the complaining witness and took his property from him, and, on being asked whether he saw two of the men in court, testified, "There is one; that fellow (pointing)," any error in the admission of the testimony of the shorthand reporter, who took the testimony, to the effect that the witness pointed to defendant, is not prejudicial to defendant, since the deposition of the complaining witness sufficiently identified the defendant.

\*Rehearing denied July 13, 1904.

9. Where the court, in a prosecution for robbery, in charging the jury, defined a reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence in the cause, leaves the minds of the jurors," etc., an objection to the instruction on the ground that a reasonable doubt obviously is not a "state of the case," but rather a condition of the mind, is untenable.

Department 1. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Bruno Lewandowski was convicted of robbery, and appeals. Affirmed.

Nathan C. Coghlan, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. Defendant, with another, was charged by information with robbery, and on a separate trial was convicted, and sentenced to imprisonment for seven years. He appeals from the judgment and from an order denying his motion for a new trial.

There was evidence tending to show that one James Saito (a Japanese), while on his way home about 1 or 2 o'clock of the morning of February 5, 1903, was "held up" by three men on Sacramento street, in San Francisco, two of whom held pistols to his head, while defendant went through his pocket and took from his person a gold watch and 80 cents in coin. Saito reported the robbery promptly, and about 2:30 a. m. of the same day the defendant, with his codefendant, Larkin, was arrested, and on defendant's person was found a revolver, gold watch taken from Saito, and 80 cents in coin. Appellant does not attack the sufficiency of the evidence, if the testimony of Saito is to be considered. Saito appeared and testified at the preliminary examination, but did not appear at the trial. Against defendant's objection, Saito's deposition taken at the preliminary examination was read, and, as appellant says in his brief, "the points raised on this appeal have almost exclusively to do with this testimony."

1. Objection was made to the reading of Saito's deposition in evidence on the ground that the proper foundation had not been laid, in that it had not been satisfactorily shown, as required by subdivision 3, § 686, of the Penal Code, that the witness Saito could not with due diligence be found within the state. The court found as follows: "It being satisfactorily shown to the court that the said witness cannot with due diligence be found within the state of California, the objection \* \* \* is overruled." That the right of a defendant to be confronted in person by the witnesses against him is a most important one, and that the trial court should be fully satisfied by the evidence that the absent witness cannot with due diligence be found in the state, before allowing the deposition of such witness, taken on the preliminary examination, to be read, may be freely conceded. The question, however, as to whether it is

satisfactorily shown that such witness cannot with due diligence be found within the state, is a question of fact that is addressed to the trial court, to be determined by it from evidence introduced before it (*People v. Plyler*, 126 Cal. 379, 58 Pac. 904); and with the determination of that question of fact by the trial court, this court will not interfere, unless the evidence thereon is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found. *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Reilly*, 106 Cal. 648, 40 Pac. 13.

We have carefully examined the evidence on this subject in regard to the witness Saito, and cannot say that the trial court was not justified in its conclusion. The witness had left the employment of one Brown six weeks before the trial, and Brown knew nothing of his whereabouts. A police officer, armed with a subpoena, testified that for a month he had been endeavoring to find the witness, and had visited various Japanese resorts in San Francisco, restaurants and lodging houses where he thought it probable information could be obtained, various employment offices, acquaintances of the witness, and the Japanese consul, and had been able to learn nothing concerning him, except that one man had seen him in San Francisco about two weeks before the trial. With this man he made a further search, but was unable to obtain any further information of his whereabouts. Two other witnesses testified to efforts to find the witness, and their failure to find him or to discover anything about him. Subpoenas had been sent to the sheriffs of various adjoining counties, and they had been returned unserved; the sheriffs certifying to their inability to find the witness. All this afforded a sufficient basis for the finding of the trial court. There was no error committed in allowing the subpoenas for this witness, that had been issued and returned unserved, to be received in evidence "for the purpose of showing what had been done toward making service upon the missing witness."

2. We are unable to appreciate the applicability of the contention that "the deposition, and not the testimony of the stenographer, should have been introduced in evidence, if the testimony was admissible at all." The record shows that the deposition, which, so far as appears, had been properly certified and filed by the shorthand reporter, was introduced and read in evidence. Whatever evidence was given by the shorthand reporter as to the correctness of his transcript, and as to what was said in the preliminary examination by the witness, was given without objection or exception on the part of defendant, and we are therefore unable to consider any question as to the admissibility of such testimony.

3. It is urged that the deposition of Saito



was not admissible under any circumstances, in so far as the testimony contained therein was taken through an interpreter in a foreign language. It appears that a portion of the testimony of the witness on cross-examination was given through an interpreter. No such objection was made on the trial. If made, however, we are satisfied that it would not have been a good objection. Whether taken from the witness through an interpreter, or directly from the mouth of the witness, the deposition of the witness taken at the preliminary examination in the manner and form required by section 869, Pen. Code, when properly certified, may be read in evidence in the cases mentioned in section 686, Pen. Code. The statute so expressly provides. It is the deposition taken and certified as provided in section 869 that is declared to be admissible by section 686. *People v. Morine*, 54 Cal. 575, 577. Under the provisions of section 869, the transcript in longhand of the shorthand notes of the testimony and proceedings, made and certified by the shorthand reporter appointed by the magistrate to take down the same, and who did take down the same, filed with the county clerk, is placed upon the footing of a deposition (*People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Buckley* [Cal.] 77 Pac. 169); the certificate of the reporter giving it the same authentication as does the subscription by the witness and the certificate of the magistrate, when the deposition is originally taken in longhand under other subdivisions of the same section. *People v. Ward*, 105 Cal. 652, 39 Pac. 33. It occupies the same position as does the deposition taken originally in longhand and subscribed by the witness. Whether taken through an interpreter or not, it is in each case the original testimony of the witness, in the same sense and to the same extent as is the testimony of the witness present at the trial, given through the medium of an interpreter, his original testimony on the trial, and in the cases provided by law may be read in evidence as such. It will readily be seen that, if this is not true, it would be impossible to take a deposition of a witness unable to speak the English language, that would be effectual for any purpose, and that every objection based on the fact that the testimony was given on the preliminary examination through the medium of an interpreter would be equally applicable to all testimony given on a trial through an interpreter.

The cases cited by counsel in support of his contention are not in point. In this case, as we have seen, it was the original testimony of the witness, his deposition, that was read in evidence. In the cases relied on (*People v. Lee Fat*, 54 Cal. 527; *People v. Ah Yute*, 56 Cal. 119; *People v. Lee Ah Yute*, 60 Cal. 96, and *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063) the question on the trial was as to what the defendant had testified to on a previous occasion; the object in one

case being to sustain a charge of perjury, and in the others to show previous inconsistent statements for purposes of impeachment. It was held in those cases that only one who heard and understood the statements on the previous occasions could testify as to the statements then made, and that to allow one who derived his information as to what those statements were solely from the mouth of another would be to allow the giving of hearsay testimony. It is unnecessary to discuss the rulings in those cases. The distinction between them and that of the use on the trial of a deposition taken at the preliminary examination in the manner provided by law is clear.

4. It is contended that the court erred in allowing the shorthand reporter at the preliminary examination to testify, as a witness on the trial, as to matters occurring during the examination of the absent witness Saito, concerning which the deposition was silent. It appears that the deposition showed that Saito, after testifying that three men attacked him, two of them pointing their pistols at him, was asked to state whether he saw two of the men in court, and according to the deposition the answer was, "There is one; that fellow (pointing)." The deposition being silent as to whom the witness indicated by pointing, the shorthand reporter was allowed to testify that the witness then pointed to the defendant. There is certainly much force in the contention that the statutory deposition cannot be thus added to by the testimony of witnesses (see in this connection *People v. Gardner*, 98 Cal. 127, 32 Pac. 890; *People v. Ward*, 105 Cal. 652, 39 Pac. 33); but the objection is not available in this case for two reasons. The record shows that the reporter gave his testimony upon this subject without objection on the part of the defendant, and no motion was made to strike out the answer. The evidence was given in response to a question by the court, reinforced by a question of defendant's counsel. The only exception noted is one to a statement of the court, to the effect that a certain statement of the prosecuting attorney, shown by the deposition and objected to by defendant, would be excluded, and that the jury would consider the testimony of the reporter just given with the deposition then being read. That testimony being in without objection or exception, and without motion to strike out, there was, of course, no error in stating that it should be considered. Again, Saito, in his deposition, stated in terms that the defendant, Lewandowski, was the man who, at the time of the attack, put his hand into his (Saito's) pockets and took his property from him, thus sufficiently identifying defendant as one of the parties who attacked him.

5. It is contended that the instruction as to reasonable doubt was misleading. The instruction, so far as is necessary to explain the point made, was as follows: "A reason-

able doubt is that state of the case which, after the entire comparison and consideration of all the evidence in the cause, leaves the minds of the jurors," etc. The criticism is "that a reasonable doubt obviously is not a 'state of the case,' but, on the other hand, is rather a condition of mind." The term "case," used in the instruction, was used by Chief Justice Shaw in his definition of "reasonable doubt" in the case of *Commonwealth v. Webster*, 5 Cush. 320, 52 Am. Dec. 711, and this instruction has been so often approved by this court that defendant's objection does not seem to call for further comment.

This disposes of all the points made by appellant in his brief for a reversal of the judgment and order.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

143 Cal. 550

PEOPLE v. MORALES. (Cr. 1,101.)

(Supreme Court of California. June 14, 1904.)

HOMICIDE — JUSTIFICATION — EVIDENCE—SUFFICIENCY—ADMISSIBILITY—WITNESSES—CROSS-EXAMINATION.

1. On prosecution for manslaughter, evidence that deceased and another person entered defendant's home in the nighttime to arrest him, informed him of their purpose, and displayed their pistols in order to intimidate him, and that while defendant was in the act of dressing deceased stooped to get defendant's shoes, whereon defendant grabbed a pistol from the deceased and shot him, did not show that the homicide was justifiable.

2. Where, on prosecution for homicide, it appeared that deceased and another, as officers, attempted to arrest defendant after night, and that defendant shot through a tin lantern held by one of the officers, hitting the deceased and killing him, it was not error to admit in evidence the bullet taken from the body of the deceased, accompanied by a small piece of tin.

3. On a prosecution for killing an officer with a pistol taken from him by the defendant at the time of the homicide, it appeared that the pistol was a 45-caliber Colt's loaded with 44-caliber cartridges with the ends cut off, though it was not necessary to cut off the ends in order to use them in such pistol. *Held*, that it was not error to admit in evidence a 45-caliber Smith & Wesson pistol, which the deceased had been in the habit of using with the same style of cartridges, in doing which it was necessary to cut the ends off, as explaining the possession of cut-off cartridges by the deceased, and strengthening the proposition that the bullet taken from his body was one that came from his own pistol.

4. Where, in prosecution for killing an officer attempting to arrest defendant, defendant testified on examination in chief that he was not informed that the officers had come to arrest him, and that they did not tell him they were officers, or show any authority or warrant of arrest, it was proper cross-examination to ask him whether or not the deceased had not once before arrested him on the same charge on which he attempted to arrest him at the time of the homicide, and whether defendant did not on such previous occasions succeed in getting away.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Pedro Morales was convicted of manslaughter. From the judgment, and from the order denying his motion for new trial, he appeals. Affirmed.

Frank W. Allender and Clifton Artell, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

SHAW, J. This is an appeal from a judgment convicting the defendant of the crime of manslaughter, and from an order denying his motion for a new trial.

The defendant was charged with the murder of one George Lee Wilson. The evidence on behalf of the prosecution shows that the deceased and one Albert Smith, having a warrant for the arrest of the defendant, entered his house at the time of the homicide for the purpose of making the arrest, found the defendant in bed, and that while defendant was in the act of dressing Wilson stooped to get defendant's shoes, whereupon the defendant grabbed Wilson's pistol and fired the shot which killed him. The defendant claims that the evidence is insufficient to show that it was he who fired the fatal shot. In this, however, he is evidently relying upon the evidence given on behalf of the defendant. The evidence for the prosecution clearly shows the facts as above stated, and it was for the jury to determine with respect to the credibility of the witnesses.

The defendant also contends that under the circumstances of the case the homicide was justifiable, on the theory that the officers used undue violence in making the arrest. In his brief, defendant's counsel ask this question: "Had they the right to drag him forth by the hair of the head at almost the hour of midnight, when all nature was at rest, and thus by their manner and conduct strike terror into the very hearts of the inmates of that little home?" Here, again, counsel are relying upon the testimony of the defendant and the witnesses in his behalf. The testimony of the prosecution shows that the officers informed him that they were there to arrest him, and used no undue violence in making the arrest, and that the precautions they took in the way of displaying pistols to intimidate the defendant were eminently proper, in view of the character of the defendant, as disclosed by the subsequent occurrences. Notwithstanding all their precautions, the defendant succeeded in escaping, at the cost of the life of one of the officers.

The defendant objected to the admission in evidence of the bullet taken from the body of the deceased, accompanied by a small piece of tin. The objection was not well taken. It was shown that the bullet was found in the body of the deceased and caused his death, and that at the time it was taken from the body it had attached thereto a small piece of tin, which had afterwards become detached while the bullet was in the possession of the sheriff. The significance of the piece of tin arose from the testimony to the effect that

the only light in the room at the time of the arrest consisted of a lantern held by one of the officers, and that the defendant shot through the lantern, which was made of tin, putting out the light, and hitting the deceased at the same time. The presence of the tin on the bullet strongly corroborated this testimony.

Defendant also claims that the court erred in admitting in evidence certain other bullets and another pistol, not the one used by the defendant on the occasion of the homicide. The pistol used by the defendant, which he took from the deceased, was a 45-caliber Colt's, loaded with 44-caliber Winchester cartridges with the ends cut off. It was not necessary to cut off the ends of the cartridges to use them in a pistol of that description. There was some dispute concerning the similarity of the bullets of the cartridges taken from Wilson's pistol after the homicide, as compared with the bullet taken from his body. It appeared that the deceased, Wilson, two days before the homicide, was using a 45-caliber Smith & Wesson pistol, which he loaded with 44-caliber Winchester cartridges; that, in order to do so, he had to cut the ends off the bullets, and that he had some of these cut-off cartridges in his belt; that he then exchanged the Smith & Wesson pistol for the 45-caliber Colt's pistol used by the defendant at the time of the homicide, and loaded the Colt's pistol with some of these cut-off Winchester cartridges which he had in his belt. The Smith & Wesson pistol introduced in evidence was of the same pattern and size as that which the deceased had in his possession when he used the cut-off cartridges therein. The sole purpose of introducing it in evidence was to explain the possession of the cut-off cartridges by the deceased, and thereby strengthen the proposition that the bullet taken from his body was one which came from his own pistol. The evidence was clearly relevant for that purpose.

Defendant also complains of the cross-examination of the defendant while on the stand as a witness. The district attorney, on cross-examination, asked him whether or not the deceased had not once before arrested him on the same charge on which he attempted to arrest him at the time of the homicide, and whether the defendant did not on the previous occasion succeed in getting away. The defendant disclaimed any knowledge of the facts imputed in the question. The cross-examination was made in response to the evidence of the defendant himself on examination in chief, in which he contradicted the evidence of the prosecution to the effect he was informed that the officers had come to arrest him, and declared that they did not tell him that they were officers, or show a star, or anything that made him believe they were officers, or show any warrant of arrest, or tell him that he was being arrested. The cross-examination was an evident attempt on the part of the district attorney to show that the

defendant, notwithstanding his denial, knew the deceased, and knew that he was an officer. This was legitimate cross-examination. The defendant in his examination in chief evidently intended to leave the impression that he was entirely ignorant of the official character of the parties who attempted to make the arrest, and that he was justified in considering it as an unprovoked and unjustifiable assault upon him in his own house. It was proper for the district attorney, if he could, to show by the defendant's own testimony that he knew that the deceased was an officer who had previously made an attempt to arrest him.

No other errors are complained of.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

143 Cal. 528

DRISCOLL v. DRISCOLL. (Sac. 1,229).\*

(Supreme Court of California. June 13, 1904.)

ASSIGNMENTS — VALIDITY — CONSIDERATION — BURDEN OF PROOF—GIFTS—DELIVERY.

1. Where deceased, several years before his last illness, executed an instrument in writing transferring certain property to his daughter, and there was no evidence that at the time the instrument was executed deceased was in contemplation or in fear of death, or that he made it with intent that it should take effect only in case of death, and the circumstances showed that it was not made in expectation of speedy death, it could not be regarded as a gift causa mortis.

2. Where deceased executed a written instrument assigning certain property to his daughter, and delivered the instrument to her, and afterwards continued to hold the same relation to the property as before, but there was no showing that the instrument was not to take effect until after his death, or that anything of that character was said at the time of its execution, the instrument was not a testamentary disposition of property.

3. Under the express provisions of Civ. Code, §§ 1614, 1615, an assignment in writing is presumed to be supported by a sufficient consideration, and a party seeking to avoid it for want of consideration has the burden of showing such fact.

4. Under the express provisions of Civ. Code, § 1040, a voluntary transfer of property is valid, though there is no consideration.

5. In the absence of any imputation of fraud, the amount of the consideration for a deed is immaterial.

6. A sale of personal property is good between the parties without delivery.

7. Civ. Code, § 1147, makes delivery essential to the validity of a gift when the thing given is capable of delivery. Section 953 defines a chose in action as the right to recover money or other personal property by a judicial proceeding. Section 1146 defines a gift as a transfer of personal property, which, if made in writing, is by section 1053 called a grant or conveyance or bill of sale, and by section 1083 vests in the transferee all the actual title to the thing transferred which the transferee then

\*Rehearing denied July 13, 1904.

† 6. See Sales, vol. 42, Cent. Dig. § 528.

has. A father executed a written instrument transferring to his daughter certain real property, and assigning to her his interest in a partnership, and thereafter continued to deal with the partnership property as he had formerly done, as if he was the owner of his original interest therein. *Held* that, as the interest in the partnership was incapable of manual delivery, the delivery of the written instrument was a sufficient delivery to make a valid gift.

8. Where a father executed a written instrument assigning certain property and his interest in a partnership to his daughter, and thereafter continued to deal with partnership property as if he owned his former interest therein, such action did not impair the title obtained by the daughter, restore the ownership of the property to the father, or entitle his administrator to the possession thereof.

Commissioners' Decision. Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Catherine Driscoll, as administratrix of the estate of John Driscoll, deceased, against Mary G. Driscoll. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank D. Ryan and James B. Devine (M. S. Wahrhaftig, of counsel), for appellant. Devlin & Devlin, for respondent.

HARRISON, C. In May, 1897, John Driscoll was a member of the partnership of Root, Neilson & Co., composed of H. F. Root, Alexander Neilson, and himself, and made and acknowledged before a notary public, and delivered to his daughter, Mary G. Driscoll, the defendant herein, the following instrument:

"Know all men by these presents: That I, John Driscoll, of the city of Sacramento, county of Sacramento, and state of California, hereby grant to my daughter, Mary G. Driscoll, the following described real and personal property: The west sixty (60) feet of lot two (2), in the block bounded by L and M and Eighth and Ninth streets, of the city of Sacramento, together with all the improvements thereon; also an undivided one-third interest in and to lot number two (2), and the north thirty-five (35) feet of lot number three (3), in the block bounded by N and O and Front and Second streets, in said city of Sacramento, together with the improvements thereon. I also hereby assign, sell, transfer, and deliver to my said daughter my undivided one-third interest in the firm of Root, Neilson & Co., including all the personal property of said firm, consisting of machinery, tools, iron, and other property situated in the foundry and machine shop of said firm on said lot two, and the north 35 feet of lot three (3), in the block between Front and Second and N and O streets, Sacramento city, together with my interest in the book accounts and notes owing to said firm and the good will of the business of said firm. Said property above conveyed by me is all my separate property, having been acquired by me prior to my marriage to my present wife.

"In witness whereof, I have hereunto set my hand and seal this 25th day of May, 1897.

"John Driscoll.

"Signed and delivered in presence of Adolph Hellbron."

After receiving the instrument, the defendant delivered it to Adolph Hellbron for safe-keeping, who retained custody of it until after the death of Mr. Driscoll, when he delivered it to the defendant, and she caused it to be recorded in the office of the county recorder. Neither the defendant nor her father informed the other members of the co-partnership of the execution of the instrument; but Mr. Driscoll continued his relation with them, and to act as a member of the firm, in the same manner as before its execution, until his death in 1902. After his death the plaintiff (his widow) was appointed special administratrix of his estate and commenced the present action against the defendant, alleging in her complaint the execution of the above instrument; that the same was made without consideration, and was not delivered by Driscoll in his lifetime; that possession of the personal property therein was not delivered to the defendant in the lifetime of her father, but was retained by him until his death; that after his death the defendant obtained possession of the instrument and caused it to be recorded, and by virtue thereof took possession of the personal property and withholds the same from the plaintiff, and claims to be its owner. She thereupon prayed for a recovery of the possession of the personal property or its value, and that the above instrument be set aside and declared null and void. Upon the trial of the cause the court found that the instrument was executed to the defendant for a good and valuable consideration, and was delivered to her by her father on the day of its execution, and that she thereby became the owner and entitled to the possession of the copartnership interest of her father in the assets of the partnership, and that the plaintiff has no right or interest therein. From this judgment and an order denying a new trial the plaintiff has appealed.

It is contended on the part of the plaintiff that it appears from the evidence that the instrument was executed without any consideration, and was, therefore, intended as a gift; that the gift of the personalty was not to take effect until after the death of the father, but that he was to retain its possession and control during his lifetime; that the instrument was, therefore, of a testamentary character, and for that reason void; that, whether the transaction between the father and the defendant be regarded as a gift *inter vivos* or as a gift *causa mortis*, it was ineffective, for the reason that there was no delivery to the defendant of the possession of the property during the lifetime of her father; and that at the time of his death it

formed a portion of his estate, which the appellant, as the administratrix thereof, is entitled to recover. The instrument was made many years prior to the last illness of Mr. Driscoll, and there is no evidence that at the time he made it he was in contemplation or fear of death, or that he made it with intent that it should take effect only in case of his death; and the circumstances under which it was made fully refute any claim that it was made in expectation of speedy death. It cannot, therefore, be regarded as intended for a gift *causa mortis*.

Neither can the instrument be regarded as a testamentary disposition of the property, or that it was so intended by him. It is very probable that he intended by it to make some provision for his daughter that would be available for her support in case of his death. The character of the instrument and the circumstances under which it was made lead to that inference. All gifts of property from a parent to a child are subject to the same inference, but such provision is not of a testamentary character, or for that reason to be held invalid; and, although it was shown that after the execution of the instrument he continued to hold the same relation to the property, so far as the outside world was concerned, as before, there was no evidence that the instrument was made in pursuance of an agreement therefor, or that it was not to take effect until after his death, or that anything of that character was said at the time of its execution. On the day of its execution Driscoll and his daughter went with Mr. Heilbron to the office of the notary, in pursuance of a previous appointment, for the express purpose of making the instrument. What Mr. Driscoll said at that interview is not very fully shown. The notary testified that he fully explained to him that, if he made the deed, it would be an absolute transfer, and the property would pass out of his hands, and he would have no right or control of it, or right of revocation; that he explained to him that, in order to be effectual, the deed must be delivered to the defendant, and that he would have no right to set it aside; that thereupon, after it had been executed, Driscoll delivered it to the defendant. The defendant testified that her father delivered the deed to her in the notary's office; that there was no condition attached, and no agreement or bargain between herself and her father. This testimony was uncontradicted, as was also the testimony that, after Driscoll had delivered the instrument to the defendant, she placed it in the hands of Mr. Heilbron for safe-keeping, and that he continued to be its custodian until after the death of Driscoll; nor was there any evidence qualifying or impairing its effect. The court was, therefore, fully justified in making the above finding in reference to the execution of the instrument. Upon the face of the instrument it purported to be a grant to the defendant in present of the property described

therein, and, as there was no evidence of any matter connected with the transaction which in any respect qualifies or limits its legal effect, the only function of the court was to give effect to its terms, and to declare that the defendant became thereby vested with the entire interest of her father in the property described in the instrument.

The finding that the instrument was executed for a good and valuable consideration was also authorized by the evidence. Being in writing, a sufficient consideration was presumed (Civ. Code, § 1614); and, if the plaintiff would seek to avoid it for want of consideration, the burden of showing such fact was upon her (Id. § 1615). If the transaction is to be regarded as a voluntary transfer, no consideration was necessary for its validity. Id. § 1040. The plaintiff not only failed to show a want of consideration, but she did not even attempt to make such showing; and it affirmatively appears that upon the suggestion of the notary the defendant gave to her father a dollar as a consideration for the deed. In the absence of any imputation of fraud, the amount of the consideration for a deed is immaterial. *Chitty on Contracts*, 29; *Lawrence v. McCalmont*, 2 How. 452, 11 L. Ed. 328.

The chief ground upon which the appellant seems to rely for a reversal of the judgment is that there was no delivery of the property to the defendant during the lifetime of her father. A sale of personal property is, however, good as between the parties, whether the possession be delivered or not. Want of delivery renders it void only as to creditors and subsequent purchasers. *Visher v. Webster*, 13 Cal. 58; *Benjamin on Sales*, § 308. If, however, the transaction between the defendant and her father could be considered as a voluntary transfer or gift from him to her, the same result would follow. The provision in section 1147, Civ. Code, making a delivery essential to the validity of a gift, is limited to "verbal" gifts, and requires an actual delivery only when the thing given "is capable of delivery." "Delivery, in this as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." 2 Kent, Com. \*439. If the property is not in the possession of the donor, his execution and delivery of a deed or assignment thereof is an efficient mode of parting with his dominion over the property, since he thereby gives the means of obtaining posses-

sion and control of the thing given. A chose in action—"the right to recover money or other personal property by a judicial proceeding" (Civ. Code, § 953)—is not susceptible of manual delivery; but such property is not, for that reason, incapable of being made the subject of a gift.

The interest of one partner in the assets of the partnership does not entitle him to the exclusive possession of any particular portion of such assets, and a transfer by him to another of such interest does not give to the transferee the right to the possession of any portion of the partnership property, but merely a right to an accounting with the other members of the partnership, and upon a settlement of its affairs to receive the share to which the partner would have been entitled. *Miller v. Brigham*, 50 Cal. 615. "Where a partner sells or assigns his share to a third person in a partnership, charge of possession is not possible, and manual delivery is not essential to the validity of the conveyance. The parties are not tenants in common, but the assignment conveys a right in the nature of a chose in action not capable of delivery, and notice of an assignment to the holder of the fund or to third persons is all that is essential, and even that, as between the assignor and the assignee, is not necessary." *Bates on Partnership*, § 548. Under the common law a gift of personalty effected by a deed operated *proprio vigore* to vest the donee with the title to the property upon the delivery of the deed without a delivery of the thing given. In the words of *Abbott, C. J.*, in *Irons v. Smallpiece*, 2 B. & Ald. 551: "A party cannot avoid his own voluntary deed, although he may his own voluntary promise." See, also, *Ward v. Audland*, 16 M. & W. 862; *Kekewich v. Manning*, 1 De Gex, M. & G. 176. The same rule is declared in *McCutchen's Adm'rs v. McCutchen*, 9 Port. 650; *Horn v. Gartman*, 1 Fla. 63, 86; *Gordon v. Wilson*, 49 N. C. 64; *Hannon v. State*, 9 Gill, 440; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *McEwen v. Troost*, 1 Sneed, 186; *Thornton on Gifts and Advancements*, §§ 189, 294. "To transfer property by gift, there must be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. Both are not requisite." *Wyche v. Greene*, 11 Ga. 189. "Where a gift *inter vivos* is perfected by delivery of possession of the thing or delivery of a deed of gift, it is complete, although made without any consideration." *Fulton v. Fulton*, 48 Barb. 590. "A transfer of a claim or chose in action by a written instrument under seal, duly executed, has the effect to divest the title of the donor in the assigned property, and has the same effect as an actual delivery. The delivery of the assignment is deemed a delivery of the property conveyed." *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284. In *Hope v. Hutchins*, 9 Gill & J. 77, where a mother had made a deed of gift to her daughter,

in which she reserved the right to the use and enjoyment of the property given during her natural life, the court held that the legal title passed upon the execution of the deed. A similar rule was declared in *Banks' Adm'r v. Marksberry*, 8 Litt. 275. A distinction is to be noted between reserving a right to the use of the property given and reserving the property itself until a future time.

There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompanied by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law, or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. A gift is declared by section 1146, Civ. Code, to be "a transfer of personal property," which, if made in writing, is by section 1053 called a "grant, or conveyance, or bill of sale," and by section 1083 "vests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed, or is necessarily implied." As, under section 1053, Civ. Code, this provision applies to personal as well as real property, the interest intended to be transferred is, under section 1054, *Id.*, vested in the transferor upon the donor's delivery of the grant. Under these provisions it follows that upon the delivery by Mr. Driscoll to the defendant, May 27, 1897, of the instrument then executed by him, she became vested with all the interest which he then had in the property described in the grant.

The conduct of the defendant or of her father with reference to the property after she had become vested with the title thereto did not have the effect to restore this ownership to him, and the plaintiff herein has no interest in the property, or right to its possession, except such as Mr. Driscoll had at the time of his death. It was not in his power, after he had parted with the title, either by his silence, or by any act or declaration on his part, to impair the title which he had given to the defendant; and whether the defendant notified the other members of the partnership of her ownership, or concealed the fact from them, as well as whether she thereupon sought an immediate accounting and winding up of the affairs of the partnership, or suffered her father to continue his relation to that firm and to represent her interests therein until the time of his death, were matters in which the other members of the firm might acquiesce, or to which they might object, but they were matters in which the plaintiff had no concern, and which do not confer upon her any right to the possession of the property.

Certain rulings of the court upon the admission of testimony offered at the trial were excepted to by the appellant, but upon

an examination of the record we are satisfied that the plaintiff did not sustain any injury thereby.

The judgment and order denying a new trial should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

(143 Cal. 537)

In re MERCHANT'S ESTATE. (S. F. 3,718.)  
(Supreme Court of California. June 13, 1904.)

WILLS—CONSTRUCTION—RESIDUARY REQUESTS—CHARITABLE TRUSTS—BENEFICIARIES—CERTAINTY—USE OF FUNDS—PERPETUITIES.

1. Where an item of a will creating a charitable trust was made a part of the decree of distribution, such item might be considered, on appeal from such decree, for the purpose of determining the intention of the testatrix, though the decree was conclusive on the trustee as to the extent of his rights.

2. A finding that the beneficiary of a charitable bequest at all times had a certain ascertained membership should be construed as a finding that it had an organization sufficiently formed to take, and not that it was necessarily composed at all times of the same persons.

3. Where a trust was created for the benefit and advancement of a society organized for charitable purposes, and testatrix directed that the bequests should be applied to equip a hospital used in connection with the society, by soldiers coming from the Pacific Coast, and the court found that such society at all times had a certain ascertained membership, and was a charitable organization having for its objects the prevention of unnecessary barbarities in war and the alleviation of suffering on the battle field, and used, when necessary, a hospital in connection with its charitable work, the power given the trustee was sufficiently definite and certain to sustain the bequest as a charitable trust.

4. Where testatrix bequeathed the residue of her estate in trust for the benefit and advancement of the Oakland Red Cross Society in California, and declared that it was her wish that, if there be a hospital used in connection with the work of the society in California, the residue be used to equip the same, so far as necessary, and that it be used for soldiers coming from the Pacific Coast, such bequest indicated an intention that the entire residue might be used by the society for the equipment of a hospital for the benefit of such soldiers.

5. Where testatrix bequeathed the residue of her estate to trustees for the benefit of the Oakland Red Cross Society in California, and to equip a hospital for soldiers, if one is used in connection with the work of such society, the bequest was not for the benefit of the individuals who at testatrix's death constituted the membership of the society, but for the benefit of the society in its organized capacity, and through it for the charitable objects for which it was formed.

6. Where testatrix bequeathed the residue of her estate to a trustee for the benefit of a society existing only to dispense charity, it would be presumed that the trust would be administered agreeably to the testatrix's intention as disclosed in the will; such intention being capable of enforcement by the courts.

7. Where testatrix bequeathed the residue of

her estate in trust for the benefit of a society in its organized capacity, the objects of which were charitable, and it was plainly manifest that testatrix intended thereby to create a charitable trust for the furtherance of such objects, the bequest was not within the rule against perpetuities.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Proceedings for the judicial settlement of the estate of Theresa L. Merchant, deceased. From a decree of distribution, Baron D. Merchant appeals. Affirmed.

P. F. Gosbey, for appellant. Campbell, Fitzgerald, Abbott & Fowler and L. D. Manning, for respondent.

CHIPMAN, C. Appeal from decree of distribution by which the residue of the estate of deceased was distributed for the benefit and advancement of the Oakland Red Cross Society in California, in preference to appellant, Baron D. Merchant, son and sole heir at law of deceased, as he claims it should have gone. The eighth item in the will of deceased is made part of the decree, and may be looked to as showing the intention of the testatrix, without violating the rule in *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145: "Eighth. All the rest, residue, and remainder of my property, of every kind and nature, I direct my executors and trustees to take charge of and use the same for the benefit and advancement of the 'Oakland Red Cross Society' in California, and it is my wish that, if there be a hospital used in connection with the work of said Society in California, the above mentioned residue be used to equip such hospital, so far as the same may be necessary, and that the same be used for soldiers who come from the Pacific Coast." The decree provides as follows: "To J. B. Richardson (executor of the will) as trustee, all the rest, residue, and remainder of the property remaining for distribution, consisting of cash amounting to \$2,842.99. Said J. B. Richardson, as such trustee, is directed to take charge of and use said residue for the benefit and advancement of the 'Oakland Red Cross Society' in California." Among other things the court found that this society was at the death of the testatrix, ever since had been, and now is, "a purely unincorporated charitable organization and society, having for its objects and purposes the prevention of unnecessary barbarities in war and the alleviation of suffering on the field of battle, and, in connection with the conflicts of war, to accumulate funds and material, and to provide nurses and assistants for national services in times of war, pestilence, fire, flood, and other calamities so great as to be considered national, and having at all times a certain ascertained membership, not organized for profit or benefit of any of its members, and has used, and does now use,

when necessary, a hospital in connection with its charitable work."

The points apparently relied on by appellant are that the power given the trustee is uncertain, and that it cannot be determined from the will how or in what manner the residue shall be used; that the will makes the executor the trustee, and the society the beneficiary; and that, as the society has "at all times a certain ascertained membership," the trust must fail as a charity, for, as it is claimed, the great distinguishing feature of a charitable trust is that the persons to be benefited must be uncertain and indefinite. It is conceded that if "the testatrix had given directly the residue of her estate to the Oakland Red Cross Society, to use it for the benefit and care of sick or disabled soldiers and sailors, the bequest might stand." But it is insisted that the residue is given to trustees to take charge of and use for the benefit of said society, and that the society is composed of a definite and ascertained number of persons, and is clearly pointed out by the terms of the gift to receive and control its benefits, and hence is not a public charity; citing *Old South Society v. Crocker*, 119 Mass. 23, 20 Am. Rep. 299; *Fay v. Howe*, 136 Cal. 601, 69 Pac. 423. On the assumption that the foregoing point is sustained—i. e., that the trust must fail as a charity—it is further claimed that it is void as creating a trust in perpetuity; citing *In re Walkerly*, 118 Cal. 656, 50 Pac. 753; *Estate of Fair*, 182 Cal. 528, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; and especially relying on *Adams v. Perry*, 43 N. Y. 487. Obviously the intention of the testatrix, as shown by the decree, was that the residue of her estate should be devoted to the objects to carry out which was the sole purpose of creating and maintaining the society; and appellant concedes that those objects are charitable. The intention being charitable, the bequest ought to be upheld if a way can be found to do so without violating sound reason and recognized principles of law. This court said in *Estate of Willey*, 128 Cal. 1, 60 Pac. 471: "Charitable donations are looked on with favor by the courts, and will be carried into effect if they can possibly be made good consistently with the rules of law." The meaning of the finding that the society has had "at all said times a certain ascertained membership" is that an organization exists sufficiently formed to take; i. e., the number at any time could be determined, not necessarily the same persons, but as "having at all times a certain ascertained membership." But this finding was coupled with the further finding that the society was a "charitable organization, having for its objects and purposes the prevention of unnecessary barbarities in war and the alleviation of suffering on the field of battle," etc., and "has used and does use, when necessary, a hospital in connection with its charitable work." The intention of the testatrix, as shown by her

expressed wish, was, not only that the bequest should be "for the benefit and advancement" of the society, whose charitable objects she must have had in her mind, but she directed that the bequest should be applied to equip a hospital used in connection with the society, which was to be used by soldiers coming from the Pacific Coast. The power given the trustee seems to us to be sufficiently definite and certain. In effect the will indicated an intention that the residue of the estate should be used for the benefit of the society in carrying out its charitable objects, and to that end, also, to equip a hospital for the benefit of soldiers who came from the Pacific Coast, and all of the residue might be used for that purpose. The bequest was not for the benefit of the individuals who happened at the death of the testatrix to constitute the membership of the society, but for the benefit of the society in its organized capacity, and through it for the benefit of the charitable objects to promote which it was formed.

Respondent cites cases to support the proposition that even if the will means that the society is the beneficiary, still, as it is conceded to be a charitable institution, the bequest necessarily becomes a charitable use; that on principle there is no difference between a bequest to a trustee for the benefit of a designated society, known or shown to be solely charitable, and a bequest to a trustee for the benefit of the persons who are the objects of the charitable ministrations of such society. Where the devise is directly to a society that exists only to dispense charity, it is presumed that the trust will be administered agreeably to the wish of the testator—i. e., for charitable purposes—and resort may be had to the courts to compel such application. So, also, where the devise is to a trustee for the benefit of such a society, the same presumption arises as to the application of the trust fund, and the same power of the court to compel it or to restrain a misuse of the fund exists. In both cases the express wish of the testator is capable of enforcement and should be enforced. In *Seda v. Huble*, 75 Iowa, 429, 39 N. W. 685, 9 Am. St. Rep. 495, the testator provided as follows: "I hereby give, devise, and bequeath to Franz Sevcik and Fred Huble, in trust for the benefit of the Catholic Church on my farm in Tama county, the sum of eight hundred dollars, and hereby direct that they or their successors shall invest said money safely for the benefit of said church, and that service be held in said church for my soul yearly." The bequest was attacked on the ground, among others, that it was void because not for a charitable use. The court held that the "church, or those who worship in the church edifice, are entitled to the benefits of the bequest." The court said, as to the last clause of the item, that the bequest is not based on the condition that services be held for the soul of the testator, nor was such the testa-



tor's intention. Said the court: "To our minds the bequest is so clearly expressed, the trust so certainly established, and the beneficiary so clearly indicated, that it is unnecessary to support the foregoing view by a citation of authorities to any greater extent than has been done." *Hanson et al. v. Little Sisters of the Poor et al.*, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 298, was the case of a trust to collect the incomes, etc., and, after paying taxes, etc., "to divide the net income thereof equally between 'The Little Sisters of the Poor' and 'The Vestry of St. Mary's Church,'" Hampden, Baltimore county. The testator also declared that it was his express desire that the money so received by "The Vestry of St. Mary's Church" should be applied to maintain the parish school connected with said church. It was shown at the trial that by the general canons of the Protestant Episcopal Church the parochial school, as well as the Sunday school, was an integral part of the church organization. The court said: "It is obvious, therefore, there can be no foundation in fact for the contention that the testator directed the vestry to execute a trust not germane to the object for which it was incorporated." In this case the money was to be paid to—that is, for the benefit of—the corporation named, with a request that the money be used for the parish school. In the present case the beneficiary named is the society, with request that the money be used to equip a hospital. In *Cheatham v. Nashville Trust Co.* (Tenn. Ch. App.) 57 S. W. 202, the devise was in trust "for the use and benefit of the Old Women's Home of Nashville, Tenn." It was shown that the home was an incorporated charitable institution. The court said: "The subject of the trust and its object are not uncertain. We have a definite trustee, and a definite beneficiary; \* \* \* and the beneficiary being purely a charitable institution, with its purposes defined by its charter, the devise is to a legal trustee in trust for a legal charitable corporation, to aid it in carrying out its chartered benevolent aims."

The question was fully considered in *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397, where by deed Russell conveyed to one Horner, in trust "to and for the following uses and purposes, to wit, the said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri." It appeared also by the deed that the object of the grantor was "chiefly for the purpose of founding an institution for the education of youth in St. Louis county, Missouri." There was at the time of the grantor's death no such institution of the name in existence. The court said: "The principal grounds upon which the plaintiffs seek to maintain their bill are that the deeds create a perpetuity, that the uses declared are not charitable, and that, if the uses are charitable, there are no ascertained beneficiaries, and no donee capable of assuming and administering the trust, and

the uses are too indefinite to be specifically executed by a court of chancery. But these positions, as applied to the facts of the case, are inconsistent with the fundamental principles of the law of charitable uses, as established by the decisions of this and other courts exercising the ordinary jurisdiction in equity." Whether or not these cases sustain respondent's position, in its broadest application, we think there is expressed in the will of the testatrix a clear intention that the residue of her estate should be used for a charitable purpose, and that the charitable objects contemplated by her were to aid the society in its charitable work and to equip a hospital connected with the society for the benefit of soldiers who come from the Pacific Coast. Mr. Justice Gray, in *Jackson v. Phillips*, 14 Allen, 556, gave the following definition of a charity as the law regards it, which Mr. Perry says leaves nothing to be desired (2 Perry on Trusts, § 697): "A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." "It is immaterial," said the learned jurist, "whether the purpose is called 'charitable' in the gift itself, if it is so described as to show it is charitable in its nature." The objects of the society in the present case being admittedly charitable, and the intention of the testatrix to create a charitable trust being plainly manifest, the rule as to perpetuities has no application. *Estate of Hinckley*, 58 Cal. 457, at page 485; *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269.

It is advised that the decree be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion the decree is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

142 Cal. 544

WRIGHT v. ASHTON. (S. F. 3,585.)

(Supreme Court of California. June 13, 1904.)

ELECTIONS—CONTESTS—TIE VOTES—EFFECT.

1. Pol. Code, § 1067, provides that if at any election, except that for Governor or Lieutenant Governor, two or more persons receive an equal and the highest number of votes, a special election must be ordered. Code Civ. Proc. § 1111, subd. 1, provides that the right of any person declared elected may be contested, first, on account of misconduct of election officers, and fourth, on account of illegal votes. Section 1112 provides that no irregularity in the proceedings of judges is such misconduct as to avoid an election unless it procures the election of the contestee when he has not received the highest number of legal votes. Section 1114

provides that an election shall not be set aside on account of illegal votes unless a number of illegal votes have been given to the contestee, which, if taken from him, would reduce the number of his legal votes below the number of legal votes given to some other person for the same office. *Held*, that where two persons were found, on an election contest, to have received an equal and the highest number of votes, the contest was properly dismissed.

Van Dyke, J., dissenting.

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Election contest by Joseph O. Wright against Frank Ashton. From a judgment of dismissal, contestant appeals. *Affirmed*.

Bell, York & Bell, for appellant. Raymond Benjamin, for respondent.

ANGELLOTTI, J. This is an election contest involving the office of justice of the peace of Hot Springs township, in Napa county. Upon the canvass of the returns by the board of supervisors, it was determined that contestee, Frank Ashton, had received 101 votes; contestant, Jos. C. Wright, 95 votes; one Wm. T. Simmons, 77 votes; and one I. Wixon, 30 votes; and Ashton was thereupon declared elected. This contest was thereupon instituted; the grounds specified in the statement being that the boards of election in each of the two precincts of the township had been guilty of malconduct, in that they had miscounted the ballots, and that in each of the precincts illegal votes had been given to said Ashton. It was further alleged that the officers of one of the precincts had failed "to keep a list of the residences of each elector." It appears from the record that upon the trial no evidence was offered or received on behalf of either party concerning any illegal votes, or any other ground of contest, other than the ballots cast at the election, which were counted by the court, and the cause was submitted to the court for decision solely upon such recount of the ballots by the court. The court found thereon that there were 265 legal votes cast for said office at said election, of which Ashton received 79, Wright 79, Simmons 77, and Wixon 30. Judgment was thereupon entered that Wright take nothing by the action, that the action be dismissed, and that each party pay his own costs. The contestant appeals from this judgment.

It is not claimed that the trial court erred in any of its rulings relating to the count of the ballots; the only questions presented upon this appeal being as to the proper disposition to be made of a proceeding of this kind when it is found therein that upon a correct count of the legal ballots the person declared elected did not in fact receive more votes than some other candidate for the same office, but did receive as many votes as any other candidate; in other words, when it is found that the person declared elected and some other person or persons received an equal and the highest number of votes.

Appellant's claim in this regard is that the election of contestee should have been annulled, and he bases his claim upon the provisions of section 1112, Code Civ. Proc., which provides as follows, viz.: "No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." It is said that it affirmatively appears here that the mistakes of the election boards in counting the ballots were such as to procure contestee to be declared elected, when he had not received the highest number of legal votes, and that judgment annulling his election should therefore have been given. It is apparent that, if the election officers had properly counted the votes, the contestee could not have been declared elected, for he would not have had a plurality on the face of the returns, and the case would have fallen under the provisions of section 1067, Pol. Code, which provides that "if, at any election, except that for Governor or Lieutenant Governor, two or more persons receive an equal and the highest number of votes, there is no choice, and a special election must be ordered by the proper board or officer." The mistakes of the election officers have therefore resulted in causing to be declared elected one who did not receive a greater number of the legal votes cast for the office than any other person. It does not, however, follow that his right to the office may be successfully contested in this proceeding. Whether or not it can be so contested depends entirely upon the statutory provisions relating to the contests which may be maintained under section 1111 et seq., Code Civ. Proc. Section 1112, Code Civ. Proc., relied on by appellant, is susceptible of the construction contended for by him. In one sense of the words, the respondent did not receive "the highest number of legal votes," for another received as many, and the mistakes of the election officers in the counting procured him to be declared elected. In another sense of the words, however, respondent did receive "the highest number of legal votes," for the highest number cast for any person for said office was 79, which he received, as did also the appellant. Section 1067, Pol. Code.

The statute provides that the right of any person declared elected may be contested, first, on account of the malconduct of election officers, and, fourth, on account of illegal votes. Code Civ. Proc. § 1111, subds. 1, 4. Section 1114, Code Civ. Proc., provides that "nothing in the fourth ground of contest specified in section 1111, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is con-

tested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person." There is apparent no sound reason why the election should be annulled where one of two persons receiving an equal and the highest vote has been procured to be declared elected because of the irregularity or improper conduct in the proceedings of the judges of election, and not be annulled when such result was procured by illegal votes. Yet such would be the result if appellant's construction of section 1112, Code Civ. Proc., in this regard, be correct, for there can be no question as to the proper construction of section 1114, Code Civ. Proc. If the concluding provision of section 1112, Code Civ. Proc., viz., "when he had not received the highest number of legal votes," be read as meaning "when he had not received as many votes as were given to some other person"—a construction supported by section 1067, Pol. Code—the section is brought into harmony with section 1114, Code Civ. Proc., the language of which latter section strongly indicates the intention of the Legislature that an election shall not be set aside for either malconduct on the part of the judges, or illegal votes, where the true result can be, and is, with certainty ascertained by the trial court, unless it appears that another person than the one declared elected has in fact received a higher number of legal votes.

This much has been said in support of the construction already given to these sections by this court, for it is undoubtedly settled by the decisions that, where the question on an election contest is as to whether the person declared elected did in fact receive the highest number of legal votes, the election will not, under our statutory provisions, be annulled unless it appears that another person received a higher vote. The precise question was presented in the case of *Snibley v. Palmtag*, 128 Cal. 283, 60 Pac. 860, where the only ground of contest specified in the statement was malconduct on the part of the boards of election, in that they had improperly counted the votes. Upon a recount the trial court found that there was a tie vote, "said Palmtag and said Snibley having received an equal and the highest number of votes cast for said office," and gave judgment annulling the election. This court, after discussing the statutory provisions, said: "Under these provisions, it is obvious that the judgment annulling the election is unauthorized by the statute or by the facts found. The judgment should have been that the contestant take nothing by the proceeding, and it be dismissed, and the cause is remanded, with directions that the superior court make such modification." In *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71, where the trial court found that each candidate received the same number of

legal votes, a judgment that plaintiff take nothing by his action was affirmed. In *Soto v. Vannoy*, 65 Cal. 285, 3 Pac. 895, it was held that, where it was determined that there was a tie vote, neither party could recover costs. These cases are decisive of the case at bar. The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

SHAW, J. I concur solely because of the previous decisions. Were it an open question, I would be of a different opinion.

VAN DYKE, J. I dissent. A person, to be elected to an office, must receive a plurality or the highest number of votes cast for such office; and where two or more persons receive an equal and the highest number of votes, there is no choice, and a special election to fill such office must be ordered by the proper board or officer. Const. art. 20, § 13; Pol. Code, §§ 1066, 1067; Code Civ. Proc. § 1112. In declaring the contestee elected when he did not receive the highest number of legal votes was such improper conduct on the part of the judges of election as to avoid the election, and whenever this fact appears, either before the canvassing board, or the court upon a contest, it should be so declared. From the facts found by the court in this case, it should have been adjudged that there was no election. This is a special proceeding in which the public is interested as well as the nominal parties, and no judgment therein should be rendered whereby a person found to be not elected is still retained in office. *Snibley v. Palmtag* seems to be the only case which is directly in line with the judgment of the lower court herein. That was a department opinion, and does not appear to be well considered. For instance, it is said therein, referring to the Code provisions, "Under these provisions, it is obvious that the judgment annulling the election is unauthorized by the statute, or by the facts found." On the contrary, section 1125, Code Civ. Proc., says, "But if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same." This clearly recognizes the power of the court, in a case where the facts warrant it, as in this case, to render a judgment annulling the election.

143 Cal. 525

In re CUMMINS' ESTATE.

UNION COLLECTION CO. v. SPENCER et al. (S. F. 3,794.)

(Supreme Court of California. June 11, 1904.)

ESTATES OF DECEDENTS—ALLOWANCE OF CLAIM—ASSIGNMENT—PAYMENT TO ASSIGNEE—INTEREST—RIGHTS OF ATTORNEY.

1. Where, after the allowance of a claim against a decedent's estate, the claimant as-

signed it, giving notice of the assignment to the administrator, the latter had no right to pay it to the assignor.

2. Under Civ. Code, § 1917, providing that interest shall run on an account after the balance is ascertained, a claim against the estate of a decedent for funeral expenses bears interest after its allowance.

3. On an application by the assignee of a claim against the estate of a decedent for the payment thereof, a contention that the assignment was to secure another person, and that the applicant was not the real party in interest, was of no avail to the estate.

4. Pen. Code, § 161, provides that every attorney who buys or is interested in buying any evidence of debt in order to bring an action thereon is guilty of a misdemeanor. *Held* that, where an allowed claim against the estate of a decedent was assigned by the owner to secure an attorney for compensation for his services, the assignment was not illegal.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Administration proceedings on the estate of Patrick Cummins, deceased. From the denial of the Union Collection Company's application for the payment of a claim, it appeals. Reversed.

J. S. Reid, for appellant. Geo. D. Shadburne and W. S. Robinson, for respondent.

McFARLAND, J. J. O. O'Connor, doing business as J. C. O'Connor & Co., presented to the administratrix of the estate of Patrick Cummins, deceased, a claim for \$251 for funeral expenses, and on March 4, 1893, it was allowed by the administratrix, approved by the probate judge, and filed as an approved account against the estate. On February 9, 1900, O'Connor assigned said claim to the Union Collection Company, and notice of the assignment was given to the administratrix. It was shown by oral evidence at the trial that the assignment was made to the collection company to secure the payment to J. S. Reid of moneys due him and to become due him for services as attorney at law for said O'Connor. Reid was also attorney for the collection company. (It appears that O'Connor also made a subsequent assignment of the said claim to one F. A. Beckett; but, as Beckett afterwards assigned the same to the collection company, these two assignments seem to be immaterial.) Subsequently, in the month of June, 1903, the administratrix, notwithstanding her knowledge of the assignment to the collection company, paid to O'Connor the amount of said claim of \$251, and took from the former a receipt therefor. On July 14, 1903, the collection company filed a petition praying for an order directing the payment to it of said claim, with interest from the date of its allowance, March 4, 1893; there then being money in the hands of the administratrix sufficient to pay all demands. This motion was heard on September 3, 1903, at which

time the final account of the administratrix, with the collection company's objections thereto, was also heard. Before that time O'Connor had informed the administratrix that he had inadvertently received the money for the claim, having forgotten that he had assigned it to the collection company, and offered to return her the money upon her giving him a receipt showing that he had repaid it; but she refused to receive the money. In the final account she had credited herself with \$251 as paid to O'Connor. After a hearing the court denied the application of the collection company for the payment of the claim, settled the final account allowing the item of \$251 paid to O'Connor, and entered a judgment settling the account and distributing the estate. The collection company appeals from the order denying its petition for payment of said claim for funeral expenses, from the order overruling its objections to the final account, and from the order and decree settling the account and directing distribution.

There does not seem to have been much reason for this litigation. Apparently all of the parties to the transaction would have had their legal rights, and no one of them would have been aggrieved, if, for instance, the executrix had paid the money to the assignee, or if O'Connor, after he had inadvertently received it, had paid it to his assignee, or if the executrix had received it back from O'Connor and paid it to the assignee. It is true that there is now a little interest on the \$251 involved; but this interest does not seem to have been the cause of the apparent determination of the parties to get into litigation. However, as the case stands, we see no way to avoid a reversal of the orders appealed from. The executrix had no right, after she had been notified of the assignment, to pay the money to O'Connor. She should have paid it to appellant, who is entitled to receive it from her; and in her final account she should not have been credited with the \$251 paid to O'Connor.

Appellant is also entitled to have interest on the said sum of money at 7 per cent. per annum from March 4, 1893, the date of its allowance. If the account was not a "claim" which needed to be presented and allowed, and did not, therefore, rank as a judgment, still by the presentation and allowance the balance was ascertained, and interest commenced at that time, under section 1917 of the Civil Code.

We do not see any merit in the point made by respondent that J. S. Reid is the real party in interest, or that the assignment was illegal under section 161 of the Penal Code, or that the assignment was for security, and appellant and Reid were simply the agents of O'Connor. The assignment passed the title to appellant, and the amount of the indebtedness of O'Connor to Reid was a matter which concerned only O'Connor, Reid, and appellant.

\* 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1042.

There are no other points calling for special notice. The orders appealed from are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

143 Cal. 532

In re WOOD'S ESTATE. (S. F. 2,927.)

WOOD v. FARMERS' EXCHANGE et al.

(Supreme Court of California. June 11, 1904.)

APPEAL—DISMISSAL—FAILURE TO FILE UNDERTAKING—ORDER NOT PREJUDICING APPELLANT.

1. Where a widow, who was administratrix of her husband's estate, appealed from an order denying her motion to set apart to her as widow the whole of the estate, and filed no undertaking on appeal, the appeal must be dismissed, since, if in appellant's individual capacity, it will be dismissed for want of the undertaking, and if in her representative capacity, she was not injured by the order.

Department 2. Appeal from Superior Court, San Benito County; M. T. Doolling, Judge.

Judicial settlement of the estate of L. S. Wood, deceased. Rosa A. Wood, widow and administratrix, filed a motion to have the whole of the estate set apart to her, which was opposed by the Farmers' Exchange and others, and from an order denying the motion she appeals. Appeal dismissed.

A. C. Cunningham, for appellant. Briggs & Hudner, for respondents.

LORIGAN, J. This is a motion to dismiss the appeal. Rosa A. Wood, appellant, is the widow of said L. S. Wood, deceased, and administratrix of his estate. In due course of administration, an inventory of the estate having been filed, said Rosa A. Wood applied to the court to have set apart to her, as widow of the deceased, the whole of the estate, under section 1469 of the Code of Civil Procedure, on the ground that it did not exceed in value \$1,500. This application was opposed by the respondents, creditors of the estate, and denied by the court, and it is from the order of denial that this appeal is taken.

It is somewhat doubtful from the record whether the appeal from said order is prosecuted by the appellant as an individual, or as administratrix of the estate. On the argument of this motion, counsel for appellant claimed that it was taken by her as administratrix. In the view, however, we take of the matter, her particular relation to the appeal is of no moment. Respondents move to dismiss the appeal, in whichever capacity it is taken, on the ground that if it is prosecuted as an individual she has filed no undertaking on appeal, and for that reason her appeal should be dismissed, and if it is taken as administratrix she is not a party aggrieved by the order, because it was in favor of the estate and her as administratrix there-

of, and hence in her representative capacity she has no right to appeal.

The motion must be granted on both grounds. If the appeal is taken individually, as it clearly appears that no undertaking on appeal was ever filed, the motion must necessarily be granted as to the individual appeal. If the appeal is taken in her representative capacity, the respondents are equally entitled to have it dismissed on the ground urged in that behalf. It is apparent that the estate which she represents as administratrix has not been injured by the order of the court denying her application as widow to have the entire estate distributed to her. In fact, the estate has been benefited. It remains intact in her hands as administratrix. It is the duty of an administratrix to preserve the estate for the benefit of the heirs and creditors of the decedent. Her relation, as to these persons, is that of trustee for their benefit, whose duty it is to hold and preserve the estate for them, and it can never be said that either the trustees, or trust estate, is injured by an unsuccessful effort to take the property from the trustee. Nor does the fact that the widow and the administratrix happen to be the same individual affect the question. If a stranger had been administrator of the estate when the widow's application was made and denied, it is obvious that such administrator would have no right to appeal because her application was not granted, and the principle is the same, whether the widow is administratrix or a stranger administrator. In neither case does the order affect the estate. It is neither injured nor aggrieved by it. The order is against the widow and in favor of the estate, and the widow individually is alone aggrieved, and she alone can appeal.

For the reasons given, the motion to dismiss the appeal is granted.

We concur: McFARLAND, J.; HENSHAW, J.

143 Cal. 515

GASQUET v. PECHIN et al. (S. F. 2,843.)\*

(Supreme Court of California. June 11, 1904.)

NOTES—DELIVERY—EVIDENCE—RELEVANCY—SUFFICIENCY—DEPOSITIONS—CORRECTION—HARMLESS ERROR.

1. In an action by a legatee on a note given deceased, evidence held to support a finding that the note was not delivered.

2. In an action by a legatee on a note made to deceased, in which defendant claimed and testified that the note was never delivered, because, though deposited in bank to the credit of deceased, he never consented to such deposit, a receipt given the bank by plaintiff stating that the note was left in its keeping by deceased was properly excluded, there being nothing to show that defendant knew of the receipt.

3. In an action by a legatee on a note given deceased, in which defendant claimed that there was no consideration because the money

\*Rehearing denied July 11, 1904.

for which the note was given was a gift, and also that there was no delivery, defendant's deposition was admitted containing statements that the note was given, from a sentiment of delicacy, to pay what she "had received" from deceased, and that when the note was given she said to deceased that it seemed that she ought to pay what she could "toward this." Plaintiff offered to show that the deposition was corrected by defendant before signing or filing, and that it originally contained the word "owed" instead of "had received," and the word "debt" after the words "toward this." *Held*, that this evidence was competent for the purpose of impeachment.

4. The chief issue on trial being that of delivery, defendant having given testimony tending to show that she regarded herself indebted to deceased, and the evidence at most being merely defendant's opinion, its exclusion was not reversible error.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Elie A. Gasquet against Celina R. Pechin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Stoney & Stoney, for appellant. A. Ruef, for respondents.

SHAW, J. This is an appeal from an order denying the plaintiff's motion for a new trial. The action was upon a promissory note dated October 1, 1894, payable to the order of Horace Gasquet. The payee died January 21, 1896, and the plaintiff has succeeded as sole legatee to the assets of his estate, including the note in question. The answer put in issue the execution of the note, and alleged that it was without consideration. The court found in favor of both these defenses, and these findings are asserted to be unsupported by the evidence.

The evidence discloses that the note was the result of a very unusual and remarkable transaction. The deceased, Horace Gasquet, and his family, and the father and mother of the defendant, Mrs. Pechin, had been very intimate and friendly ever since and previous to said defendant's birth. They were all of French birth, and lived many years as neighbors in Crescent City, Del Norte county, in this state. The deceased, it seems, was a man advanced in years and of considerable means, and had during the latter years of his life taken a deep and kindly interest in the welfare of Mrs. Pechin, and had frequently expressed a desire and intention to give her money to a considerable amount. She had been somewhat reluctant to accept his assistance, but finally consented, and at his request they met for that purpose at the office of her brother, Mr. Carrou, in San Francisco. Mrs. Pechin resided with her mother in San Francisco, and had been for a number of years, and was at the time mentioned, a teacher in the public schools of the city. At the meeting he handed her an order on the French Bank, together with his passbook, the order being blank as to the amount to be paid, and told her to fill the blank left for the amount with such sum as she needed or

wanted, and get the money from the bank. She received the order and passbook, and left the office. After about 20 minutes, during which time she was considering the matter, she returned to the office, where Horace Gasquet and Mr. Carrou had remained, and told Mr. Gasquet that she did not like to accept an order with the amount payable not inserted, and that she thought \$4,500 would be enough. Mr. Gasquet was rather impatient at what he seemed to consider her unnecessary scruples, and said that he wanted to give her any amount she would take, up to the sum on deposit in the bank in his name as shown by the passbook. He handed the order to the brother and requested him to fill in the blank with the sum mentioned by her, which he then did, and returned the order to the defendant. She then said to Mr. Gasquet that she would make him a note for the money. He again became impatient and told her that he did not want any note. She said: "Well, you have been a great many times in very good circumstances and have lost all you have had, and you might get there again, and some day you might be very glad to have a little of this money, and if I can pay it I think I shall do it while you live, and if you die it will be another matter." He said: "Well, if I die it is all right. It is all right anyhow." She said, "Yes, I suppose it is, but it would suit me better." He still objected strongly and lost his temper, and then said that if she insisted on giving a note to do as she pleased, but that he wanted her to understand that he did not want to be bothered with it, and that she should never talk to him of it again. She then wrote the note in his presence, and while she was writing it he said: "Do what you want with it; you are writing it. Do what you please with it; I want nothing to do with that." He would not take the note, and she then handed it to her brother and asked him to go to the San Francisco Savings Union, a savings bank in San Francisco, and get a passbook in the name of Mr. Gasquet, saying that she wanted to put whatever money she was going to pay in that bank in his name. She then left the office. The next day her brother went to the San Francisco Savings Union to open the account in the name of Horace Gasquet, as requested by her, and was told that it could not be done unless Mr. Gasquet would come to the bank and write his signature. The brother then saw Mr. Gasquet and informed him of the matter. Gasquet objected strongly to having anything to do with it, but finally consented to go and give his signature. When they reached the bank they were informed that some money must be deposited in order to open the account. Mr. Gasquet flatly refused to deposit any money, and, upon the cashier saying that a dollar would do for the opening of the account, the brother himself advanced that sum, and Mr. Gasquet wrote his signature. The brother then handed the note to the cashier who put it in an envelope

indorsed "Note of Mrs. Pechin," and placed it in a tin box in the bank, where it remained until after the death of Mr. Gasquet. There is no direct evidence that Mr. Gasquet ever agreed that the bank should hold the note for him. He said nothing whatever during the transaction at the bank, except by way of objection, protest, and refusal to have anything to do with the plan. The note was not mentioned by either of the persons present. The only act he did to manifest consent to any part of the affair was to give his signature so that deposits could be made in his name. When the brother would begin to talk about the matter, he would protest and say that he wanted nothing to do with it. A few weeks afterward Mrs. Pechin discovered that she needed \$500 more, and wrote to Gasquet stating that her first estimate was not sufficient by that amount, and asking for an additional \$500. He sent her a check for the \$500, inclosed in an envelope, without any letter or other explanation. She made a note for the \$500, payable to his order, and deposited it with the San Francisco Savings Union along with the first note. Afterwards, during his life, she made payments of several amounts at different times, by depositing the sums to his account as thus opened. On making each payment she wrote to him informing him of the fact, but he never at any time answered any of these letters. She saw him again before his death, but he never mentioned or referred to the matter in any way. Her testimony in regard to her intention is somewhat inconsistent. From her actions and words it would be inferred that she was unwilling to accept the money as a gift, and insisted on taking it as a loan. But upon the direct question being put to her, she testified: "I accepted it as a gift from the very beginning, and I went off, as I told you, and that was a gift; and when I came back I concluded that was not a very good way to do, and then I had the amount stated on the order, and then I stated, 'Now I shall give a note.'" Gasquet did not while he lived draw any of the money thus deposited in his name, nor by any positive act recognize or signify his acceptance of the deposit for his benefit.

It is urged on behalf of appellant that there must be an acceptance in order to constitute a legal gift, and that when Mrs. Pechin took the money, at the same time insisting on making a note and refusing to accept it as a gift, it thereby necessarily became a loan, and constituted a sufficient consideration for the note. There are many cases of gifts of real estate, or other classes of property, where the transfer is made by means of a conveyance, or where the delivery of possession of the thing given is not immediate, in which it is held that an unequivocal acceptance of the conveyance, either expressed or implied, or a consent to the method of delivery by which the gift is manifested or effected, is necessary to pass the title to the subject of the gift. There are also cases

holding that, where a gift is by means of a check or order on a bank, it is revocable at any time before actual payment by the bank, either by the direct act of the donor or by his death. None of these cases are precisely applicable to the case at bar. Here the order was duly paid by the bank, and there was no revocation made or intended. Unquestionably the title to the money passed to the defendant. The real question is whether from the conduct of the parties it must, or must not, necessarily be considered as a loan. We are cited to no authority upon the exact question. Where one party accepts the money offered as a gift, but declares an intention to repay it, or so much as she can repay, during the life of the donor, and endeavors to thrust upon the other a note for the amount, which the other not only refuses to take, but with equal persistence refuses to consider the transfer otherwise than as a gift, it is difficult to say what should be the precise legal character of the transaction. We do not feel disposed to decide this question, inasmuch as we think the finding that the note was not delivered is sustained by the evidence, and is sufficient to justify the judgment.

The deceased refused to take the note from Mrs. Pechin. She tried to evade the effect of this refusal by delivering the note to her brother to be left in the bank, where she could make payments by deposits, in the name of the deceased, to be credited on the note. If there was conduct on his part which must necessarily be construed as an acceptance of this arrangement with respect to the note, so that the bank must be considered as the custodian of the note for him, then, manifestly, the note must be considered as delivered to the bank for him, the delivery would be good, and, if there was a sufficient consideration, the note would be valid. But the evidence must be construed, so far as possible, in support of the finding. There was no positive act of the deceased showing an intention to accept the note as his property. He expressly declared his intention to have nothing to do with it. While she was writing it he declared that if she insisted on giving a note she could do as she pleased, but he wanted her to understand that he did not want to be bothered with it, and that he wanted nothing to do with it. This statement might possibly be construed as a consent to the giving of the note to him, but it is not necessarily to be so interpreted. It is at least equally susceptible of the meaning that while he conceded that she might give the note—that is, write it out and sign it—so far as her action with respect to it was concerned, that, on the other hand, he would not accept it or have anything to do with it. The delivery of the note would not be complete without his acceptance, any more than the gift of the money to her would be complete as a gift without her acceptance. We must presume that

the court construed the declaration as a refusal to accept the note, and we think that construction was more in accord with the surrounding circumstances than the contrary would be. There was nothing in his subsequent conduct that was necessarily inconsistent with this declared intention, while there was much that is consistent with it. He consented to give his signature to the bank in order that she might make deposits to his credit. But the evidence does not show that he was cognizant of the delivery of the note to the bank. There is not a word to show that such delivery was called to his attention. And, if the matter had been fully known to him, it is probable, from the plain manner of man he was, that he would not have understood that the possession of the bank with his consent might have the legal effect of constituting a delivery to him so as to make the note binding in the hands of his successors. If so, the intent to accept it would not necessarily be imputed from such consent. The natural construction to be placed on his actions with respect to this bank account is that he was willing, in order to satisfy what he regarded as an overnice delicacy on her part, that an account might be opened, and that she might make such payments to him as she was able to make during his life, and credit the same on a note, or in any other manner she wished, but that he did not intend in any way to recognize the note as a valid obligation belonging to him. The transaction was highly creditable to both parties, and there is nothing in it which makes it necessary for this court to overrule the decision of the court below as to the effect of equivocal evidence, and thereby take away the benefit which the deceased manifestly intended to confer on Mrs. Pechin by giving it a legal effect which he never intended it to have.

Some alleged errors of law remain to be considered. There was no error in excluding the receipt for the note given by the plaintiff to the San Francisco Savings Union after the distribution of the note to him from the estate of Horace Gasquet. The bank was in no sense the agent of the defendant to declare for her that the note had been "left in its keeping by Horace Gasquet during his lifetime," as the receipt declares, and there is nothing to show that the contents of the receipt were known to her. Prior to the trial Mrs. Pechin had given a deposition relating to the case, in which she testified that, at the interview with the deceased at the time he gave her the check or order, she said to him: "You have many times in your life lost money, and it seems to me I ought to give you a note, and I ought to pay what-

ever I can towards this." And that in regard to the subsequent payments she testified thus: "I thought I would do it from a sentiment of delicacy, I suppose, to pay what I had received from Mr. Gasquet, if I could." The plaintiff on the trial offered to show that the deposition had been corrected by her before it was signed or filed, and that in her original testimony, before correcting it, she had added the word "debt" to the part first quoted, so that the last clause would read thus, "And I ought to pay whatever I can towards this debt," and that the last clause of the latter portion of the deposition quoted originally stood thus, "I suppose to pay what I owed if I could." The proper foundation was offered for this testimony, but the court refused to allow it, assigning, as the reason for the ruling, that the witness was bound only by the terms of the deposition as finally corrected before signing. This ruling was erroneous, and the reason given fallacious. If her original statement was as claimed, and was inconsistent with the testimony given on the trial on a material point, it could be proven for the purposes of impeachment, regardless of the occasion upon which the original statement was made, provided, of course, that it was not privileged. But while the ruling was incorrect, we do not think that it could have caused substantial injury, such as to require a reversal of the order. At most, it could only go to show that at the time she gave the deposition she considered that she owed a debt to the deceased. She appears to have been of the same mind during portions of the trial, and, in any event, it was a mere matter of opinion on her part. The testimony offered might have had some slight effect on the question of the consideration of the note, a question which we have not assumed to decide, and which was not necessary to support the judgment for the defendant. It has no bearing on the question of the delivery of the note, which is the point on which the case depends. There is no doubt that she intended that it should be legally delivered, and that was fully shown by her testimony, so that the admissions in question would not aid the plaintiff as to her intention. The question as to sufficiency of the delivery depended solely upon the intention of the deceased to accept it, and these admissions made by her long afterward could have no weight whatever upon that subject. There are no other questions that require discussion.

The order denying the new trial is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.



FLANAGAN ESTATE v. GREAT CENT.  
LAND CO. et al.

(Supreme Court of Oregon. July 11, 1904.)

STRICT FORECLOSURE—VENDOR'S LIEN—CONTRACT—CONSTRUCTION—DEED—ESCROW—EQUITY JURISDICTION—STATUTE—CONVERSION—TIME FOR PAYMENT—"REASONABLE TIME"—DECREE—MODIFICATION ON APPEAL.

1. A contract for the sale of land provided that the vendee should pay a portion of the consideration on the date of the contract, and within 10 days thereafter deposit another portion to the credit of the vendors, and "within one year thereafter" make a second deposit. It further provided that the last payment on the purchase price should be made within two years from the date of the contract. *Held*, that the second deposit was due to be made one year from the date of the contract, not one year and ten days thereafter.

2. A deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event on which it was intended to be delivered to the grantee designated, where there is no incapacity on the part of the grantors.

3. Plaintiff's vendors, as sole heirs of certain real property, entered into a written contract for the sale thereof to defendant, the consideration to be paid in several installments at times provided in the contract. The contract provided that, when a certain sum had been paid, the vendors would execute a deed to be delivered to a trustee in escrow until the whole amount should be paid, which was done, but subsequently, and prior to another payment on the purchase price becoming due, the vendors incorporated the plaintiff corporation and conveyed the premises in question to it, but subject to the contract of sale with defendant. *Held*, that the mere fact that the plaintiff corporation placed in escrow no deed executed by it, to be delivered on like conditions as the deed of defendant's vendors, was not a breach of the contract, so as to defeat a strict foreclosure of the contract for failure to make a payment on the purchase price as provided therein.

4. Where a strict foreclosure of a contract for the sale of land is sought for breach of conditions as to payment of purchase price, no forfeiture is involved, though the vendee has paid a material part of the consideration; and hence equity has jurisdiction.

5. B. & O. Comp. § 423, providing that the foreclosure of a mortgage may be ordered and the property sold, subject to be redeemed, as under execution, does not cut off the remedy of strict foreclosure of a vendor's lien as applied to the sale of land.

6. By a contract for the sale of land an equitable conversion takes place, the vendee being deemed the owner of the land in equity, and the vendor to have a lien thereon for the purchase money, such relations being recognized only in equity.

7. Where an equitable conversion takes place, as by a contract for the sale of land, under which the vendee, in equity, is deemed the owner of the land, and the vendor to have a lien thereon, the vendor may invoke equitable cognizance by foreclosure to cut off or bar the vendee's interest, it being an equity of redemption, on the supposition that that is done which ought to be done.

8. The remedy of strict foreclosure being a harsh one, courts of equity will decree it only under peculiar and special circumstances.

9. Where the holder of a contract for the sale of land goes into equity, seeking a strict foreclosure of a lien for the unpaid portion of the purchase price, he must allow defendant a reasonable time in which to make payments.

10. What will be a reasonable time in which defendant, in a strict foreclosure proceeding, should have to make payments of the unpaid portion of the purchase price under a contract for the sale of land, rests mainly in the sound discretion of the court, time being allowed in proportion to the size of the debt.

11. Where land was sold under contract expressly showing the intentment of the parties that the agreement should cease to be obligatory on the vendors when the vendee made default in payment of the purchase price, and, of the stipulated consideration of \$50,000, \$13,250 had been paid when a default occurred, leaving a balance due, after deducting interest, amounting to \$41,160, a strict foreclosure is not inequitable.

12. A decree of strict foreclosure of a vendor's lien under a contract for the sale of land, requiring the vendee to pay the balance due on the purchase price at a date when part of the consideration had not yet become due, or suffer foreclosure, is inequitable.

13. Where, in a proceeding to enforce a vendor's lien by strict foreclosure under contract for the sale of land on the purchase price of which there is a balance due of \$41,160 of the total consideration of \$50,000, and the trial court decreed that the vendee should pay the balance of the consideration at a date when part of it had not yet become due, or be foreclosed, the Supreme Court, on appeal, will modify the decree, by allowing six months from the date of entry of its decree in which to make the payment, in affirming the decree of strict foreclosure.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Suit by the Flanagan Estate, a corporation, against the Great Central Land Company and another. From a decree for plaintiff, the land company appeals. Modified.

On July 25, 1902, Florence Sheridan and others, being the sole heirs at law of Patrick Flanagan, deceased, gave to one H. Sengstacken the following agreement in writing: "For value each for him or herself agree that they will convey to H. Sengstacken all of the interest which I have in and to the real property owned by my father P. Flanagan at the time of his death on what is known as Pony Slough and known as the Pony Slough tract and including the land known as Centerville and tide land abutting owned by said estate and the whole including about six hundred acres, provided that the said Sengstacken shall pay to us this day the sum of One Thousand (\$1,000.00) Dollars, and shall within ten (10) days thereafter deposit 25% of (\$49,000.00) Forty nine Thousand Dollars, in the Flanagan & Bennett Bank to our credit and subject to our order and shall within one year thereafter deposit in said bank fifty per cent. of said Forty nine Thousand (\$49,000.00) Dollars with interest thereon at the rate of 6% per annum, and shall within two years from this date also pay the remaining 25 per cent. of said forty-nine thousand (\$49,000.00) Dollars with interest thereon at the rate aforesaid. Upon the first 25 per cent. of the \$49,000.00 being deposited as aforesaid each for himself or herself agree to make, execute, acknowledge and deliver to Flanagan & Ben-

nett Bank a deed of all of his or her interest to the real property already referred to in which deed Henry Sengstacken or to whom he assigns this contract on the back hereof shall be the grantee and said bank shall hold the deed in escrow until the purchase price and interest aforesaid shall have been fully paid, or until default be made in any payment, and all payments, except the one thousand (\$1,000.00) Dollars shall be made to said bank for the grantors aforesaid, the One Thousand (1,000.00) Dollars payment to be made to E. G. Flanagan for the grantors aforesaid. If any default be made in any payment the Bank shall immediately return all deeds to the grantors it being understood by the Bank that time is of the very essence of the contract. All conveyances shall contain covenants of warranty. In case of default in any payment all previous payments are hereby declared forfeited to the grantors aforesaid. The grantors also agree that his or her wife or husband shall each for him or herself join in the conveyance aforesaid. The purchase price is Fifty Thousand (\$50,000.00) Dollars, and the one thousand dollars aforesaid shall form a part of the purchase price after the first 25% payment is made, but prior to that time, it shall be considered as a consideration for the option only. Time is especially and peculiarly made the essence of this contract and no verbal extension of time shall in any way be considered or affect this contract in any ways, and it is expected and understood that in case of any default of any payment all previous payments shall be forfeited to and retained by the grantors and in such even they intend to convey the land forthwith to another, and they shall not be required to bring any suit to declare the forfeiture." Sengstacken paid the \$1,000 on the day of the execution of the agreement. On August 2, 1902, he assigned and set over to the defendant, the Great Central Land Company, a corporation, all his interest in the agreement, which company has since continued to be the owner and holder thereof. Later, the company paid to the Flanagan & Bennett Bank, to the credit and subject to the order of the vendors in the agreement, 25 per cent. of the remaining \$49,000, being \$12,250, whereupon, on August 20, 1902, the vendors executed, in accordance with the terms of their undertaking, a deed to the land company for the premises designated, and delivered the same to the Flanagan & Bennett Bank, to be delivered to said company when the stipulated payments of that which remained due of the purchase price were made. The plaintiff, the Flanagan Estate, was subsequently duly incorporated and organized by the vendors, who became and were the owners of the entire stock thereof, and on September 30th they conveyed the premises in question to the corporation, but subject to the contract of sale or agreement above set forth, and the conveyance to the Great

Central Land Company, evidenced by the deed deposited in escrow with the Flanagan & Bennett Bank, and transferred and set over unto it all their right, title, and interest in and to the contract. The land company having failed to make payment of the additional 50 per cent. of the \$49,000 on or prior to the 25th day of July, 1903, the plaintiff, at 12 o'clock p. m. of that day, by notice to the land company, declared the contract forfeited, and demanded of the Flanagan & Bennett Bank a return of the deed held by it in escrow, the demand being at once complied with. This suit was instituted to obtain a strict foreclosure of the contract of sale or agreement. Two defenses were interposed: (1) That defendant, the Great Central Land Company, was entitled until August 4, 1903, to make the second payment, but was precluded therefrom by plaintiff's previous declaration of forfeiture and withdrawal of the escrow, contrary to the stipulations of the contract; and (2) that the vendors have since the execution of the contract conveyed all their interest in the premises to the plaintiff, which company has failed and neglected to execute and deposit with the Flanagan & Bennett Bank a deed conveying the same to the land company. The trial court decreed a strict foreclosure, and the defendant, the Great Central Land Company, appeals.

E. B. Seabrook, for appellant. J. W. Bennett, for respondent.

**WOLVERTON, J. (after stating the facts).** The first contention in logical order to be noticed is that the forfeiture was prematurely declared, it being insisted by counsel for the defendant land company that the third payment of 50 per cent. of the \$49,000 remaining of the purchase price after the payment of the \$1,000 was not then due and payable. The position depends upon the proper interpretation of the contract, the plaintiff contending that the payment in question fell due July 25, 1903. The agreement or contract, as will be noticed, provides that Sengstacken shall pay on the day which it bears date the sum of \$1,000, "and shall within ten (10) days thereafter deposit 25% of (\$49,000.00) Forty nine Thousand Dollars, in the Flanagan & Bennett Bank to our credit and subject to our order and shall within one year thereafter deposit in said bank fifty per cent. of said Forty nine Thousand (\$49,000.00) Dollars with interest thereon at the rate of 6% per annum." The inquiry centers about the employment of the word "thereafter," where found the second time in the excerpt. Does it bear relation to the date of the contract and that of the payment of the \$1,000, or to the date of the deposit of the 25 per cent. of the balance of the purchase price designated? By pursuing the contract further, it will be found that the stipulation touching the last payment is that it shall be made two years after its date, so that all payments

save this one are unmistakably fixed with reference to the date of the execution of the contract, and it is highly improbable that the payment in question should have been fixed with reference to some other date. Indeed, a critical reading of the conditions does not seem to us to lead to such a result, and we are firmly of the opinion that the contention is without merit.

It is next insisted that the deed by the Flanagan heirs, the vendors in the contract, to plaintiff carried the title of the premises to it, so as to defeat the purposes of the escrow, which is tantamount to, or is in itself, a breach of the contract on their part, and for that reason plaintiff cannot insist upon the remedy sought, the plaintiff not having placed in escrow a deed executed by it to the land company to be delivered upon like conditions as the former. The rule seems to be well established that a deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event upon which it was intended to be delivered to the grantee designated, except in certain cases arising through incapacity of the grantors, where by fiction of law it is allowed to take effect from the first delivery. 1 Devlin, Deeds (2d Ed.) § 328; Prutsman and Others v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; Andrews v. Farnham, 29 Minn. 246, 13 N. W. 161; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315. An inspection of the provisions of the deed to the Flanagan Estate will disclose, however, that it was not the purpose of the Flanagan heirs thereby to supersede the escrow, or to defeat the title that was intended to be conveyed by the latter instrument at the happening of the events upon which it was to become operative as a conveyance. By express condition the deed was made subject to the contract, and to the conveyance to the land company evidenced by the escrow, which we are impressed was effective to subordinate any title that may have passed thereby to the title that would have been acquired through the escrow if the conditions had come to pass upon which it was so placed. The fact that the plaintiff knew of the escrow, and of the terms and conditions upon which it was to become operative, would not alone have been effective to subordinate its title to that which would have ripened by the escrow taking effect as a deed, but it would be held, upon principles of equity, to have acquired the legal title in trust for the defendant land company. This, however, would not obviate the objection of the defendant, because it was the purpose of having the deed deposited in escrow to avoid the possibility of trust relations thus arising, and the necessity of requiring their enforcement so as to obtain the legal title. We think, however, as indicated above, that the conditions of the deed to the Flanagan Estate of themselves subordinated its title to

that which would have accrued to the land company through the escrow, had the conditions upon which it was so placed come to pass; hence we conclude that the second objection is not well asserted.

The next objection pertains to the relief sought, it being insisted that the court ought not to decree a strict foreclosure under the conditions prevailing. A forfeiture is not insisted upon here, and, if it were, equity would not enforce it. While it might refuse in many instances to interfere for the relief of an obligor against forfeiture for breach of an obligation, it will never interpose to declare a forfeiture, that being a matter, if insisted upon, entirely for the law side of the court. The plaintiff, by the act of instituting a suit for a strict foreclosure, recognizes the agreement as still in force and presently subsisting, for its purpose is to get rid of the equity of the land company by obtaining a decree barring it forever. The plaintiff thereby admits that the land company has an equity in the premises which plaintiff's predecessors by the terms of the contract agreed to convey, but submits that the company should be foreclosed thereof by reason of not having fulfilled the stipulations therein contained upon its part. It was once a mooted question whether strict foreclosure could be at all maintained in this state, in view of the provisions of our statute with relation to the foreclosure of liens (B. & C. Comp. § 423), but it has been settled in favor of the remedy, as applied to contracts for the sale of land, in Savings Co. v. Mackenzie, 33 Or. 209, 52 Pac. 1046, where the lien thereby acquired is differentiated from the lien acquired for the security of some debt, which latter is alone declared to be within the intendment of the statute. By the contract of sale an equitable conversion takes place, the vendee being deemed the owner of the land in equity, and the vendor to have a lien thereon for the purchase money, but at law these relations are not recognized. The lien suggested is known in the books as a "vendor's lien," but does not exist in this state after title has passed. Frame v. Sliter, 20 Or. 121, 45 Pac. 290, 34 L. R. A. 690, 54 Am. St. Rep. 781. Its only existence, therefore, is upon the idea, which is nearly if not quite a fiction, that the title has passed when it has not, and that the vendor retains a lien upon the land which has passed to the vendee in equitable contemplation, but has not in law or in reality, the prime fact being that the legal title is reserved pending compliance on the part of the vendee with the conditions upon which it is to be conveyed. "And the so-called 'lien,'" as said by Mr. Justice Bean in Savings Co. v. Mackenzie, supra, "is simply the vendor's right to enforce his claim for the purchase money against or out of the vendor's equitable estate"—not his legal estate, for he has none. The conversion spoken of entails equitable remedies, hence the vendor may invoke eq-

uitable cognizance by foreclosure to cut off or bar the vendee's interest, it being an equity of redemption, on the supposition that that is done which ought to be done. This much being settled, it does not follow, however, that the court will always declare a strict foreclosure of the contract. It may also decree a foreclosure by a sale of the land in the ordinary way, although the title has not passed from the vendor, dependent upon the exigencies and equities of the case. *Savings Co. v. Mackenzie*, supra; *Vail v. Drexel*, 9 Ill. App. 439. Mr. Story says, "The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached" (2 Story, Eq. Jur. [10th Ed.] § 1217), and this in connection with his discussion of the nature of the vendor's rights and remedies in a case like the present. "In this country, as a general rule," says Mr. Justice Berry in *Wilder v. Haughey*, 21 Minn. 101, 103, "a sale is almost universally regarded as the just and appropriate remedy." See, also, *Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465. And, speaking relative to the conditions under which a strict foreclosure would be proper, Mr. Justice Norval, in *Harrington v. Birdsall*, 38 Neb. 176, 186, 56 N. W. 964, says: "The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated." And this court has given utterance to a similar view in *Slevens v. Brown*, 34 Or. 454, 56 Pac. 171, 45 L. R. A. 642, which is especially applicable to the case at bar, wherein Mr. Justice Moore says: "The justice of the rule, announced in England and followed in Wisconsin, may well be doubted, and particularly so when the vendor has received a large portion of the purchase money, in which case equity would seem to demand that the premises be sold to satisfy the balance due on the con-

tract, upon the payment of which the vendee should be entitled to the remainder of the money derived from such sale." Thus we find that strict foreclosure is the exception, not the rule, but, if required by the equities of the case, the court will not hesitate to enforce it. Of the stipulated consideration of \$50,000, \$13,250 has been paid. The balance, if interest for two years be added to it at 6 per cent. per annum, would amount to \$41,160. Deducting this from the original, we have \$8,840, a considerable sum, as the measure of the defendant land company's equity of redemption, if the value of the land remains the same to this time as the estimate the parties put upon it when the agreement was entered into. Assuming that such is the case, there are still other considerations to be taken into account in determining whether there should be a strict foreclosure. It was the intentment of the parties that the agreement should cease to be obligatory upon the vendors when the vendee made default in payment, and at law the stipulation could have been insisted upon. But plaintiff, having gone into equity, must at least do equity, else the court would not grant any relief. Having admitted that defendant was not yet precluded from making payment and acquiring title to the land, the subject of the contract, plaintiff must allow a reasonable time in which to make the payment, otherwise the foreclosure would be tantamount to a declaration of forfeiture, which, as we have seen, equity will not entertain affirmatively. As to what time is reasonable, there appears to be no positive rule, it resting mainly within the sound discretion of the court. Under the English chancery it was six months, and if the debt was large another six months was usually granted. 2 Jones, Mortgages (2d Ed.) §§ 1563, 1565; *Vail v. Drexel*, supra. While, however, the defendant is conceded still to have an equity in the premises, it has not sought to reinstate itself by tendering or offering to make the overdue payment, but stands upon technical defenses, though insisting upon the broadest equities. By the agreement, defendant is not obligated to pay anything more if it does not desire to do so, and no deficiency decree can be obtained against it. There is, therefore, not that reciprocity of remedies that ordinarily exists in foreclosure cases, and it is not in as good a position to insist upon the largest latitude possible for its redemption as a debtor resting his equity of redemption upon the legal title. We conclude, therefore, that it would not be inequitable to grant a strict foreclosure in the present case. The decree complained of, however, required the payment by the defendant land company of the full stipulated consideration at a date when part of it had not yet become due, or be foreclosed. This, we are impressed, did not give time enough for that purpose, and, considering the large amount involved, another six months will be allowed from the date of the entry of

the decree here in which to make such payment. In all other respects the decree will be the same as rendered by the trial court.

Modified.

**UNITED STATES v. 150 HEAD OF CATTLE AND 52 CALVES.**

(Supreme Court of Arizona. July 9, 1889.)\*

**CUSTOMS—SEIZURE OF GOODS—FORFEITURE—COSTS—PROCEDURE.**

1. Under Act June 22, 1874, c. 391, § 16 (18 Stat. 188, 189), providing that, in actions to enforce a forfeiture of goods, no fine or forfeiture shall be imposed unless an intent to defraud shall be found, no judgment for costs can be rendered against the property or the claimant unless payment or forfeiture is had.

2. In trial of cases of the seizure of goods for violation of the custom laws, the proceeding is at common law.

Appeal from District Court, First District; before Justice Barnes.

Proceedings by the United States to enforce forfeiture of certain cattle imported. From a judgment for the government for costs, an appeal was taken. Reversed.

Jeffords & Franklin, for appellant. O. T. Rouse, U. S. Dist. Atty.

**PER CURIAM.** The United States marshal seized 150 head of cattle and 52 calves. The finding of the court was that 50 head of the cattle were imported from the republic of Mexico and were dutiable, and that said 50 head of cattle were mixed with others. The court further found that the claimant, H. K. Hildebrandt, did not import the said 50 head of cattle with intent to violate the customs law of the United States.

The supplement to the Revised Statutes of the United States provides that in all actions to enforce a forfeiture of goods, wares, or merchandise, where an issue of fact shall be found, the court shall find, as a distinct and separate finding, whether the alleged acts were done with an actual intent to defraud the United States, and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed. Act June 22, 1874, c. 391, § 16, 18 Stat. 188, 189, repealed Supp. Rev. St. U. S. 1891, p. 755, § 29. The claimant moved to retax the costs in this action, as the same appears in the memorandum of costs, and to strike out from said memorandum of the costs the sum of \$878.62, charged as marshal's fees, filed herein by plaintiff, on the ground that no part of said costs was made by claimant, and therefore they are not chargeable to him, and on the further ground that only \$98.12 thereof are court costs. The motion was denied by the court, which we conceive to be error. The Supreme Court of the United States has held that, in cases of

\*Opinion not previously available.

seizure of goods for violation of the customs laws, the proceeding is at common law. In the trials of all cases of seizures on land, the court sits as a court of common law. The *Sarah*, 8 Wheat. 391, 5 L. Ed. 644; *Morris v. United States*, 8 Wall. 507, 19 L. Ed. 481. In actions at law it is a general rule that the losing parties are to pay the costs. *Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

We think that only in cases of a payment or forfeiture is the claimant or property seized liable for costs of same. Only costs of the trial should have been taxed against the appellant. The motion of claimant to retax costs should have been allowed.

The judgment for costs is hereby reversed so as to retax the costs.

**Ex parte BROWN et al.**

(Supreme Court of Arizona. Nov. 7, 1892.)\*

**CONTEMPT—REVIEW.**

1. The judgment of a district court that a contempt had been committed was not reviewable by the Supreme Court where the district court had jurisdiction of the parties and subject-matter.

Habeas corpus by R. C. and G. W. Brown to obtain release from custody on a conviction of contempt. Prisoners remanded.

H. B. Lighthizer and C. F. Ainsworth, for petitioners. Joseph Campbell, for the sheriff.

**GOODING, C. J.** The record in this case discloses that the defendants were cited regularly to appear in the district court to answer a charge of contempt of court, preferred in writing, and that they did appear and answered, and that there were facts presented to that court upon which that court adjudged that a contempt had been committed.

I conclude that its decision upon that issue is one that this court cannot review, and I think the authorities are abundant and overwhelming on this proposition. If the law were otherwise, there would be no such thing as preserving order in courts, or preventing a collision between courts. I think the proposition is well settled, and not open to doubt or dispute. On the facts set up in the record, as shown to this court by the record produced herein, that court found that it had jurisdiction of the parties and the subject-matter, and found facts showing that it had jurisdiction. It having jurisdiction of the subject-matter and of the parties, this court has no power or authority to interfere with the judgment of that court in that matter.

I must therefore remand the prisoners into the custody of the sheriff of Pima county.

¶ 1. See Contempt, vol. 10, Cent. Dig. § 212.

\*Opinion not previously available.

**RYDER v. LEACH et al.**

(Supreme Court of Arizona. June 18, 1889).\*

**APPEAL—QUESTION OF FACT—FINDINGS OF TRIAL COURT—CONCLUSIVENESS—NEW TRIALS—GROUNDS.**

1. A new trial will not be granted to enable a party to obtain additional evidence which is not newly discovered, and which is merely cumulative.
2. The Supreme Court will not disturb a judgment on pure questions of fact, unless clearly erroneous.
3. The judgment of the trial court, based on conflicting evidence, will not be disturbed on appeal.

Appeal from District Court, First District; before Justice William H. Barnes.

Action by Emmon P. Ryder against Charles W. Leach and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Haynes & Mitchell, for appellant. Herring & Herring and Ben Goodrich, for appellees.

**PORTER, J.** Defendants had applied for a United States patent for the mineral claim known as the "Boss Mine," situated in Tombstone mining district, Cochise county. Pending the application for patent, plaintiff filed an adverse claim in the United States land office for a portion of the ground described in said application, and, in support of such adverse claim, brought this action in the district court of Cochise county. Plaintiff alleges that he is the owner of and in possession of a certain piece of ground, which he describes as the "Little Venture Mine," and alleges that the same was located by his grantors on the 2d day of January, 1885. The action was brought by plaintiff to quiet title to the aforesaid premises.

The Boss mine was located in June, 1878, by the grantors of defendants. No question was raised by plaintiff of the fact of a continued compliance by defendants and their grantors from the time of the location of the Boss mine to the commencement of this action with the laws of Congress in relation to the annual expenditure of \$100 upon said mine in labor and improvements. The initial monument of the Boss mine is fixed in the location notice of said mine at the north end center of the Tribute mine; thence a line runs 41 deg. east to the western boundary line of the Sulphuret mine. No question is raised as to the fact that the initial monument of the Boss mine is now at the point at the north end center of the Tribute mine, exactly where the original location notice fixes it. Neither is any question raised that the line running north from this point terminates in the western boundary line of the Sulphuret mine; but the contention before the court below by the plaintiff was that the point in the western boundary line of the Sulphuret mine where the line terminates

which is described as running "north, forty-one degrees east," from the initial monument of the Boss mine, should be determined by a magnetic course, without any allowance for the magnetic variation, instead of by the true course of the meridian, and thus leave sufficient ground on the westerly side of the Boss mine and adjoining the West Side mine to fulfill the conditions of the Little Venture location. If the line was a true meridian, then 300 feet, or a very little less than that, running west along the line of the Sulphuret, will reach the point where the west side of the northeast extension of the Sulphuret and Sulphuret touch or corner, and where the northwest corner of the Boss should be, if that was the course of the location when made.

The witness White testified that three days after the Boss location he saw a Boss monument at that point. Upton swears that he knew the Boss in 1880, and that he saw a 2x4 stake at that point, with the word "Boss" cut in it, and saw it nearly every day for two or three years. Howe swears that he made the official survey of the West Side mine in 1881, and that he then found a stake at that point marked "Northwest corner Boss," and that this was in a monument  $4\frac{1}{2}$  feet in diameter and 4 feet high. Maps were introduced of the survey of the Sulphuret, showing this monument of the Boss. If the place where this monument was seen by White, Upton, Howe, and others was one of the established corners of the Boss, then the Boss claim covers the ground claimed by plaintiff. On this point the evidence was overwhelming and without contradiction. If that point was a corner, then the line from the initial monument, according to the true meridian, runs within 300 feet of that corner. The line of the magnetic meridian touches the Sulphuret about 358 feet from that corner. The difference between 300 feet and 358 feet is too great to be accounted for by a mistake. If the location had been made by the magnetic meridian, the Boss northwest corner monument would have been located about 58 feet farther east. When the line of the true meridian corresponds so closely to the monuments as to amount to accuracy, it is a practical demonstration that that was the line. When you add to it the idea that north means north, and not the magnetic north, nothing short of overwhelming evidence will overturn the conclusion that the northwest corner Boss, as established by Howe, is the true corner.

Against this, in 1885, Sweazy says he saw a pile of stones along the line of the Sulphuret, and that he got a board with a straight edge, and, starting at the center monument of the Tribute, the initial of the Boss, he sighted by the needle north, 41 deg. east, and that he saw the pile of stones at the point on the line of the Sulphuret where the line he was sighting cuts it. When this pile of stones was placed there, he does not know. No other

\*1. See New Trial, vol. 37, Cent. Dig. § 218.

\*Opinion not previously available.

witnesses ever saw it before that. The Boss claim had been located and monumented seven years before that. This is all the evidence to sustain this view. All the rest is inference, argument, and speculation. The plaintiff asked for 30 days to procure the evidence of the witnesses Gird and Walker by deposition, which was granted. Great indulgence was given to aid the plaintiff. The evidence was not produced. On the motion for new trial he asked that the same be granted, so as to secure the evidence of these witnesses. It was not newly-discovered evidence. At best, it was mere cumulative evidence, and does not come within any of the rules by which new trials are granted to enable a party to produce other evidence. The affidavits, besides, do not show that the evidence would overturn the conclusive evidence in this case. It does not contradict the Boss northwest corner monument. It does not show that the true meridian was not run.

The court did not err in refusing a new trial. There does not appear to be a question of law raised in the case. It was purely a question of fact, and the judgment must be clearly erroneous before we will disturb it. Where there is a conflict of evidence, we will not review the judgment of the trial court. The judgment is affirmed.

BARNES, A. J., and WRIGHT, C. J., concur.

# TERRITORY v. FLORES.

(Supreme Court of Arizona. Sept. 3, 1890.)\*

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS  
—SIGNING—TIME—STATEMENT OF FACTS—  
REQUISITES—TIME FOR MAKING UP.

1. Rev. St. 1887, par. 1739, Pen. Code, provides that a bill of exceptions must be presented to the court for allowance and signature within 10 days after conclusion of trial, unless further time is granted, and paragraph 1744 provides that the court may extend the time. *Held* that, in order to be considered on appeal, the bill must have been presented within the 10 days, unless the time has been extended by order.

2. On appeal the record must affirmatively show a compliance with the statute.

3. Under the express provisions of Rev. St. 1887, par. 1740, Pen. Code, a bill of exceptions in a criminal case must be submitted by the judge to the district attorney before signature.

4. A statement of facts in a criminal case, in order to be considered on appeal, must be made up in the time specified by statute, unless it is extended by order of court.

5. A statement of facts in a criminal case should state that it contains all the facts admitted, and the facts admitted to have been proven, and the evidence of the facts disputed.

Appeal from District Court, Second District.

Ramon Flores was convicted of grand larceny, and he appeals. Affirmed.

P. S. Perley and Henry Steegletz, for appellant. Clark Churchill, Atty. Gen., and Frank Cox, Dist. Atty., for the Territory.

PER CURIAM. The defendant (appellant) was found guilty of grand larceny, and judgment passed accordingly. A motion for a new trial was made, and grounds alleged as follows: "Because the verdict is contrary to the law and the evidence; because the court misdirected the jury as to the law." The motion was overruled.

The first objection raises the familiar proposition of law that, where there is a conflict in the evidence, the appellate court will defer to the conclusion reached by the court below, for the reason that the court below saw the witnesses face to face, took notice of their appearance and demeanor on the stand, and was in better position to weigh the evidence and judge of the credibility of the witnesses than the appellate court, which only knows of the evidence by the cold type. While the action of the defendant (appellant), taking his own statement as true, was not the conduct and action of a shrewd and cautious criminal, the most casual observer has noticed that the conduct of criminals is often marked by an apparent, if not a real, recklessness wholly abnormal. A criminal is in a certain sense and to a certain degree abnormal, and it is not strange that his conduct should be like himself. In this case the defendant's action, upon his own statement, was bold and reckless, on the theory of his guilt. But we are not without observation where criminals have been equally reckless. But we do not deem it the province of this court, in a case of this character, to examine and pass upon the weight of the evidence. We have examined it enough to see that there was evidence sufficient to make it the duty of this court to acquiesce in the conclusion of the jury as to the facts in the court below.

The objection to the instruction of the court presents a fine discussion on the meaning of the word "Inconsistent." In the light of the evidence and of the entire case, we do not think it at all probable that the jury were influenced adversely by the instruction, even if the view taken by his counsel of the meaning of the word should be accepted as the correct view. The argument on this point is very ingenious, but we do not think it necessary to enter into that discussion. We think the instructions as a whole presented fairly the law of the case to the jury.

We have thus far considered the case on its merits, and have taken no notice of the defects in the record that are fatal to the appeal under the decisions of this and other courts with statutes similar to ours. We will now call attention to some of these defects that the bar may become familiar with, and observe what are held to be the essential requirements of the law. There appears in the transcript—not in the record—a paper entitled of the court and cause and beginning

\* 4. See Criminal Law, vol. 15, Cent. Dig. § 2876.

\*Opinion not previously available.

with these words, viz.: "Transcript of shorthand notes of the testimony, etc., taken upon the trial of the above-entitled cause, at \* \* \*," etc. Then follows what purports to be testimony of witnesses in the case. This paper has filing mark "January 10, 1889," probably intended for January 10, 1890. At the bottom of this paper are these words: "Approved this 15th January, 1890," and signed by the judge. The judgment was rendered on the 16th day of November, 1889. Motion for a new trial was made and overruled same day. This "approval" of this paper was then about 55 days after motion for new trial was overruled. To be available, this paper must be either a bill of exceptions or a statement of facts. If a bill of exceptions, it should have been presented to the judge for his allowance and signature within 10 days after the conclusion of the trial, unless further time was granted. Rev. St. Ariz. 1887, par. 1739, Pen. Code. The statute provides (Rev. St. Ariz. 1887, par. 1744, Pen. Code): "The court or judge thereof may by order extend the time for making up, signing, approving, or filing any bill of exceptions in a criminal action." There is no order extending the time, and nothing to show any presentation within the 10 days. Are we to infer, or should the record show, a compliance with the law? Our inference might be a mistake. The record should, in our opinion, show that the requirements of the statute have been complied with. If a mere "approval" of a paper purporting to be testimony of witnesses 55 days after the conclusion of the trial is sufficient, of what use is the statute? Why provide by statute that a thing must be done in 10 days? Why provide that, if more than 10 days is thought necessary, the court or judge may extend the time by an order, if the time may be extended indefinitely without an order? We think the bill must be presented within 10 days, and not afterwards, unless the time has been extended; and this extension must be by order. Any other construction would change the language, and, as we think, the meaning, of the statute. We conclude this paper is not a bill of exceptions. If this paper was intended as a bill of exceptions, and presented to the judge as such, it should have been presented by the judge to the district attorney. Rev. St. Ariz. 1887, par. 1740, Pen. Code.

Is this paper a statement of facts? The provisions of the law for making up a statement of facts are very similar to the provisions for a bill of exceptions. We deem it unnecessary to repeat the provisions. Time is to be extended by order of the court or judge, as in the case of a bill of exceptions. No order is here. If the paper is to be considered as a statement of facts, it should state that it contains all the facts admitted, and the facts admitted to have been proven, and the evidence of the facts disputed. No such statement is contained

therein. We conclude this is not good as a statement of facts.

Without a bill of exceptions and without a statement of facts, upon what basis could we predicate error in the instructions, even if there should appear to be error therein? But we do not think that error does appear, even if the paper should be considered.

The judgment is affirmed.

#### TERRITORY v. SHANKLAND.

(Supreme Court of Arizona. Sept. 29, 1892.)\*

MURDER — SELF-DEFENSE — EVIDENCE — CONTINUANCE — AFFIDAVITS — COUNTER AFFIDAVITS — CHANGE OF VENUE — DISCRETION OF TRIAL COURT—REVIEW.

1. On a prosecution for murder, evidence held to show that the killing was not done in self-defense.

2. Where a motion for a continuance in a criminal case was based on affidavits as to the absence of a witness, and what could be proved by her, and on affidavits tending to show that accused could not go to trial, owing to his ill health, counter affidavits as to his health, and as to what the witness had sworn to on a former trial, were allowable.

3. On a prosecution for murder, where the defense was self-defense, a continuance was asked because of the absence of a witness who would testify as to threats made by deceased and communicated by witness to defendant, and to the fact that deceased was armed; but it was shown that the same threat was communicated by another, and that, at the time of the killing, defendant was not in real or apparent danger. Held, that the denial of the continuance was proper.

4. A motion for a continuance is addressed in the first instance to the discretion of the trial court.

5. Where an entire case is before the Supreme Court on writ of error, it may look into the whole case to determine whether the denial of a change of venue prejudiced defendant.

6. The fact that three peremptory challenges remained to accused when he went to trial may be considered in determining whether a denial of a change of venue prejudiced accused.

7. It is not reversible error to refuse a proper challenge where there remain unexhausted challenges at the time of going to trial.

Appeal from District Court, Cochise County; before Justice Sloan.

Daniel B. Shankland was convicted of murder, and he appeals. Affirmed.

The facts are stated in the opinion.

W. H. Barnes, and J. H. Martin, for appellant. William Herring, Atty. Gen., and Allen R. English, for the Territory.

GOODING, C. J. The evidence in this case is before this court—brought here by the eleventh assignment of error—and has been carefully read and considered.

That the defendant shot and killed the deceased at the time and place alleged in the indictment was clearly proven, and in fact is not disputed on the part of the accused. The only issue going to the merits of this case is well expressed in the brief of the ap-

\* 2. See Criminal Law, vol. 14, Cent. Dig. § 1365.

\*Opinion not previously available.



pellant in these words: "On the trial the issue was whether the defendant shot in self-defense or not. If he did, he was justified. If not, he was guilty of murder." This being the admitted issue, and the only one affecting the merits, we have carefully read all the evidence, to ascertain its force and weight bearing on this particular case. The evidence discloses the fact that deceased, Dr. Willis, had just seated himself in his buggy, when the defendant approached, and, without a word of warning, reached over the dashboard with a gun or a pistol—more accurately speaking—and shot the deceased, inflicting a mortal wound; that while deceased was falling the defendant shot a second time, and, after he had fallen, at least two or three more times at him, and then walked away. No word passed between defendant and deceased. These facts are established by credible and disinterested eyewitnesses. Only two of these five shots took effect. The shooting occurred between 3 and 4 o'clock in the afternoon, and death ensued about 6 o'clock of the same afternoon. There was no evidence tending to show self-defense, except the unsupported evidence of the defendant. He testified to a peculiar look given him by the deceased, and that deceased put his hand to his hip pocket, as if to draw a revolver. No other witness saw the peculiar look, or the reaching for the hip pocket, or any act or fact that tended to show an attempt on the part of the deceased to draw a pistol or make any assault on the defendant. There was no evidence that the deceased had a pistol at the time. None was found on his person or at the place of the homicide. There is not a shadow of evidence that the defendant was in the least danger, except the evidence of the defendant. The deceased had just entered his buggy to drive away when he was approached by the defendant and shot as above set forth. A number of witnesses, too, testified to threats made by the defendant that he would kill the deceased. There was also evidence of threats made by the deceased, communicated to the defendant, and very strong evidence by the defendant himself, often repeated, that the deceased made a move towards his hip pocket, and also of warning by the deceased to defendant not to speak to him again. This warning was, however, some days before the shooting; but the evidence clearly establishes that the defendant sought the deceased, and, without a word passing, put his revolver over the dashboard of the buggy and shot the deceased, giving a mortal wound, and then shot a second time as the deceased was falling out of the buggy, and then three more shots after he had fallen. Immediately after the shooting the defendant was arrested by George Braven, and Braven said to him, "Dan, what in h—l did you do that for?" His reply was, "I have been having trouble with the s— of a b—." No word of "self-

defense" or "attempt on the part of the deceased to get a pistol out of his pocket."

We deem it unnecessary to discuss all the evidence in the case. Counsel concede that, if the defendant did not shoot in self-defense, he was guilty of murder.

The motion for a new trial assigns eleven grounds or reasons therefor. The eleventh reads as follows: "The verdict is contrary to the law and the evidence." The ninth assignment of error is as follows: "The court erred in overruling the motion of defendant for a new trial for reasons stated in the motion." This brings the evidence before us for consideration. We think the evidence establishes the guilt of the defendant beyond a reasonable doubt, and that the killing was deliberate and cold-blooded.

This is the case on its merits. Was, then, the error on the trial prejudicial to the defendant? We shall only consider such errors as are referred to in the appellant's brief.

The defendant filed his motion for a continuance, based on his disability to go on with the trial by reason of ill health, and also on account of the absence of Mrs. James; setting forth what he expected to prove by her, viz., threats made and communicated, and the fact that the now deceased Dr. Willis was armed at the time. In support of this motion he filed his own affidavit and that of his physician. Counter affidavits were allowed as to the health of the defendant, and as to what Mrs. James had sworn on the former trial.

We think the record of the case, as well as the affidavit of the physician who examined him, clearly shows that the defendant was able physically and mentally to pass the ordeal of the trial. The fact that he refused to be examined by a second physician, in connection with the history of the trial, and the affidavit of the one who did examine him, leaves no doubt in the mind of this court that there was no merit in the application for a continuance on this ground. We simply hold that in some cases counter affidavits may be allowed, and this case is one in which they were properly allowed.

As to the evidence of Mrs. James, the defendant testified that threats were made to her, what they were, and that she communicated them to him, and the fact that Willis, the deceased, was armed at the time. But in view of the fact that substantially the same threat was communicated to the defendant by McMahon, and the utter absence of any facts tending to show that the defendant was in the least danger, or in any position that would have caused a reasonable man to believe that he was in danger, at the time the fatal shot was fired, we cannot say that there was such error, if any, as to justify the reversal of this case on account of the refusal to grant a continuance for the presence of Mrs. James. Besides, the affidavit of Mrs. James was not

produced in the hearing of the motion for a new trial.

Another ground insisted upon for a reversal is the refusal of the court to grant a change of venue. The showing in this respect is much stronger than the showing for a continuance. There were a large number of jurors excused for bias, and the affidavits showing excitement and prejudice were sufficiently numerous and of such character as might have caused the court to believe it altogether probable that the verdict might have been influenced thereby, had the evidence in the case left any room for such a conclusion. This motion, like a motion for a continuance, is addressed in the first instance to the discretion of the trial judge. The statute provides (Pen. Code, § 890): "If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection." In a case where it appears that this discretion was abused to the prejudice of the defendant, the court would feel called upon to review the case. We think, however, it is competent for this court to look into the whole case—at least when the entire case is before it by assignment of error—to determine whether the exercise of discretion was wrongful and to the prejudice of the defendant. If the evidence in the case left room for any doubt as to the legal guilt of the defendant, we would be constrained to hold that, in the showing made by the affidavits, the discretion of the court below had not been properly exercised. In the case of *Hyde v. State*, 16 Tex. 459, 67 Am. Dec. 630, when considering a question of wrongful exercise of discretion in refusing a motion for continuance—and we think the language is applicable alike to a refusal to grant a change of venue—the court says: "But in considering the case upon appeal, when the motion for a new trial brings before us a statement of the evidence upon the trial, we do not feel bound to shut our eyes wholly to the facts of the case, in considering whether the judgment ought to be reversed for the refusal of the court to grant a continuance. If upon the trial there had appeared to be cause to apprehend that a continuance was improperly refused, a new trial must have been granted. But if, on the contrary, it very satisfactorily appears that the application for a continuance could not have been well founded in fact, it must afford an additional reason for refusing a new trial, or to reverse the judgment on that ground. We forbear comment upon the evidence. It may suffice to say that several witnesses, who were eyewitnesses of the homicide, had ample means and opportunity of seeing and observing all that passed, and could not be mistaken as to the author of it, testified positively as to the fact, with such circumstantial particularity and just such diversity as to immaterial matters as to show that

there was no collusion; and such perfect unanimity as to the material facts, which were calculated to make a strong, abiding impression upon the memory, as to show that they were not and could not be mistaken. It thus appears that there were other witnesses than those named in the affidavit by whom all the facts and circumstances attending the fatal scene could be abundantly proved; that the witnesses whose testimony was sought could not, if present, have testified to the truth of the fact proposed to be proved by them; and that the affidavit for continuance, therefore, was not entitled to credit. We have thus looked into the evidence upon the motion for a new trial, which necessarily brings it under review, and we advert to it, not as a ground for affirming the judgment of the court refusing a continuance, but as placing it beyond doubt that no injustice could have been done the defendant by refusing his motion, which was rightfully refused on the ground of its want of legal sufficiency." We cite the above as an authority that the court did not err in refusing a continuance, and also to the point that the evidence may be considered in passing on the question when there was reversible error in the refusal to grant a change of venue.

The record shows that there still remained to the defendant three peremptory challenges at the time he accepted the jury and went to trial. While this fact is perhaps not conclusive, it is a fact which this court may consider, in connection with the overwhelming evidence of guilt, in determining whether the discretion exercised by the trial judge was such an abuse of discretion as to call for a reversal in this case, and award a new trial in another county. On a review of the whole case, we do not see how any jury in any county, on the evidence in the case, could have found any other verdict, unless it would be a verdict of guilty of murder, instead of manslaughter.

It is further complained that the court erred in refusing to allow the challenges to the jurors Gibson and Turner. As we have before stated, the defendant had three peremptory challenges at the time of going to trial. If the court had erred as to those jurors, the remedy was in the hands of the defendant.

That it is not reversible error to refuse a proper challenge when there remains unexhausted challenges at the time of going to trial. We cite the following as expressing the better law on this question: *Johnson v. State*, 27 Tex. 758; *State v. Raymond*, 11 Nev. 98; *People v. McGungill*, 41 Cal. 429; *People v. Gatewood*, 20 Cal. 149; *Rosenberg v. Block*, 102 N. Y. 259, 6 N. E. 580.

After a careful consideration of the grounds for a reversal set out in the brief of the appellant, we have reached the conclusion that the judgment below should be affirmed. It is therefore ordered that the judgment below be affirmed.

**BRAYMER v. SEATTLE, R. & S. RY. CO.**  
(Supreme Court of Washington. July 12, 1904.)

**CARRIERS—PASSENGERS—EXTENT OF CONTRACT—BOARDING WRONG CAR—EXPULSION—EVIDENCE—CHARACTER OF CONDUCTOR.**

1. Where a street car company operated some of its cars on a certain line from A. to C., and others only from A. to B., a point intermediate between A. and C., and plaintiff, whose destination was C., boarded a car bound only for B., without asking the conductor whether the car went to C. or not, and there was no system of transfers from cars going only to B. to those going beyond to C., and plaintiff did not ask for any such transfer, even if there had been such a system, there was no contract to carry plaintiff beyond B.

2. A statement by the superintendent of the company, who was on the car, after arriving at B., that he would tell the conductor on the car bound for C. to pick plaintiff up, did not constitute a contract to carry plaintiff to C. without additional fare, at least in the absence of evidence of any custom to so transfer passengers without the payment of additional fare.

3. A further statement by the superintendent, made the next day, that he had intended to tell the conductor to pick plaintiff up, but had forgotten to do so, was no part of the original contract, and showed, at most, no more than an intention to authorize gratuitous carriage of plaintiff to C.

4. The expulsion, without excessive force or inexcusable negligence, of one who presents no evidence of a right to free passage, and who does not pay his fare, affords such a one no cause of action.

5. In an action by a passenger for ejection from a street car, evidence as to the general character and disposition of the conductor who ejected plaintiff was properly excluded, as the only subject for inquiry was the character and disposition of the conductor on the particular occasion.

6. Where a complaint for the ejection of a passenger from a street car was based merely on the breach of the contract of carriage, and did not allege the employment of an incompetent conductor, evidence of the general character and disposition of the conductor who ejected plaintiff was properly excluded.

7. Where a street car bound only for B. was boarded by a passenger for C., who made no inquiry as to the destination of the car, it was immaterial, on the question of his contract of carriage, that the car which he boarded left at about the time that the car for C. ordinarily left.

Appeal from Superior Court, King County; B. B. Albertson, Judge.

Action by A. E. Braymer against the Seattle, Renton & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Tucker & Hyland, for appellant. Peters & Powell, for respondent.

**HADLEY, J.** Appellant sued respondent to recover alleged damages. The complaint avers that appellant, for hire, became a passenger upon respondent's road, paid the fare demanded of him, and rode in one of respondent's cars to a point near Brighton Beach, his destination being Fairview, upon said line of road that at said point near

Brighton Beach the respondent, through its officers and agents, with force and without any cause whatsoever, ejected appellant from respondent's car. He avers that he was thereby greatly humiliated, and was damaged in the sum of \$2,500, for which amount he demands judgment. The answer of respondent denies the material allegations of the complaint, and affirmatively alleges that appellant boarded one of respondent's cars at or near Brighton Beach; that he refused to pay the fare demanded of him by the conductor as necessary to entitle him to ride as a passenger in said car, and upon such refusal he was by said conductor, without unnecessary force or violence, ejected from the car. The cause was tried before the court and a jury. At the conclusion of the plaintiff's testimony the defendant moved for a nonsuit, which was granted, judgment was thereupon entered dismissing the action, and the plaintiff has appealed.

The evidence shows that on Sunday, February 1, 1903, appellant boarded one of respondent's cars at the corner of Second Avenue South and Washington street, in Seattle. It appears that he desired to go to his home, at Fairview, a station on the line of said road outside of the city of Seattle. The conductor demanded his fare, and he paid five cents, the customary amount. He did not inform the conductor that he desired to go to Fairview, and he made no inquiry as to how far that car would go. It also appears by the evidence that the company intended that the car upon which appellant was riding should go no further than Hillman City, which is a station nearer Seattle than Fairview, where appellant desired to go. It appears that appellant did not know that the car would stop at Hillman City, and inasmuch as a car, by schedule, should have left at 4:30 p. m., bound for a point on the line beyond Fairview, he supposed that this car, which left about that time, would go beyond his station. Before the car reached Hillman City, a Mr. Brown, the superintendent of respondent company, boarded it, and directed the motorman of this car to take another to the barn while he (Brown) acted as motorman of the car which carried appellant until it reached Hillman City. Upon reaching the latter place, Brown concluded that he had time to carry a few passengers as far as Brighton Beach, a station beyond Hillman City, while waiting for the next car to come. He seems to have made this run as a matter of mere accommodation to certain Brighton Beach passengers, it being no part of the regular run of the car. Appellant remained upon the car until it reached Brighton Beach. At the latter point he was requested by Brown to retire from this car and take the next one coming from the city. Appellant testified as follows: "I says, 'All right,' and after he got on his car, and I got off, he says, 'I will tell the conductor on the other car to

¶ 4. See Carriers, vol. 2, Cent. Dig. § 1418.

'pick you up and take you on.' I says, 'All right,' and he went back and went into the switch, and just then the other car came along." After appellant boarded the other car the conductor demanded fare, which he refused to pay; stating as a reason that he had paid his fare once, and was entitled to ride through. He also testified that he attempted to explain, and ask if Brown had not spoken to the conductor, but the latter would hear no explanation, and informed him that he must pay fare or get off. Appellant then said: "'Well,' I says, 'not quite so fast. I have paid my fare once. If you want me off this car, you will have to put me off.'" Thereupon the conductor called the motorman, and, without violence, they removed appellant from the car. No injury was done to his person or clothing.

Appellant's complaint, in effect, alleges a contract on the part of respondent to carry him to Fairview Station for the price of a fare which he then paid; that respondent afterwards refused to carry him beyond an intermediate station, demanded further fare from him, and, upon his failure to pay, ejected him. If there was a contract to carry appellant as far as Fairview, then the minds of appellant and respondent's agents must have met upon that subject. Nothing, however, was said to the conductor upon the subject of appellant's destination. The conductor knew that his car was bound to Hillman City, and not beyond. Under such circumstances, it was impossible for their minds to have met in an agreement to carry appellant to Fairview for the fare he then paid. The evidence shows that it was a common thing for cars to go no further than Hillman City, and there is no evidence that there was any system of issuing transfer tickets to passengers upon those cars which were good for passage upon others going beyond there. Even if such system obtained, there is no evidence that appellant asked for such transfer ticket. He contends, however, that if his contract was not, in the first instance, sufficient to carry him beyond Hillman City, it became sufficient when the superintendent said to him: "I will tell the conductor on the other car to pick you up and take you on." It will be observed that Brown did not say that appellant would be carried upon the other car for the fare already paid. Doubtless appellant so inferred, but the language used was not sufficient to make a contract to that effect, at least when unaided by any custom of the company to transfer passengers from one car to another to be carried further without additional fare. We therefore think appellant had no contract except one for carriage as far as the car he first boarded was intended to go, viz., to Hillman City. When he was carried to the latter place, the contract was at an end. His carriage beyond that point, as we have seen, was a mere gratuity—a license to him, revocable at pleasure, until he should pay

fare, and thus effect a contract for further carriage upon another car. Appellant sought to show by a witness that Brown, the superintendent, said to him the next day after the incident that it was more his (Brown's) fault than that of the conductor, as he intended to tell the conductor to pick appellant up and take him out, but that he forgot to do so. The witness did so testify, and it is not clear, from the sweeping motion to strike testimony in connection with the motion for nonsuit, whether the court intended to strike this part of the testimony or not. But for the purposes of this discussion, we shall treat that evidence as before the jury. If one may infer from what Brown said the next day that he intended to have appellant carried further without additional fare, still it does not appear that such a course of transferring fare-paying passengers was authorized by any custom or regulation of the company. What Brown said to appellant, or what he may have said the next day, of his intentions, was no part of the original contract, and amounted to no more than an intention to authorize gratuitous carriage of appellant from Brighton Beach out. Such intention was, however, not carried out; the conductor was not so authorized; appellant presented no evidence of right to free passage; and, in any event, such passage would have been without consideration from appellant to support a contract, and, in the absence of injury from excessive force used to expel him from the car, or from other inexcusable negligence, would furnish no ground for recovery. We regard this case as wholly unlike that of *Lawshe v. Tacoma Railway & Power Co.*, 29 Wash. 681, 70 Pac. 118, 50 L. R. A. 350, cited by appellant. In that case the system of transferring from one car to another under payment of a single fare prevailed, and an actual contract for such a transfer and passage was made; but, the conductor of the first car having made the transfer check read over the wrong line, the second conductor ejected the passenger. It was held that the passenger had, in consideration of the fare paid and of his application for a proper transfer check, an actual contract for continuous passage, and was therefore wrongfully ejected. We have seen, however, that in the case at bar there was no contract for continuous passage, and it was therefore limited to the extent of the run of the car upon which the fare was paid. We believe the court did not err in granting the nonsuit.

Error is assigned upon the court's refusal to admit evidence touching the general character and disposition of the conductor who ejected appellant. We think this was properly rejected, since his conduct and disposition as manifested upon the particular occasion were the only proper subjects for inquiry. Moreover, appellant's complaint does not allege as a ground of recovery the employment of an incompetent conductor, but

it is based merely upon an alleged breach of contract for carriage.

It is assigned that the court erred in striking certain evidence relating to car schedules. Even if we consider all of that evidence, we are unable to see that it affects the actual contract hereinbefore discussed, and which the court must have considered in granting the nonsuit. While it may be true that the car appellant boarded left Seattle about the time a car ordinarily left for points beyond Hillman City, still there is, we think, no room for argument, under the evidence, that this particular car was started for points beyond Hillman City, and appellant made no inquiry as to the destination of the car.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

# MULHOLLAND v. WASHINGTON MATCH CO.

(Supreme Court of Washington. July 5, 1904.)

CORPORATIONS — STOCK SUBSCRIPTIONS — PURCHASE OF TREASURY STOCK — RESCISSION — FALSE REPRESENTATIONS — INVESTIGATION — NECESSITY — DILIGENCE — ESTOPPEL — APPEAL — TRIAL DE NOVO — PROCESS — SERVICE — WAIVER OF DEFECTS.

1. No service of summons is necessary to confer jurisdiction where defendant enters a full appearance in the action by demurring, and later by answering.

2. A motion to quash the summons and service was of no effect where defendant had, a month prior to the time when it was made, entered a full appearance through accredited counsel.

3. Where the subject-matter of false representations is at hand, and the truth easily ascertainable, one cannot be heard to say that he has been defrauded by such representations, if he has neglected to avail himself of a present and reasonable opportunity to learn the truth.

4. The rule imposing on one to whom representations are made the necessity of ascertaining their truth by reasonable inquiry has no application to the case of representations made concerning a machine of a complicated nature, requiring skilled knowledge to understand it, and which was not at hand when the representations were made, and did not in fact exist, and the facts concerning which were peculiarly within the knowledge of the one making the representations.

5. A circular issued by authority of the trustees and officers of a corporation for the purpose of inducing the purchase of treasury stock may be relied on by the purchaser, and false representations contained therein which are so relied on are binding on the corporation, and entitle the purchaser to rescind his contract of purchase.

6. An action to rescind a contract for fraud is triable de novo in the Supreme Court, and it will affirm the judgment if there is sufficient competent evidence to sustain it, although some incompetent evidence was erroneously admitted.

7. A complaint for the rescission of a contract on the ground of false representations, alleging that plaintiff demanded a rescission

within a reasonable time after he ascertained the falsity of the representations, was sufficient as against demurrer, and in the absence of a motion for a more definite statement of the time.

8. One seeking a rescission of a contract, who did not discover the falsity of the representations until May, 1903, and on June 24th of that year verified his complaint, having previously made a demand for rescission, acted with sufficient diligence.

9. A purchaser of stock in a corporation is not estopped to obtain a rescission of his contract of purchase for false representations by having accepted other stock in the corporation from individuals as collateral security for the performance of certain obligations by them, and afterwards having such collateral absolutely transferred to him, or disposing of it for stock in other corporations.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Action by J. J. Mulholland against the Washington Match Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. Foster, for appellant. Jas. J. Anderson, for respondent.

HADLEY, J. The respondent, as the holder of stock in the appellant corporation, brought this suit to rescind the contract of purchase and sale by which he obtained the stock, and also to obtain judgment for the amount originally paid therefor. The material allegations of the complaint are that the capital stock of the corporation, as stated in its articles of incorporation, is the sum of \$1,200,000, divided into 240,000 shares, of the par value of \$5 per share; that one Lucius T. Holes subscribed for 239,996 shares of the stock upon the organization of the company, and that four other persons named as codefendants with appellant herein, each taking 1 share, subscribed for the remaining 4 shares; that said persons became the incorporators, trustees, and officers of the corporation; that thereafter said Holes transferred to said corporation 108,000 shares of said capital stock, which was known as "treasury stock," the same to be sold by the company, and the proceeds thereof, to be placed in the treasury; that afterwards the said company and its officers issued and published a certain circular or prospectus for the purpose of advertising the company and its stock, in which circular the names of said original stock subscribers were set forth as the promoters, incorporators, trustees, and officers of the company, for the purpose of inducing persons who should read said prospectus to believe that the several matters and things therein set forth and represented were true; that in said circular said persons, for the purpose aforesaid, represented that said Holes had invented a certain match machine, called the "Holes Match Machine," and that said invention or machine was then the property of said company; that said machine was capable of producing and was producing five times as much finished product in any given

¶ 2. See Fraud, vol. 23, Cent. Dig. §§ 19, 20.

length of time as any other match machine, and at one-fifth the cost for labor; that the machine was capable of making and was making a complete match; that it would put the matches into the boxes, and would wrap the boxes into packages containing from one dozen to one gross of the boxes; that it would turn the packages out of the machine ready to ship, and, if desired, would print advertising matter on each and every match; that the machine had a capacity of 86,400,000 matches, or 4,000 gross of 150 matches in each box, for every 10 hours operated; that said Holes was a practical match manufacturer, as well as the inventor of said machine; that said company had letters from "the trade" (meaning the dealers in matches) containing more orders for matches than the factory proposed to be constructed by the company could produce. A copy of the alleged circular is made a part of the complaint, and contains, among other things, substantially what is stated above as alleged by respondent. It is further averred that the said officers and agents of said company caused to be exhibited to respondent a copy of a certain writing purporting to be an assignment or bill of sale from said Holes to said company of a certain machine therein represented to have been invented and perfected by said Holes for the purpose of manufacturing and boxing matches, and in which it was stated and represented that said Holes was the owner of the machine; that one of the machines described in the assignment was represented to be then in the city of Philadelphia, Pa., but that certain parts thereof were then in Seattle, Wash.; that said writing also contained certain other of the representations hereinbefore set forth, and was exhibited to respondent for the purpose and with the intent of inducing him to believe that said Holes had invented and perfected such a machine, and that said company was then the owner thereof; that it was also exhibited to him for the further purpose of inducing him to purchase shares of the capital stock of the said company; that at various times one Lanning, also a co-defendant, who is alleged to have been assistant manager of said company and its duly authorized agent, and also the said Holes, acting for themselves and for their codefendants, including the appellant company, repeated the representations hereinbefore recited, together with others of similar import; that said Lanning represented to respondent that he had actually seen the machine making matches; that all of said representations were made to respondent prior to the time that he purchased any stock in said company; that respondent, believing said statements and representations to be true, and relying upon them, did purchase from said corporation 250 shares of the so-called treasury stock, and paid therefor to the said company the sum of \$250, and afterwards, further believing and relying upon said statements, he

purchased an additional 150 shares of said stock, for which he paid to said company the further sum of \$150; that said sums, aggregating \$400, were received by said company and turned into the treasury of the company for its benefit; that the same is retained by the company, and no part thereof has been repaid to respondent. It is further alleged that each and all of said statements are, and were at the time they were made, wholly false; that said Holes never did invent or perfect any machine for the manufacture of matches; that there has at no time been any perfected machine known as the "Holes Match Machine"; and that the said corporation did not own such a machine. The truth of practically every representation hereinbefore set forth is negatived, and it is averred that their falsity was known to the company and its said officers and agents at the time they were made. It is further alleged that prior to the commencement of this action, and within a reasonable time after respondent ascertained that said representations were false, he tendered to said company the said 400 shares of stock purchased as aforesaid, and demanded the repayment of said \$400 paid for the stock; that the company refused and still refuses to accept the return of the stock or to repay the money; and that respondent now brings the shares of stock, and deposits them with the clerk of the court, to await the orders of the court in the premises. The complaint prays judgment for \$400, and that the contract of purchase of the said 400 shares of stock be rescinded. The appellant was the only defendant that joined issue upon the complaint, the other defendants not having been served with summons. Appellant demurred to the complaint, which was overruled, and after answer a trial was had before the court without a jury, resulting in a judgment according to the prayer of the complaint. The company has appealed from the judgment.

Appellant's first assignment of error is that the motion to quash the summons and service was overruled. It is asserted that the summons was insufficient in form, but we are unable to appreciate the criticism, since every essential statutory requirement seems to be contained in the summons. It is unnecessary for us to examine the record as to the service of the summons, since appellant entered a full appearance in the action, as shown by respondent's supplemental transcript. In such case no service of summons was necessary. On September 12, 1903, a full appearance for appellant was entered by demurrer to the complaint, through J. W. A. Nichols, its attorney. The same counsel also on the 22d day of September, 1903, served upon respondent's counsel an answer in the cause, which was filed October 13, 1903. It is true that the record brought here by appellant shows that counsel who appears for appellant in this court did on October 12, 1903, file a motion to quash the summons

and service, and stated therein that the appearance was limited to the purposes of the motion only, but the motion was then of no effect, for the reason that appellant had a month prior to that time entered a full appearance through accredited counsel. The court did not err in denying the motion to quash.

It is next assigned that the complaint is wholly insufficient upon its face to authorize the court to make and enter any judgment or to grant any relief. By reason of this assignment, we have set forth above at some length the more material averments of the complaint. It seems to be appellant's theory that respondent was dealing with it at arm's length. It is argued that, since no fiduciary relation existed, and since it is not alleged that respondent was overcome by cunning or artifice, by reason of being frail of body, or of weak and imbecile mind, caused by advanced age or disease, he does not show a ground for relief. It cannot be the law that a person of ordinary faculties may never rely upon representations made to him, even though no fiduciary relation may exist. Each case must depend upon its own circumstances. Where the subject-matter is at hand, and the truth easily ascertainable, this court has held that one must use his senses, and cannot afterwards be heard to say that he has been defrauded, if he neglects to avail himself of a present and reasonable opportunity to learn the truth. The above rule was applied in *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 386; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 43 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216. Under the circumstances detailed by the complaint as hereinbefore set out, we think the rule of the above cases does not apply here. The representations with regard to the ingenious device for manufacturing matches upon the proposed new plan, and upon such an extensive scale, involved a special, skilled knowledge of the mechanism itself. Even if respondent had been sufficiently skilled to analyze and pass upon the merits of the mechanism, or even if it had been his duty to cause it to be done by some one known to be skilled, yet, under the allegations of the complaint, the machine was not at hand, and did not in fact exist. The facts with reference to the existence of such a machine and the patent therefor, together with the ownership thereof by appellant, were peculiarly within the knowledge of appellant's officers and agents who made the representations. It even appears by the complaint that a paper purporting to be a transfer of such ownership was shown to respondent for the fraudulent purpose of misleading him. It is manifest from the nature of the subject-matter that the value placed upon the stock in respondent's mind was due to the belief that this so-called match ma-

chine of extraordinary capacity actually existed, and was also the actual property of appellant company. The statements made in the prospectus which was placed in respondent's hands are alleged to have been false. This circular is alleged to have been issued by authority of the trustees and officers of the corporation for the purpose of inducing the purchase of treasury stock. "A prospectus issued by the authority of the directors or the stockholders of a corporation may be relied upon by a person in subscribing for stock, and if the prospectus contains a false representation, and the subscription is made by reason thereof, such representation is binding upon the corporation. \* \* \* Nevertheless a subscriber may have rescission where the prospectus is not an honest, candid, straightforward document, but suggests that which is untrue, and is in a high degree misleading." *Cook on Stock & Stockholders* (3d Ed.) § 143. The same rule is stated in *Thompson's Commentaries on the Law of Corporations*, vol. 1, § 452, as follows: "Where the promotor of a company, together with the directors, puts forth a fraudulent prospectus, on the faith of which a person is induced to purchase shares of the company, he may bring a bill in equity against the company, the directors, and the promotor, and under it he will be entitled to a rescission of his contract." The foregoing statements of the principle involved here made by eminent authors seem to be founded in natural justice, and the minds of reasonable men instinctively accept them as correct statements of the rule that should govern the conduct of men under the circumstances named. The authors do not, however, state the rule upon their own authority alone, but they cite the decisions of able courts in support thereof. Concerning the general principle governing fraud in obtaining subscriptions to the capital stock of a corporation, the above-cited volume of *Cook on Stock & Stockholders*, at section 140, further states the rule as follows: "The modern doctrine, however, both in this country and in England, has completely exploded the theory that corporations are not chargeable with the frauds of their agents in taking subscriptions. The well-established rule now is that a corporation cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. The misrepresentations are not regarded as having actually been made by the corporation, but the corporation is not allowed to retain the benefit of the contract growing out of them; being liable to the extent that it has profited by such misrepresentations. The question of the authority of the agent taking the subscription is immaterial herein. It matters not whether he had any authority, or exceeded his authority, or concealed its limitations. The corporation cannot claim the benefits of his fraud without assuming, also, the representations which procured

those benefits." The above-stated rule pertaining to subscribers for stock applies with equal force here. It is true, respondent was not an original subscriber for stock, but he was a purchaser of shares which belonged to the company, theretofore set apart as treasury stock. The contract of purchase was with the company, and the money paid was as much for the benefit of the company as if paid on an original subscription. For all the foregoing reasons, we think the complaint states a cause of action for the relief asked.

Errors are assigned upon the introduction of evidence, but the cause is triable de novo here, and, as we have often held, if there is sufficient competent evidence to sustain the judgment, it will be affirmed, even though some incompetent evidence may have been erroneously admitted.

Errors are assigned upon the findings of facts and conclusions of law. The evidence is sufficient to support the material allegations of the complaint which have already been recited. The findings are in substantial accord therewith, and, we think, were not erroneously made. The conclusions of law follow from the findings, within the law as hereinbefore discussed. It is argued that respondent should be estopped to wage this action for the reason that he waited about 18 months before seeking a rescission. The complaint alleges that, within a reasonable time after respondent ascertained that the statements and representations were false, he tendered back the stock and demanded a rescission. The allegation was sufficient as against demurrer and in the absence of a motion for more definite statement of the time. Respondent himself testified that until within six months of the time of the trial he had always believed that such a match machine existed, and that it belonged to the company. The discovery of the falsity of the representations, as shown by the evidence, must have been made about the month of May, 1903. The complaint was verified June 24th of that year, and the demand for rescission alleged therein must have been made within the period of one month after discovery. Respondent therefore acted with sufficient diligence.

It appears that, some time after respondent became the holder of the aforesaid stock, the said Holes, the alleged inventor of the match machine, and large holder of stock, caused to be pledged to respondent 1,000 shares of stock in appellant company as a guaranty that respondent's stock would within 90 days from the date of the pledge become worth \$1.50 per share. The guaranty contract not being fulfilled, respondent proceeded to dispose of the collateral stock by exchanging it for other stock in another corporation. Whether the stock received in exchange was of any actual value, does not appear. We refer to this circumstance for the reason that appellant argues that it

shows respondent to have been trafficking in appellant's stock, and that such fact should estop him to rescind his contract of purchase of his original stock. We do not see that the disposition of the stock held as collateral bears any relation to the original contract of purchase. If that contract was induced by fraud, respondent is entitled to have it rescinded. The transaction as to the collateral stock concerns only the pledgor, the respondent, and the latter's transferee. It does not affect the questions before us in this appeal. The same is also true of 600 other shares taken by respondent as collateral security for a loan of \$450 made by him to a Mr. Lanning, hereinbefore mentioned as assistant manager of appellant company. This circumstance is also urged by appellant as in some way carrying with it the element of estoppel. We are unable to see that the fact of respondent's accepting said stock as security for an actual loan, even though afterwards absolutely transferred to him, in any way estops him to assert his rights under his original stock-purchase contract, fraudulently procured.

The judgment is affirmed.

ANDERS, DUNBAR, and MOUNT, JJ., concur. FULLERTON, C. J., did not sit in this case.

(35 Wash. 333)

# STATE v. FRATERNAL KNIGHTS & LADIES.

(Supreme Court of Washington. July 12, 1904.)

STATUTES—TITLE—SUFFICIENCY — INCORPORATION OF EXTRANEOUS MATTER — VALIDITY — REGULATION OF INSURANCE COMPANIES — CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—DISCRIMINATION IN FAVOR OF FOREIGN CORPORATIONS.

1. The title to Laws 1901, p. 356, c. 174, which is, "An act regulating fraternal beneficiary societies, orders, or associations," is sufficiently broad to include section 12 thereof, which makes it necessary for subsequently formed associations to adopt assessment rates not lower than those indicated as necessary by a certain mortality table; and such section is not repugnant to Const. art. 2, § 19, providing that no bill shall embrace more than one subject, which shall be embraced in the title.

2. Laws 1901, p. 362, c. 174, § 12, requiring subsequently formed fraternal insurance associations to adopt mortuary assessment rates not lower than those indicated as necessary in the Fraternal Congress Mortality Table, incorporates the table into the act, so that its terms constitute a part thereof.

3. The fact that such table was originally prepared by a body of men bearing no official relation to the Legislature did not prevent the Legislature from adopting the table and incorporating it into law.

4. The question of what mortuary assessment rates fraternal insurance associations must adopt may be determined by the Legislature, as in Laws 1901, p. 362, c. 174, § 12; and the question is not necessarily one of evidence, to be weighed by the courts.

5. Laws 1901, p. 362, c. 174, § 12, requiring subsequently formed fraternal insurance asso-



clations to adopt mortuary assessment rates not lower than those indicated as necessary in the Fraternal Congress Mortality Table, is not, because it discriminates between corporations already formed and those to be subsequently formed, violative of Const. art. 1, § 12, forbidding the grant to any citizen or corporation of privileges or immunities which do not belong to all citizens or corporations.

6. Nor does the act, because it does not apply to previously formed foreign associations, and does apply to subsequently formed domestic associations, violate Const. art. 12, § 7, providing that no foreign corporation shall be allowed to transact business on more favorable conditions than similar domestic corporations.

7. Equal protection of the laws given by the Constitution requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the state against the Fraternal Knights & Ladies. From a judgment for defendant, plaintiff appeals. Reversed.

W. B. Stratton, E. W. Ross, C. O. Dalton, and E. B. Palmer, for the State. J. W. Langley, W. H. Merritt, and Robert D. Hamlin, for respondent.

HADLEY, J. The state of Washington, the appellant in this appeal, instituted this proceeding against the respondent to enjoin and prohibit it from continuing or carrying on the business of fraternal insurance until certain alleged violations of law have been corrected. The complaint avers that the respondent is a fraternal beneficiary corporation organized and existing under and by virtue of chapter 174, p. 356, of the session laws of 1901; that the corporation was organized on the 16th day of April, 1903, and ever since said date has been, and now is, transacting a fraternal beneficiary business, and issuing to its beneficiary members certificates entitling their beneficiaries to payment, in the event of death of the member, or in case of sickness or accident, of the sums set forth in a table or schedule, such payments being in consideration of the monthly payment of installments or assessments in sums set forth in the same table; that the mortuary assessment rates heretofore charged and collected and now being charged and collected by said corporation have been at all times since the organization of the company, and are now, less than the mortuary assessment rates indicated as necessary by the Fraternal Congress Mortality Table, set forth in said chapter 174, p. 356, of the Laws of Washington, 1901, and less than the mortuary rates required by law; that said corporation ever since its organization has been, and now is, transacting and carrying on business in violation of section 12 of said chapter 174, p. 362; that the Commissioner of Insurance of the state of Washington has repeatedly demanded of said corporation, its officers and agents, that the mortuary assessment rates charged and collected by it be increased, and made to correspond with the

rates indicated as necessary by said Fraternal Congress Mortality Table, and as required by law, but that it has refused and still refuses to increase said rates or to comply with the requirements of law; that the said Commissioner of Insurance has served upon the Attorney General notice in writing that said corporation has been and is exceeding its powers, is conducting its business fraudulently, and has failed and refused to comply with the law; and that this proceeding is prosecuted at the request of said Commissioner of Insurance. The complaint prays that the corporation be enjoined from continuing its business until the said violation shall have been corrected, and the costs of this action paid. The corporation demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained. The state elected to stand upon its complaint, and judgment was entered that the injunction be denied and the action dismissed. The state has appealed.

Respondent concedes that chapter 174, p. 356, Laws 1901, is a complete act for all the purposes expressed in its title, without section 12 of the act, but contends that said section is repugnant to section 19, art. 2, of the state Constitution, which is as follows: "No bill shall embrace more than one subject, and that shall be embraced in the title." The title of the act of 1901 is as follows: "An act regulating fraternal beneficiary societies, orders, or associations." Section 12 of the act, which it is claimed is not within the above title, is as follows: "No association not admitted to transact business within this state prior to the passage of this act shall be incorporated or given a permit or certificate of authority to transact business within this state, as provided for by this act, unless it shall first show that the mortuary assessment rates, provided for in whatever plan of business it has adopted, are not lower than is indicated as necessary by the following mortality table:" (Here follows a table designated as "Fraternal Congress Mortality Table.") Respondent's argument is that this objection would be less forcible if the minimum rate and the manner of determining it provided by section 12 applied alike to all associations doing business in this state, but that inasmuch as the section attempts to apply the rate to a class not yet in existence, and exempts from its operation all associations already doing business in the state, the matter of fixing a minimum rate for the only members the act can affect becomes a material part, if not the sole purpose, of the act itself, and is not sufficiently indicated by its title. If it is competent for the Legislature to make the classification required by section 12, then we think the title of the act is broad enough to include it, for the reason that the words "regulating fraternal beneficiary societies," etc., seem broad enough to require the reader to examine the body of the act for

every feature that may properly come within the scope of regulation. The adoption of minimum mortuary assessment rates, and their application under stated conditions, are matters of regulation, and come within the title of the act. Whether it is competent for the Legislature to regulate by classification, we shall hereinafter discuss.

Respondent's next contention is that section 12 aforesaid is vague and uncertain, in that it is alleged no minimum mortuary assessment rate is in fact written in the law itself as the legislative judgment and will. It is true, it is designated as "Fraternal Congress Mortality Table," but the section so refers to the table that its terms become a part of the act itself, and it is wholly immaterial by whom it was prepared, or by what, if any, name it is designated. It may be true, as respondent argues, that the table was originally prepared by some body of men bearing no official relation to the legislative body, but that does not prevent the Legislature from adopting the table and incorporating it into law as a regulative feature. It is further argued that such tables belong to the domain of evidence, and that, like other evidentiary matters, they should receive the scrutiny of the courts, and be held subject to impeachment. We think, in the light of modern experience, that it is entirely competent for the Legislature to incorporate such tables into law, and require that they shall be applied. It may be a matter of difference of opinion as to whether the table includes the rates most approved by experience, but that is a question which the Legislature may determine, and it is not necessarily one of evidence to be weighed by the courts.

Respondent's principal contention, however, is that section 12 attempts to make an arbitrary and unreasonable classification of corporations with reference to the application of assessment rates, and grants unequal privileges and immunities, in violation of section 12, art. 1, of the state Constitution, which is as follows: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." It is insisted that inasmuch as the law of 1901 exempts corporations then existing and doing business from the operation of the rates named in the act, but applies them to corporations thereafter created or admitted to do business, there is for that reason an attempted discrimination which is violative of the above constitutional requirement. It will be observed, however, that all corporations thereafter created or admitted to do business are placed in a class to themselves, and no discrimination is made between any of the class, but the law is operative alike upon all corporations similarly situated. It is further suggested that, inasmuch as foreign corporations which had

been admitted to transact business within this state prior to the passage of the act are exempt from the application of the statutory assessment rates, the fact that the rates are made to apply to respondent, a domestic corporation, is violative of section 7, art. 12, of the state Constitution, which is as follows: "No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." It will also be observed in this connection that all foreign corporations thereafter admitted to do business in this state are classified with such as respondent, and no more favorable conditions are extended to the one than to the other. Thus all corporations, whether domestic or foreign, which are admitted to do business in the state after the passage of this law, are placed upon equal footing. What may have been the legislative reasoning, may be surmised. Doubtless it was believed that experience had shown that assessment rates lower than those incorporated in the act were insufficient to secure payment of benefits and insurance to beneficiaries. It may have also been the view that certain contractual relations as to assessment rates then obtained between certificate holders and existing corporations, which prevented the application of the new rates to old members. It may have been believed to be impracticable for existing corporations to carry two sets of rates—one for old and another for new certificate holders. It may be supposed that the Legislature, actuated by such reasoning, decided to arrange the associations in two classes as aforesaid, and that by so doing it would be more effectively correct what it must have believed to be a prevailing evil, viz., the charging and acceptance of mortuary assessment rates too low to secure payments to the beneficiaries of trusting, but uninformed and inexperienced, certificate holders. It must be assumed that it was the object of the Legislature to establish such regulative conditions as will best serve and protect the rights of the citizen. Based upon such grounds as above indicated, the classification seems to be neither unreasonable nor arbitrary; and such reasonable classifications are held to be not violative of the constitutional principles invoked here, where all persons who come within the operation of the law are affected alike, even though they may constitute a class. Equal protection of the laws given by the Constitution requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations. *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419, 46 Pac. 650; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *Mc-*

Daniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; People v. Phippin, 70 Mich. 6, 37 N. W. 888; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 165; C., B. & Q. Ry. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Central Iowa Ry. Co. v. Board of Supervisors, 67 Iowa, 199, 25 N. W. 128; In re Oberg, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577; Ex parte Koser, 60 Cal. 177; Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; Am. Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; New York, etc., Ry. Co. v. State of New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.

The principle under discussion here has been so frequently held not only in the above-cited cases, but in many others, that we deem it unnecessary to further pursue the subject. The act of 1901 operates alike upon respondent and upon all other corporations similarly situated. Such legislative classification is not in conflict with the Constitution. No acquired rights or privileges have been taken from respondent. Its existence followed that of the law, and its incorporators were bound to know its limitations in the light of existing law. We think the complaint states a cause of action.

The judgment is reversed and the cause remanded, with instructions to the lower court to overrule the demurrer to the complaint.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

#### JOHNSTON et al. v. GERRY.

(Supreme Court of Washington. July 12, 1904.)

#### INTEREST—UNLIQUIDATED DEMANDS—TIME OF COMPUTATION.

1. Where appellant secures a reversal and remand with directions to enter a money judgment in his favor in a specified sum, which was unliquidated until established by the special verdict of the jury, notwithstanding which the lower court entered judgment against him, he is entitled to interest only from the date of the final judgment entered in pursuance of the mandate, and not from the date of the judgment appealed from.

Response to petition for modified opinion. For former opinion, see 76 Pac. 258.

PER CURIAM. The appellant has filed a petition for a modification of the opinion of this court filed in this cause on April 4, 1904, and reported in 76 Pac. 258. It will be shown

by an examination of the said opinion that the superior court adjudged the mortgage executed by appellant to Ida J. Moore to be a valid lien upon all the lands in controversy in this action. But it was further adjudged that the interest of appellant in the land should be primarily subject to the mortgage lien. After the lien of the mortgage had been established by the judgment of the court, the action was dismissed as to the mortgagee at the instance of the respondents. The finding of the court that the mortgage was a lien upon the entire land in dispute having been accepted and acquiesced in by the respective parties to the action, we deemed the controversy in that regard at an end, and therefore refrained from discussing the question at length on the appeal. It was stated, in effect, in the opinion heretofore filed in this cause, that the appellant's two-fifths interest in the land was subject to the mortgage to Ida J. Moore. But it was not stated therein that the remaining three-fifths of the premises, awarded to the respondents, was also subject to the lien of that mortgage; and for that reason appellant asks to have the opinion so modified as to express more clearly the real meaning and intention of the court with respect to that matter. We did not suppose that it would be inferred from anything that was said in the opinion that it was the intention of the court to modify or reverse the ruling of the superior court fixing the status of the mortgage. As we have already intimated, we did not consider that question an issue in the case as presented to this court. The superior court awarded only one-fifth of the land to appellant. But this court, after a careful consideration of the evidence, concluded that he was entitled to two-fifths thereof, subject, however, to the mortgage, and therefore directed the trial court to enter a judgment to that effect. And when we stated that appellant's said interest in the property was subject to the mortgage of Ida J. Moore, we supposed it would be understood, although not so stated, that the respondents' interest therein was also subject to the lien imposed upon it by the same instrument, and validated by the judgment of the court above mentioned. But, inasmuch as a doubt has arisen in the minds of counsel as to our decision in regard to that matter, we will again say that it was not our intention to annul, modify, or change the ruling of the lower court as to the validity of this mortgage, but simply to show that the lien extended to and was binding upon the interests of all parties, as finally determined by this court.

The appellant also asks that interest on \$810, which was found to be due him from the respondents, be allowed from the date of the judgment appealed from, instead of from the date of the final judgment, as specified in the opinion of the Supreme Court. But, inasmuch as we are still of the opinion that appellant is entitled to interest on his demand only from

¶ 1. See Interest, vol. 29, Cent. Dig. § 125.

the time when the amount thereof was finally determined, we are not inclined to grant this request. We are also of the opinion that it was not inequitable, under the circumstances appearing in this case, to refuse to allow costs to either party, and appellant's request to recover the costs of the appeal is likewise denied.

#### STATE v. DEATHERAGE.

(Supreme Court of Washington. July 8, 1904.)

#### BURGLARY — EVIDENCE — FLIGHT — ARREST — INSTRUCTIONS — FAILURE OF ACCUSED TO TESTIFY.

1. Where, on a prosecution for burglary, a witness testified that he witnessed the crime and reported it at once to the police but not to the owner of the burglarized premises, it was not prejudicial error to exclude a question as to why he did not report it to the owner.

2. On a criminal prosecution it was not error to permit a police officer of the city where the crime was committed to testify that when he saw the defendant and conversed with him after the crime at another town, where defendant was found by witness, he was under arrest, though he was not handcuffed and the sheriff was not present.

3. On a criminal prosecution a witness testified that he saw accused commit the crime at 2 o'clock in the morning, and an officer testified that he found accused at 10 o'clock at a place 25 miles distant, and that defendant stated he had walked all night. *Held*, that the testimony of the officer was competent as tending to show flight.

4. An instruction in a criminal case that, "while the statute \* \* \* provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf, and the court so instructs," which was in the language of the statute (Ballinger's Ann. Codes & St. § 6941), was not erroneous because of the reference to the statute.

5. An instruction that, if the jury found that burglary was committed as charged, evidence of flight might be considered, was not erroneous as violating Const. art. 4, § 16, prohibiting instructions on facts or comment thereon.

6. The instruction was not erroneous because the court did not state that the circumstances explaining flight might be considered, there being none in evidence to explain it.

7. The instruction was not erroneous as authorizing a conviction on flight alone.

8. A new trial in a criminal case will not be granted for insufficiency of evidence, where the defendant's evidence was squarely contradicted by sufficient evidence.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Duke Deatherage was convicted of burglary, and he appeals. Affirmed.

Alex. M. Winston, for appellant. Horace Kimball, for the State.

ANDERS, J. The defendant was convicted of burglary upon the trial of an informa-

tion of which the following, omitting formal parts, is a copy: "That the said defendant, Duke Deatherage, on the 4th day of November, 1903, in the county of Spokane and state of Washington, then and there being, did then and there wilfully, unlawfully, feloniously, and burglariously enter in the nighttime a certain stable there situate, the property of, and belonging to, C. O. Wilson and W. M. Moore, copartners doing business as the Klondike Stables, and then and there used by them as such, in which certain goods and valuable property of the said C. O. Wilson and W. M. Moore, copartners as aforesaid, was then and there kept for use, with intent then and there unlawfully, wilfully, and feloniously to steal, take and carry away the said goods and valuable property of the said C. O. Wilson and W. M. Moore, copartners as aforesaid, then and there kept for use as aforesaid." A motion for a new trial was denied, and the defendant has appealed from the judgment.

The errors assigned and relied on by the appellant for a reversal of the judgment call in question the ruling of the court in sustaining objections to certain questions propounded to witnesses, in refusing to strike from the records the testimony of the witness McPhee, in giving certain instructions to the jury, and in denying appellant's motion for a new trial. At the trial the state called one Fisher, who testified, in substance, that he lived in Spokane, and was employed in a stable adjoining the Klondike Stables; that he was acquainted with the appellant; that on the night of November 3, 1903, he was in the stable adjoining the Klondike Stables on First avenue; that about 1:30 or 2 o'clock on that night his attention was attracted by the barking of a dog in the Klondike Stables; that he went to the rear of the stable and hid behind an open swinging door; that he saw the appellant coming out of the Klondike Stable with a saddle under each arm (which saddles were produced in court, and identified by the witness); that the appellant then walked up the alley and disappeared from sight; that in about five minutes he returned and went into the stable where the witness was secreted, and in a few moments came out leading a horse belonging to the proprietor of the stable; that when appellant came out, he, the witness, asked him, "What are you going to do with that horse?" "whereupon he dropped the horse and ran away." This witness further testified that he then telephoned the police station and reported the matter to the police, and two policemen came up to the barn; that he and the policemen looked for the saddles, and that he found them and the bridle about 150 feet from the barn, in a wagon which was in the alley. On cross-examination the witness stated that he did not enter the Klondike Stables after the saddles were taken until the next day, and that he reported the taking of the saddles that night to the police by phone. Coun-

¶ 7. See Criminal Law, vol. 14, Cent. Dig. § 1857.

sel for the defendant then asked the witness the following questions: "Q. Did you report to Mr. Wilson or Mr. Moore the taking of the saddles that night? Ans. I did not. Q. Why did you not report to Wilson or Moore the taking of the saddles that night?" This question was objected to by counsel for the state on the ground that it was immaterial. The objection was sustained by the court, and the defendant, by his counsel, excepted. It is claimed that this ruling of the court was erroneous and prejudicial to the appellant, and it is insisted that the appellant had the right to know why the witness did not inform the proprietors of the Klondike Stables that a burglary had been committed; and it is, in effect, argued in support of this contention that, if the witness had no good reason for not promptly reporting the burglary to the proprietors of the stables, counsel for the appellant could have argued to the jury that, as a matter of fact, no burglary was committed, or, if that offense was committed, that the witness himself or some person other than the appellant committed it. Although this interrogatory, as propounded to the witness, may not be deemed to have been wholly irrelevant or immaterial, yet we are convinced that the sustaining of the objection thereto constitutes no sufficient ground for the reversal of the judgment. The witness had already testified that he reported the burglary to the police, but did not report to Wilson or Moore that night that the saddles had been taken from the stable; and it would seem that the reason why he did not report to them was, at most, a circumstance only remotely, if at all, material to appellant's defense. Whether the answer to the question would have been beneficial or not to the appellant, is merely a matter of pure speculation. If any inference favorable to appellant could be drawn from the fact that the witness did not report the taking of the saddles to Wilson or Moore, the appellant was certainly entitled to the benefit of it, and his counsel could have so argued to the jury.

It is next insisted that the trial court erred in permitting the witness McPhee, over appellant's objection, to answer the question, "Was defendant under arrest?" and in refusing to strike from the record the statement of the witness that the defendant was under arrest when he saw him at Reardon, Wash., at about 10 o'clock in the forenoon of November 4, 1903. These two assignments of error are based upon the proposition that an arrest may be proved in two ways only: First, by a person who made the arrest, or who saw it made; and, second, by a certified copy of a public record showing the arrest. But conceding, without deciding, that this proposition is correct, still we find nothing in the record showing that the witness was not qualified to testify that the appellant was under arrest at the time he saw him and conversed with him at Reardon. The

fact that the appellant was not handcuffed does not show that he was not under arrest. On the contrary, as stated by counsel for the state, this shows, if it shows anything, that appellant was in no way resisting arrest. Nor does the fact that the sheriff was not in the store when McPhee was there throw any light either one way or the other on the subject of the arrest of appellant. McPhee was a police officer of the city of Spokane, and he testified that, while he was on the railroad going from Davenport to Spokane, he was informed that appellant was at Reardon, in custody, and that he found him there sitting in a store at the time above mentioned. In fact, it appears that the question of appellant's arrest was not deemed of any special importance by the prosecuting attorney, as there was no attempt to ascertain from the witness the details of the original arrest of appellant, if he was arrested by some person other than the witness himself. If the appellant, as seems to have been the fact, was in the actual custody or within the power of McPhee, he was, in contemplation of law, under arrest. *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480. We think the court did not err either in overruling appellant's objection to the question as to appellant's arrest, or in denying the motion to strike the answer thereto from the record.

Nor do we think the court erred in refusing to strike from the record the entire testimony of the witness McPhee. It is admitted that the primary purpose of the testimony of this witness was to show that appellant had precipitously fled from the scene of the crime with which he was charged. But the learned counsel for the appellant earnestly insists that such testimony was wholly insufficient to prove flight, and therefore should have been excluded from the consideration of the jury. It is true that the testimony in question was not alone sufficient to establish the fact that the appellant was fleeing from justice, but it was nevertheless competent and material evidence upon that question. It constituted at least one link in the chain of circumstances from which flight might be inferred, and was therefore properly submitted to the jury. That McPhee saw appellant at Reardon, a town 25 miles from Spokane, at 10 o'clock in the morning of November 4, 1903, and that appellant told him he had walked all the way from Spokane the night before, is not disputed. And the materiality of this testimony becomes at once apparent when viewed in connection with the positive testimony of the witness Fisher to the effect that he saw the appellant, at or about 2 o'clock in the morning of the same day, carrying saddles from the Klondike Stable, in the city of Spokane, and trying to steal a horse from the adjoining stable. Why the appellant walked on that particular night from Spokane to Reardon is not disclosed by the record, and, that being true, it cannot be

said there was no evidence of flight on the part of appellant. It is not necessary, in order to prove the flight of one charged with crime, to show that he escaped from jail or from an officer having him in custody, for it often happens that persons conscious of guilt seek safety by flight even before they are suspected of crime. "The wicked flee when no man pursueth."

The fifth assignment of error is that the court erred in instructing the jury as follows: "While the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf, and the court so instructs the jury in this case." It is conceded that this charge of the court complies with the letter of the statute, but it is contended on behalf of appellant that it is not within the spirit of the law; and it is urged that the appellant was entitled to an unqualified instruction, without reference to any statute whatever; or, in other words, that the appellant was prejudiced by the statement to the jury that "the statute expressly makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf." It is stated, in effect, by counsel for appellant, that the judge by this instruction virtually told the jury that "the law requires me to so instruct you, and for that reason only I do it." This instruction is clearly in accordance with the law, and the statement of the court that it was made its duty by the statute to so instruct the jury did not, in our judgment, abridge or injuriously affect any right of the appellant. Where the jury is properly directed as to the law upon a particular question, the language used by the court is a matter of no special importance. In *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707, this court ruled that an instruction which substantially complies with the provisions of the statute is sufficient, and we think such is the general rule. The instruction now under consideration is not only substantially but literally in the language of the statute (*Ballinger's Ann. Codes & St. § 6941*), and is therefore not subject to legitimate criticism.

Upon the question of flight the court charged the jury as follows: "If you find that burglary was committed as charged in the information, evidence of flight of the accused may be considered in determining the question as to whether he was the one who committed the act." It is contended by appellant that this instruction is erroneous, for the reasons: (1) That there is no evidence of the flight of the appellant, and no evidence of any attempt to escape from the officers; (2) that it comments upon the facts in the case;

and (3) that this is not a proper case for such an instruction, and that the instruction fails to state the law correctly. What we have said in discussing appellant's fourth assignment of error disposes of the proposition that there was no evidence of flight of appellant, and therefore a further consideration of the question of flight is unnecessary. Nor do we think that this instruction is violative of section 16 of article 4 of the Constitution, which provides that judges shall not charge juries with respect to matters of fact, or comment thereon. The learned judge made no statement to the jury as to the evidence which had been introduced upon the question of flight. Neither did he make any remarks indicating his own opinion upon that question, or suggesting the conclusion which should be arrived at by the jury. In short, he did not "comment thereon." The contention that this instruction does not state the law is based upon the proposition, if we understand appellant's argument, that the court should have gone further and informed the jury that the circumstances explaining or excusing flight should be taken into consideration, and no doubt the jury should be so instructed in cases where the evidence warrants such instruction. *Wharton's Crim. Ev.* (9th Ed.) § 750. But in this case there were no facts or circumstances explaining, or tending to explain or excuse, the flight of appellant, and consequently no countervailing conditions for the consideration of the jury. Although the court might properly have charged the jury that the flight of the accused would not by itself warrant a conviction, yet the omission to do so did not, in our opinion, vitiate the instruction as given. Indeed, this instruction plainly implies that a conviction might not be based solely on the fact of flight. In *State v. Gee*, 85 Mo. 647, the Supreme Court of Missouri approved an instruction couched in the following language: "The court instructs the jury that flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having shot and killed Minnick, as charged in the indictment, fled the country and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence." The instruction given in this case does not state that guilt may be inferred from flight, or even, as was said in the Missouri case, that flight raises the presumption of guilt. It simply says to the jury that evidence of flight may be considered in determining whether the accused was the one who committed the offense, and the court committed no error in so charging the jury.

Lastly, it is contended by appellant that the court erred in refusing to grant a new trial on the ground that the verdict was contrary to the evidence. This contention is absolutely untenable. We have read and carefully considered all the evidence contained in the record, and are thoroughly satisfied

that it justifies the verdict of the jury. It is true, one Ingalls, a witness on behalf of the defendant, testified at the trial substantially as follows: "On the evening of November 3d, about 9 or 10 o'clock, I called at the Klondike Stables, and defendant and I went to town and had several drinks together, among other places, at the Judge Saloon. About 12 o'clock or thereafter the defendant left me, stating he was going back to the barn to sleep. After that time I went to the barn, walked into the door, took these saddles from the barn, and carried them away. Deatherage was not with me. After I had taken the saddles out, I went upstairs to the place where Deatherage was asleep and told him what I had done. He remonstrated with me and said he did not want to have anything to do with it, and if the saddles were taken he would be accused of it." Of course, if this testimony was true, appellant was entitled to a new trial. But evidently the jury and the judge, having observed the demeanor of this witness and heard his testimony, disbelieved the statements above set forth. And an examination of his testimony as a whole, even as it appears in the record, is sufficient to convince any unbiassed mind that it is wholly unworthy of belief. Although he testified positively and without hesitation in his examination in chief that he took the saddles from the barn, and afterwards went upstairs where appellant was sleeping and told him what he had done, and that appellant remonstrated with him, he was utterly unable to recount the surrounding circumstances, or to give a more detailed account of the transaction. For instance, the following are questions asked this witness on cross-examination, and his answers thereto: "Q. How many saddles did you take? A. Two. Q. Did you take anything else besides the saddles? A. No. Q. Are you sure about that? A. Yes. Q. From where did you take the saddles? A. I got them in the stable. Q. Did you take the saddles from the same identical place in the stable? Were they hanging together at the time you took them? A. Yes. Q. Where was Deatherage at this time? A. Upstairs. Q. Did you go upstairs thereafter? A. Yes. Q. How did you get upstairs—by stairs or by ladder? A. I don't know. Q. Where was Deatherage sleeping—on a bed or on the floor? A. I can't tell you. Q. Why can't you tell? A. I don't know. Q. Who else, or was there any one else, in the room with Deatherage at that time? A. I don't know. Q. How could you see him—was there a light in the room? A. I don't know. Q. Describe the room in which Deatherage slept. A. I cannot. Q. Where did you put the saddles after taking them? A. I don't remember. Q. Which way did you go with the saddles after leaving the stable—north, south, east, or west? A. I don't remember. Q. Where have you been during the last two or three weeks? A. I have been confined in the county jail. Q. In

what cell were you confined in the county jail with reference to the defendant Deatherage? A. I was confined in the same cell. Q. For how long a time were you confined in the same cell with Deatherage? A. For several weeks. Q. Have you not been heretofore convicted of felony in the county of Whitman, state of Washington, and served sentence by reason thereof? A. Yes, sir." It seems plain to us that the testimony of this witness Ingalls, taken all together, bears upon its face the brand of untruthfulness, and that the jury was fully justified in regarding it as a mere fabrication. But even if Ingalls' testimony were considered as worthy of serious consideration, it was squarely contradicted by other evidence which the jury had the right to believe and did believe, and which was clearly sufficient to sustain their verdict. Under such circumstances this court has uniformly declined to award a new trial on the ground of insufficiency of the evidence. See *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036, and cases therein cited.

We have discovered no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, J., concur.

#### MORRISON v. JONES et ux.

(Supreme Court of Montana. July 9, 1904.)

#### MORTGAGES—DEED ABSOLUTE ON ITS FACE—EXISTENCE OF DEBT—EVIDENCE.

1. No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty.

2. A lease and option to purchase was assigned to secure a debt, the assignee to collect and account for the rents. Later the assignor deeded to the assignee, for a consideration much larger than the original debt, all her right and title to the property, the assignee agreeing to reassign if the assignor should pay him the consideration expressed in the deed before exercise of the option, and to reassign thereafter on payment of a larger sum. *Held*, that the deed was not a mortgage, there being no debt secured.

3. In an action to have a deed declared a mortgage the court may, on defendant's motion for a nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.

4. In an action to have a deed decreed a mortgage, an agreement executed concurrently with the deed, whereby the grantee agreed to reconvey on certain conditions, was properly admitted in evidence.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Elizabeth Morrison against J. O. Jones and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Kirk & Clinton, for appellant. Jno. J. McHatton and Geo. F. Shelton, for respondents.

POORMAN, C. This is an action to have a deed to certain real estate declared a mort-

gage, and for an accounting of the rents and profits. At the trial of the case the court sustained defendants' motion for a nonsuit, and entered judgment in favor of defendants. The plaintiff appeals from the judgment and from an order overruling her motion for a new trial.

1. It appears from the record that on the 11th day of May, 1898, John Noyes and wife, being then the owners of lot 2 in block 58 of the Butte town site, leased the same to the plaintiff herein for the period of three years, and also in the lease gave the plaintiff an option to purchase the property for the sum of \$4,500, on condition that she comply with all the terms of the lease with reference to the payment of rent, and should make the payments specified in the option within the time therein stated, the last payment thereof being the sum of \$2,500, which was to be paid on or before the 11th day of May, 1901. Time was made of the essence of this agreement, and the lease as well as the option was to become null and void in case the lessee (appellant here) should fail to comply with the terms thereof. On May 4, 1899, Mrs. Morrison, the appellant here, became indebted to the respondent Jones in the sum of \$3,300, and as security for the payment thereof assigned to Jones this lease and option, with the agreement that Jones should have possession of the property, should rent the same, and account for the net proceeds arising therefrom. This indebtedness from Mrs. Morrison to Jones appears to have been increased, and on May 2, 1900, Mrs. Morrison executed and delivered to Jones, for a consideration of \$5,089.80, a bargain and sale deed, by the terms of which she sold, assigned, transferred, and conveyed to Jones and his heirs all of her right, title, interest, claim, demand, possession, and right of possession of, in, and to this property. This deed also makes specific reference to this lease and option which then existed between Noyes, the owner of the property, and Mrs. Morrison, and includes the lease in the conveyance. The deed then contains this further statement: "It is agreed and understood, that if said second party shall make the payments required under said lease and agreement from said John Noyes and his wife to the said first party and obtain a deed of conveyance for said premises, that the title thereby conveyed shall be and remain the property of said second party or his assigns, free from all claims and demands of the said first party, and all and every person claiming, or to claim through and under her." It is further specified in this deed that the grantor surrenders to the grantee, Jones, the right to the possession of the property, "and he shall henceforth be entitled \* \* \* to the same, and to receive the rents, issues and profits thereof without let or hindrance on the part of the first party or any person claiming under her." Concurrent with this deed a written agreement was entered into between the par-

ties, by the terms of which Jones is declared to be the owner of this lease and agreement to convey, executed by Noyes to Mrs. Morrison, and Jones further agrees therein that he will assign this lease and option to Mrs. Morrison on condition that she pay to him the sum of \$5,089.80, together with interest, on or before the 14th day of May, 1901, provided this payment is made before Jones shall acquire a deed of conveyance from Noyes, but that, if Jones shall acquire the deed of conveyance from Noyes, then the amount required to be paid is the sum of \$5,089.80, plus \$2,500, besides the interest thereon, which payment shall be made before the 14th day of May. In the event this payment is made by Mrs. Morrison at any time prior to the 14th day of May, 1901, Jones agrees to account to her for the rents received from the premises from May 2, 1900.

The appellant contends that this deed is a mortgage. The rule adopted by this court for determining whether a deed absolute on its face is a mortgage is that no conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of a duty existing at the time the conveyance is made, or to be created or to arise in the future. *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240. The original indebtedness, as will be noticed, was \$3,300. The consideration expressed in this deed was \$5,089.80. A considerable portion of this consideration was therefore not included within the former agreement between the parties, and was not secured thereby. The test is whether the grantor in the deed sustains the relation of a debtor to the grantee. In the present case could the grantee Jones, at any time after the execution of the deed, have successfully prosecuted an action against Mrs. Morrison to recover the consideration expressed in the deed? The written terms of the deed and the concurrent agreement appear to cover about every phase of the case, and negative any claim of indebtedness. Mrs. Morrison does not in either of these instruments agree in any manner to pay to Jones any sum whatsoever. There is nothing in either of these instruments that would give Jones any right of action against Mrs. Morrison, nor could he, under the terms of these instruments, maintain any action against her or compel her to pay him any sum whatsoever. There was, therefore, no indebtedness existing between these parties; hence there could be no mortgage; for if this instrument was a mortgage as to Mrs. Morrison, it was also a mortgage as to Jones, and, if a mortgage, there must have been an indebtedness. Being no indebtedness, there could be no mortgage. *Gassert v. Bogk*, supra; *Martin v. Allen* (Kan.) 74 Pac. 249; *Reed v. Parker* (Wash.) 74 Pac. 61.

It further appears from this record that Mrs. Morrison did not pay Noyes the \$2,500 due under her option May 11, 1901, but that defendant Jones made this payment. If this



instrument was in fact a mortgage, and Jones had not made this payment to Noyes, the rights of both Mrs. Morrison and Jones would finally have terminated with respect to this property, and Mrs. Morrison would still be liable to Jones for this indebtedness, if it was an indebtedness, of \$5,089.80, with the interest thereon; but that indebtedness was canceled by the taking of this deed, as appears from the written agreement between the parties in this case. The claim made by appellant that this deed is a mortgage cannot be sustained.

2. There is no evidence in this cause showing that any payment or tender was made to Jones within the time required by the terms of this written contract, or in fact that any tender whatsoever was made. The plaintiff's rights, if she had any, to enforce a conveyance, were therefore lost by her failure to comply with this written agreement.

3. It is further complained that the court improperly entered judgment decreeing this instrument to be a deed; that the same could not properly be done on a motion for nonsuit. This is strictly an equitable action, and the defendant may, if he chooses, at the close of plaintiff's case, submit the cause to the court for decision; and where the plaintiff's evidence fails to sustain the allegations of her complaint there is no inconsistency in the court's rendering judgment on the merits of the cause, so far as it is necessary for plaintiff to maintain the same to entitle her to recover. There is no such thing as technical nonsuit in a strictly equitable action.

4. The appellant claims, in his specification of errors, that the introduction in evidence of this concurrent agreement dated May 2, 1900, was error. This agreement was a part of the transaction between plaintiff and defendants respecting this property, and it was a proper matter to be inquired into by the court.

We recommend that the judgment and order appealed from be affirmed.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MILBURN, J., not having heard the argument, takes no part in this decision.

#### COTTER v. BUTTE & RUBY VALLEY SMELTING CO.

(Supreme Court of Montana. July 9, 1904.)

CONTRACT — RESCISSION — INSTRUCTIONS — FINDINGS—NEW TRIAL—ABUSE OF DISCRETION.

1. Under Civ. Code, §§ 2271, 2273, requiring that the party rescinding a contract must rescind promptly on discovering the facts, and must restore, or offer to restore, everything of

value received under the contract, a complainant undertaking to rescind a contract of purchase of stock, under which he paid certain money, and demanding a return of the money, is not entitled to rescission, where the existence of none of the grounds of rescission is shown, and complainant has not complied with the prescribed rules governing rescission.

2. Where plaintiff rescinded a contract of purchase of stock and demanded repayment of the money after he had been recognized as a stockholder and voted the stock, a finding for defendant was justified under an instruction that if plaintiff paid the money with the understanding that he was to receive stock, and defendant failed to deliver to him the stock in a reasonable time, the jury should find for plaintiff.

3. Where a company recognized plaintiff as a stockholder, and he was permitted to vote the stock at stockholders' meetings, he was estopped to deny a delivery of the stock to him and acceptance of it.

4. Where instructions warranted a finding for defendant, but were inconsistent and conflicting with other instructions, the court abused its discretion in granting a new trial on the ground that the verdict was against the law because contrary to the instructions, since the verdict, while opposed to some of the instructions, was warranted by others.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by George H. Cotter against the Butte & Ruby Valley Smelting Company. From an order granting plaintiff a new trial, the defendant appeals. Reversed.

Jas. E. Murray and Robt. McBride, for appellant. Jno. J. McHalton and Geo. F. Shelton, for respondent.

CLAYBERG, C. C. This is an appeal by defendant from an order granting plaintiff a new trial. Plaintiff filed a complaint in which he sought to recover upon five separately stated causes of action. The defendant answered the first cause of action, and allowed judgment to be taken against it on the other four. Plaintiff replied to this answer by way of general denial. By these pleadings an issue was formed, which was tried before a jury, and a verdict was rendered for defendant. Plaintiff moved for a new trial, which was also granted.

The cause of action thus tried arose out of the following circumstances: In 1899 a syndicate composed of Charles Schatzlein, William Owsley, Silas F. King, John W. Cotter, and S. W. Davis agreed and mutually contracted to enter into a company or co-partnership for the purpose of carrying on smelting and mining operations through a lease of the properties of the Montana Smelting & Mining Company at Twin Bridges. It appears that these parties paid certain money to rehabilitate the properties leased, and to prepare for the operations of the company. Cotter paid \$6,000, and says, "There was a corporation to be formed, and we were to take stock in the corporation." The corporation was subsequently organized, and corporate meetings were held, at which Cotter participated as a stockholder, voting

10,000 shares of stock. Afterwards the capital stock of the corporation was increased, in which proceedings Cotter also participated as a stockholder. No certificate of stock was ever delivered to Cotter. After some time two of the syndicate turned over certain promissory notes to the First National Bank of Butte, and that bank brought suit thereon, attaching all the properties of the company. The record is somewhat indefinite as to the purpose and character of these notes, but, as we view the case, this matter is entirely immaterial. After the attachment Cotter gave notice to defendant and to its president and secretary in the following form: "Gentlemen: You and each of you are hereby notified and requested to return and pay over to me the sum of \$6,000 which was heretofore paid to the Butte and Ruby Valley Smelting Company, on or about the 15th day of September, A. D. 1899, as a subscription for stock in the said company, which said stock has never been delivered to me, and I have elected to rescind the said contract of subscription for stock, owing to the failure of the company to deliver the stock to me in accordance with the terms of my subscription; and I hereby demand that the said company immediately repay to me the said sum of \$6,000 with interest thereon from the date of the payment of the same to the said company to the date of repayment of same to me. Dated, Butte, Mont., September 4, 1902. John W. Cotter." Subsequently Cotter assigned his claim to plaintiff, and this suit was brought.

1. The issue presented by the pleadings and proof was a very narrow one, and the evidence on material points was practically undisputed. Cotter says that he paid \$6,000, which the company used, and that he was to have stock in return for it. He admits that the company was organized; that stockholders' meetings were held, at which he participated as a stockholder, voting 10,000 shares of stock. It will be noticed that he undertook to rescind the contract under which the money was paid, and demanded a return of his money. He did not seek to compel the delivery to him of the certificates representing his stock, or to recover damages because the certificates were not delivered. His admissions that he paid the money for the benefit of the company and was to take stock therefor, and that he voted such 10,000 shares of stock as a stockholder in corporate meetings of the company, seem to us to be conclusive in this case that he was recognized as a stockholder by the company, and is estopped to claim the contrary. The mere issue of the certificates of stock to him would but furnish him with evidence of his ownership. One can be a stockholder prior to the issuance and delivery to him of certificates of stock. *Clark & Marshall on Private Corporations*, §§ 378a, 378b; *Cook on Corporations*, § 13; *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706,

17 Am. St. Rep. 910; *Mitchell v. Beckman* (Cal.) 28 Pac. 110; *California Hotel Co. v. Callendar*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Pacific Fruit Co. v. Coon* (Cal.) 40 Pac. 542; *Packard Machine Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

Section 2271 of the Civil Code provides that contracts may be rescinded "in the following cases only": "(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party; (2) if, through the fault of the party as to whom he rescinds the consideration for his obligation fails, in whole or in part; (3) if such consideration becomes entirely void from any cause; (4) if such consideration, before it is rendered to him, fails in a material respect, from any cause; or, (5) by consent of all the other parties."

Section 2273 provides that rescission "can be accomplished only" by compliance with the following rules: "(1) He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and, (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

The record is barren of pleading or proof of the existence of any of the grounds of rescission mentioned in section 2271, supra, and of compliance with either of the rules announced in section 2173, supra. There was, therefore, no rescission shown. Before the right to recover the money paid upon the contract arose, the contract must have been rescinded.

2. One of the grounds urged by plaintiff upon his motion for a new trial was that the verdict was "against the law," being contrary to the instructions of the court. All the instructions given are to be taken into consideration in determining this question, and if the verdict was justified by any of the instructions given, and the instructions as a whole were inconsistent or conflicted with each other, the verdict was not contrary to the instructions.

By instruction No. 1 the jury were charged that if they found from the evidence that Cotter paid to defendant \$6,000, or any amount, with the understanding that he was to receive a certain number of shares of the capital stock of the company, and if they further found "that defendant failed or neglected to deliver to him shares of its capital stock within a reasonable time, or at all, thereafter," and that Cotter demanded a repayment to him of the amount and interest,

and assigned his claim to plaintiff before the commencement of the suit, they should find a verdict for plaintiff. Under this instruction we believe that the jury was justified in finding a verdict for defendant. As above stated, the certificate of stock is merely evidence of ownership. The evidence disclosed that the company recognized Cotter as a stockholder to the extent of 10,000 shares, and that he voted that amount of stock as a stockholder at different stockholders' meetings of the company. In our opinion this is equivalent to a delivery of the shares of stock to Cotter and an acceptance by him which he is estopped to deny, and that the jury might have found such delivery, and therefore have rendered a verdict for defendant.

In instruction No. 2 the court charged the jury that if they found from the evidence that Cotter paid \$6,000 as subscription to the capital stock of said company to be thereafter organized, and if they further found that the company was organized and did not deliver to Cotter the certificates of stock for which he had subscribed or paid, "and if you further find that after the expiration of such reasonable time he rescinded said contract, and demanded a repayment to him of the money so paid as a consideration for such stock, to be delivered," and if they further found that he assigned his claim to the plaintiff before the commencement of the suit, and that same has not been paid since the assignment, the verdict should be in favor of plaintiff for the amount so paid, together with interest. Instructions Nos. 4 and 5 also left the question of rescission to the jury. The jury may have found, and were justified in finding, under these instructions and the evidence, that the contract had not been rescinded.

In instruction No. 8 the court charged the jury that "you are instructed that the written notice offered in evidence in this case, signed by John W. Cotter, and notifying defendant that he had elected to rescind the contract of subscription, and demanding a repayment of money claimed to be due him thereunder, was a sufficient rescission of said contract, and rescinded the same, provided you find that defendant failed to deliver to said John W. Cotter the stock subscribed for by him, as explained in these instructions." By this instruction the court took away from the jury the right to find as to whether or not Cotter rescinded the contract, but left the jury to find upon the delivery of the stock. This instruction is inconsistent with the others given, and clearly the jury might have returned a verdict for defendant upon a finding that the stock had been delivered.

The court below was evidently confused upon the necessity for the delivery of the certificate of the shares of stock, instead of placing Cotter in the position of a stockholder and recognizing him as such. Under the cases of *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, and *King v. Lincoln*,

26 Mont. 157, 66 Pac. 836, the rule of this court has been established that the jury is bound by the law as given by the court, whether correct or not, and, if they do not follow such instructions in rendering their verdict, the verdict will be set aside and a new trial granted. This rule was adopted in California, as announced in the case of *Emerson v. Santa Clara County*, 40 Cal. 453. In our opinion this rule is not applicable in this case. Taking the whole charge of the court together, the jury was warranted by instructions 1, 2, 4, and 8, as above recited, to find a verdict for defendant.

In the case of *Altoona Quicksilver M. Co. v. Integral Quicksilver M. Co.* (Cal.) 45 Pac. 1047, the court instructed the jury to find a verdict against plaintiff. At the same time he gave other instructions submitting the entire case to the jury. The court say: "In various instructions it submitted to the jury the question as to whether plaintiff or its grantors had complied with the law in regard to the location and working the mine, and as to its claim of right by actual adverse possession. The jury found for the plaintiff. In so doing they disobeyed the express direction to find against the plaintiff, but they obeyed the other direction to consider and pass upon the rights of the plaintiff, and to find according to the facts and principles of law declared by the court. The judge, in considering the case on motion for a new trial, was convinced that he had erred in directing the jury to find against the plaintiff, but thought, nevertheless, he was bound to grant a new trial on the authority of *Emerson v. Santa Clara Co.*, 40 Cal. 543, in which it was held that a verdict against the instruction of the court is a verdict against the law. This case is not within the reason of that case. Here the instructions were, in effect, contradictory, and the verdict, while opposed to one instruction, is warranted by others."

Under the case of *Murray v. Heinze*, supra, we are not allowed to consider the correctness of any of the instructions given to the jury, but we hold that we may look to the instructions to ascertain whether or not any thereof justified the verdict as returned by the jury. We have seen that the verdict was justified by instructions 1, 2, 4, 5, and 8. We cannot conceive how any verdict could be rendered upon the testimony as disclosed in the record except one for defendant. This being the case, we can perceive no reason for granting a new trial, and we therefore conclude that the court below abused its discretion in granting the new trial prayed for, and advise that its action in that regard be reversed. We have not been aided in the investigation of this appeal either by printed brief or oral argument in behalf of respondent.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the order appealed

from is reversed, and the court below instructed, to set aside the order granting the plaintiff a new trial.

MILBURN, J., not having heard the argument in this case, does not participate in this decision.

### MUELLER v. RENKES.

(Supreme Court of Montana. July 2, 1904.)

MORTGAGES—NATURE—INTEREST OF MORTGAGEE — CANCELLATION—RELEASE—EFFECT—FRAUDULENT CONVEYANCES — EVIDENCE — SUFFICIENCY.

1. Civ. Code, § 3810, declares that a mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity for a change of possession. *Held*, that a mortgage itself does not create or alienate an estate in real estate, but is a mere security.

2. Civ. Code, § 1642, declares that the term "conveyance" embraces every instrument in writing by which any property is mortgaged, etc. *Held* that, while a mortgage is a conveyance, it is a conveyance of a mere chattel interest.

3. A mortgage may be canceled or released by the mortgagee at any time without consideration, and with or without the consent of the mortgagor.

4. Civ. Code, § 3752, declares that the creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security. Section 3790 provides that a lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and that it is extinguished in like manner with any other accessory obligation. Section 3817 provides that a mortgage does not bind the mortgagor to perform the act for the performance of which it is security. *Held*, that the purchaser of mortgaged real estate does not thereby become liable for the indebtedness.

5. When a mortgage is released, a bona fide purchaser holds the premises free of the mortgage, whether the purchase was made prior or subsequent to the release.

6. Under the express provisions of Civ. Code, § 3345, a mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his representative, acknowledging satisfaction, in the presence of the county clerk or his deputy, who shall subscribe the same as a witness.

7. Under Civ. Code, § 2170, providing that the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate it, one attacking the release of a mortgage, which was given to him and released by himself, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside.

8. By Code Civ. Proc. §§ 890, 891, a party is not entitled to a writ of attachment until he has made an affidavit stating the amount of his claim, and that payment has not been secured by any mortgage or lien or pledge, or, if originally secured, that the security has, without any act of plaintiff or the person to whom it was given, become valueless. One who had a mortgage on lands securing his debt discharged the same of record, and subsequently sued at law on the note which was secured by the mortgage, attached the land which had been mortgaged, and purchased it at judicial sale, the land having before the discharge of the mortgage been conveyed by the mortgagor to a third person. *Held*, in a suit by such person to quiet

title, that a finding that the mortgage was not a lien on the property at the time the suit to quiet title was commenced was warranted.

9. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except in extreme cases.

10. The mere fact that a conveyance of land is from a daughter to her mother, or vice versa, is not sufficient to stamp it with fraud.

11. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being \$2,100, and between \$800 and \$1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only \$1, such conveyance was not fraudulent as to creditors.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Suit by Lena Mueller against George Renkes. From a judgment in favor of complainant, and from an order overruling a motion for a new trial, and from a judgment overruling an application for a receiver, defendant appeals. Affirmed.

John J. McHatton, for appellant. J. N. Kirk and John Lindsay, for respondent.

POORMAN, C. This case stands for review on appeals on the part of defendant from a judgment rendered against him, from an order of the court overruling his motion for a new trial, and from the action of the court in overruling his application for the appointment of a receiver. The action is one to quiet title. The complaint contains the allegations of possessory right, of possession and ownership, and other allegations usually found in such complaints, and that the defendant claims to own some interest in the property adverse to the plaintiff. The defendant denies the allegations of the complaint, and alleges as a separate defense and counterclaim that one Mrs. Mosherosh, the grantor of the plaintiff, on July 16, 1895, for a valuable consideration delivered to this defendant her promissory note dated July 16, 1895, for the sum of \$2,450, due one year after date, with interest; that the maker of the note, who was then the owner of the property described in the complaint, on that day executed a mortgage to the defendant on said property to secure the payment of this note; that the note has never been paid; that on the 8th day of June, 1898, "this defendant, not knowing the effect of his act, canceled such mortgage upon the records of said county," the note not then having been paid; that this mortgage was recorded on the day of its execution; that on the 6th day of May, 1896, the said Mrs. Mosherosh made a pretended conveyance of this property to the plaintiff; that subsequently, and on the 20th day of December, 1898, this defendant "commenced a suit in" the district court, "entitled 'George Renkes, plaintiff, against Emma Mosherosh,

¶ 10. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 350.

defendant," to recover the amount due Renkes upon this promissory note; that judgment therein was entered for the plaintiff Renkes by default; that Renkes, at the time of the commencement of that action, filed an affidavit and undertaking on attachment, and caused this property to be attached; that an execution was issued and the property sold under the judgment so obtained by the said Renkes, and was bid in by him; that the pretended conveyance from Mrs. Mosherosh to the plaintiff in this action was made for the purpose of hindering and delaying the creditors of the said Mrs. Mosherosh, and that the plaintiff in this action, Mrs. Mueller, now holds the property in trust for the said Mrs. Mosherosh. The plaintiff filed a replication denying these allegations so far as they relate to the matters in issue between the plaintiff and defendant in this action. The defendant claims that some of these denials relating to this new matter and counterclaim of this defendant are not sufficient to raise an issue. Under the view taken, however, the question of indebtedness between Mrs. Mosherosh and this defendant becomes immaterial, except the mere fact that an indebtedness did exist between them with reference to this note, and this fact is undisputed. It is further undisputed that at the time Mrs. Mueller, the plaintiff, purchased this property, there was a valid, subsisting, and recorded lien thereon. It is further undisputed that the defendant in this action did recover a default judgment against Mrs. Mosherosh on this note, and that this judgment has not been paid.

There are two questions presented by these appeals: (1) Was this mortgage a valid, subsisting lien on the property described in the complaint at the time of the commencement of this action? (2) Was the conveyance from Mrs. Mosherosh to the plaintiff herein a bona fide transaction, so as to pass the title of the property to this plaintiff?

1. A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. Section 3810 et seq., Civ. Code; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Gallatin County v. Beattie*, 3 Mont. 173; *Holland v. Commissioners*, 15 Mont. 400, 39 Pac. 575, 27 L. R. A. 797; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821; *Swain v. McMillan* (Mont.) 76 Pac. 943; *Adler v. Newell* (Cal.) 41 Pac. 799; *Mott v. Clark* (Pa.) 49 Am. Dec. 566; *State v. Gilliam*, 18 Mont. 100, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556. It is true, a mortgage is a conveyance (section 1642, Civ. Code), but it is a conveyance of only a chattel interest (*Hull v. Diehl*, supra). A mortgage being a mere lien executed for the benefit of the mortgagee, it may be canceled or released by him at any time with or without consideration, and with or without the consent of the mortgagor. See *Swain v. McMillan*,

above. Nor does the purchaser of mortgaged real estate become thereby personally liable for the payment of the indebtedness described in the mortgage. Sections 3752, 3790, 3817, Civ. Code. The lien is strictly in rem by reason of the mortgage, and, when the mortgage is released, a bona fide purchaser holds the res free of such claim or lien, whether the purchase was made prior or subsequent to such release.

In this state a mortgage may be discharged by entry in the margin of the record thereof. Section 3845, Civ. Code. The release in this case was made in that manner, and is in the following form: "I hereby certify and declare that the mortgage, together with the debt thereby secured, is fully paid, satisfied and discharged. Witness my hand this 8th day of June, 1898. George Renkes. Attest, John Weston, County Recorder, by A. E. Whipple, Deputy." The defendant, in attacking this release, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside. Section 2170, Civ. Code. The evidence clearly shows that neither Mrs. Mosherosh, the mortgagor, nor Mrs. Mueller, the plaintiff herein, knew of the intention of appellant to release this mortgage, and did not know for some time afterwards that he had done so. The defendant says: "I came to the courthouse alone, voluntarily, without conferring with any one about it, with the intention of canceling this mortgage and going over to Mrs. Mosherosh, which I did, and getting new papers made out. I did not think I was making a mistake. \* \* \* No consideration in the way of money passed between myself and Mrs. Mosherosh for the cancellation of the mortgage." No claim can therefore be made that the release is the result of any deception on the part of Mrs. Mosherosh or of Mrs. Mueller. The appellant, Renkes, claims that he "did not know what he was doing" when he made the release, and "did not know the effect of his act," and that the same was without consideration. The defendant testified that in a conversation both the plaintiff and Mrs. Mosherosh tentatively stated to defendant that they would give him a new mortgage, but they did not say when they would do it, and that Mrs. Mosherosh told him that this mortgage was good for 10 years, but that he disbelieved it. Mrs. Mosherosh denies that she ever promised to execute a new mortgage, and testified that she informed defendant that she was no longer the owner of the property.

The deed from Mrs. Mosherosh to Mrs. Mueller was executed May 6, 1896, and was recorded on that day. Several months after the defendant had executed the release, and after he had been fully informed as to its effect and import, he instituted an action at law on this note against Mrs. Mosherosh, to which action the plaintiff herein was not a party, "filed in said action an affidavit and

undertaking on attachment, and thereupon caused a summons and writ of attachment to be issued in said cause," and attached this same property as the property of Mrs. Mosherosh. Why the defendant thought necessary to attach the property if he believed that he had a mortgage on it is not explained. Under the Code, before a party is entitled to a writ of attachment he must make an affidavit stating, among other things, the amount of his claim, "and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." Sections 890, 891, Code Civ. Proc. Whether the defendant was legally entitled to any attachment at all in his action against Mrs. Mosherosh is a question which does not arise in this case. It is apparent, however, that if this mortgage was a valid, subsisting lien for the security of this note on December 20, 1898, when defendant instituted his action against Mrs. Mosherosh, then the statement in the affidavit for attachment, "the payment of the same is not secured," was untrue, and, if this statement was true, the mortgage did not exist at that time. If it did not exist at that time, it does not exist now, for it has never been reinstated nor the release set aside.

No case has been cited, nor have we been able to find any, approximately similar to this in its statement of facts. The following cases, however, discuss the main question: *United States v. King*, 9 Mont. 75, 22 Pac. 498; *Stephenson v. Hawkins* (Cal.) 7 Pac. 198; *Garwood v. Eldridge*, 34 Am. Dec. 195; *Dix v. Smith* (Okla.) 50 L. R. A. 714, and note; *Attkisson v. Plumb* (W. Va.) 58 L. R. A. 788, and note.

When the defendant ascertained his mistake in making the release, he had his option to institute an action in equity against all interested parties to set aside the release and to foreclose the mortgage, or to sue in an action at law on the note. He chose the latter course, and, to secure the benefit of an attachment, made and filed an affidavit to the effect that he had no mortgage. The trial court did not err in holding that this mortgage was not a lien on the property described in the complaint at the time this action was commenced.

2. The bona fides of a conveyance presents questions of fact which must be determined from the particular acts of the parties, and the circumstances and conditions surrounding the transaction and under which they act. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a

conveyance, except, perhaps, in extreme cases. *Maloy v. Berkin*, 11 Mont. 188, 27 Pac. 442. Nor is the mere fact that the transaction is between mother and daughter sufficient evidence to stamp it with fraud. It is true this court has decided that where a husband, then being in debt, transfers property to his wife, courts of equity will scrutinize the transaction very closely (*Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063; *Shepherd v. First National Bank*, 16 Mont. 24, 40 Pac. 67); and it is an equitable rule that, where fraud is charged, the entire transaction should be closely examined.

The evidence in this cause shows conclusively that on the 6th day of May, 1896, Mrs. Mosherosh, the grantor of the plaintiff herein, was indebted to the plaintiff in certain sums which had theretofore been advanced to her; that she was also at that time indebted to the defendant herein, Mr. Renkes; that Mr. Renkes' claim was secured by a mortgage on real estate, which mortgage was then duly recorded. The consideration named in the deed from Mrs. Mosherosh to this plaintiff was \$1. The deed was a bargain and sale deed. The testimony, however, shows conclusively that the consideration was \$2,100; that somewhere between \$800 and \$1,200 were paid to Mrs. Mosherosh on the day the deed was executed. The balance of the consideration had been theretofore advanced. The mortgage of defendant, then being of record, was prior to this deed, and no conveyance which Mrs. Mosherosh could make could in any manner defraud this defendant or invalidate his lien. This lien continued for more than two years after this conveyance to plaintiff had been recorded, and was then released only by the voluntary act of the defendant himself; nor was any suit ever instituted by the defendant to foreclose that mortgage or to set aside this release. We are unable to understand from this state of facts how Mrs. Mosherosh, at the time she made this conveyance to her mother, could have intended to defraud this defendant, for it was beyond her power to invalidate the lien of the defendant, or to make any conveyance of the property that would be prior to this mortgage.

We think the judgment and orders appealed from should be affirmed.

CALLAWAY, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and orders are affirmed.

BRANTLY, O. J., not having heard the argument, takes no part in this decision.

## SHAW v. NEW YEAR GOLD MINES CO.

(Supreme Court of Montana. July 9, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—  
EXPLOSION IN MINE—DUTY TO ADOPT RULES  
—APPEAL—NONSUIT—CONSIDERATION OF EVIDENCE.

1. To justify reversal on appeal from a nonsuit in an action for personal injuries, the evidence must not leave either the negligence of defendant, or that it was the proximate cause of the injury, to conjecture; and, if it is equally consonant with some theory inconsistent with either of these facts, it does not tend to prove them, within the rule that whatever the evidence tends to prove will on such an appeal be taken as established.

2. In an action against a mine owner for injuries to a miner caused by an explosion, evidence held not to justify submission of the issue of defendant's negligence.

3. While a master is bound to use reasonable diligence to provide and maintain a safe place to work, such rule does not apply to a case where servants are creating the place of work, when it is constantly being changed in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when by the negligence of the workmen the place is rendered unsafe without the master's fault or knowledge.

4. Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution.

Commissioners' Opinion. Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by E. A. Shaw, as administrator of the estate of Joseph L. Adams, deceased, against the New Year Gold Mines Company. From a judgment for defendant, plaintiff appeals. Affirmed.

A. C. Gormley, for appellant. Ransom Cooper, for respondent.

CLAYBERG, C. C. Appeal from a judgment of nonsuit. Joseph Adams, who was plaintiff's intestate, brought suit against the New Year Gold Mines Company to recover damages for personal injury caused by the alleged negligence of defendant. The material allegations of the complaint as to this negligence are as follows:

"(4) That the plaintiff, at the time of the accident hereinafter set forth, and for some time prior thereto, was actually engaged and employed by the defendant as a miner in said Old Bach mine; that the plaintiff was employed as such miner in drilling, blasting, and driving a tunnel in said mine.

"(5) That it was the duty of the defendant to provide and maintain a reasonably safe place for the plaintiff to work in, and to keep and maintain said tunnel in which plaintiff was working in a safe condition, so as not to expose the plaintiff to any unnecessary or extraordinary hazard or peril.

"(6) That the defendant failed and neg-

lected to perform and discharge its said duty to the plaintiff, and knowingly and negligently permitted the place in which plaintiff was working to become unsafe, thereby exposing the plaintiff to extraordinary hazard and peril, as is more particularly set out in the next paragraph herein.

"(7) That on the morning of the 25th of September, 1900, while the two men employed on the day shift in said tunnel were at work therein, and immediately after the two miners aforesaid had loaded a hole with blasting powder in the bottom of the tunnel, as it was their custom and duty to do at said time, the foreman of the defendant came to the place where said men were working, and ordered and directed them not to fire the hole loaded by them with blasting powder as aforesaid; that said men obeyed the instructions of said foreman, and left the said blast as it was, and the same remained unexploded until the accident to the plaintiff as herein stated; that said men on the day shift quit work at 6 o'clock on said day, and that the plaintiff and his partner on the night shift went to work, as was their duty, at 7:30 p. m. on said day, in the same place where said day shift had been working; that the plaintiff, shortly after commencing work as aforesaid, started in to clean up the bottom of said tunnel which had been left by the day shift, and which it was the duty of the plaintiff to do, and plaintiff accordingly began to drill holes in the bottom of said tunnel a few feet from the face of the drift, for the purpose of loading them with blasting powder and cleaning up said bottom, and while the plaintiff was so drilling in said place the charge of blasting powder loaded by the day shift in the morning as aforesaid exploded, which explosion caused plaintiff to receive severe and grievous injuries, his left eye being blinded and the sight in the other eye being seriously affected, his jaw being fractured, most of his teeth being knocked out, his side and chest being severely bruised and injured, his left hand being almost blown off, so that it was necessary to have the same amputated, his right hand being rendered crippled and useless, and suffering also a compound fracture of the left arm between the elbow and the wrist, said injuries causing him great and excruciating pain and suffering, and confining him to the house and hospital for several months; that when plaintiff went to work on the evening of September 25th as aforesaid, and up to the time when said accident occurred, plaintiff did not know and had no means of knowing that there was at said place, or anywhere in said tunnel, any charge or charges of blasting powder not shot off, and could not have discovered the fact except by being informed thereof; that the defendant and its said foreman knew, or by the use of reasonable diligence might have known, of the existence of said unexploded blast, and of the danger to

the plaintiff therefrom, and it was the bounden duty of the defendant and its said foreman to convey such information to plaintiff, but that the defendant and its said foreman failed and neglected so to do, and willfully, knowingly, and negligently allowed and directed the plaintiff to go to work in said place, where his duty called him, in ignorance of said danger; that said explosion occurred and plaintiff was injured as aforesaid without any fault or negligence on his part, but solely because of the defendant's negligence as aforesaid; that the said foreman was the vice principal of the defendant in all matters relating to the working and operating of said Old Bach mine, and with reference to the employment of the plaintiff and the other miners mentioned herein, and that the negligence of said foreman as aforesaid was the negligence of the defendant."

"(9) That by reason of the said neglect and omission of the defendant to keep and maintain a safe place wherein plaintiff was required to work as aforesaid as defendant's employee, and by reason of the injuries suffered by plaintiff solely because of said negligence and want of ordinary care on the part of the defendant, as hereinbefore set forth, the plaintiff has been damaged by the defendant in the sum of thirty thousand dollars."

The answer of defendant denies that the injuries to plaintiff were caused by the negligence of defendant. Sets up contributory negligence on the part of plaintiff. Alleges that he had been employed at the mine for some time, and knew the conditions, and knew that in running the tunnel it was necessary for the employes to drill holes, put blasts in the rock in the breast of the tunnel, and explode them; that he had been engaged for a long time in the performance of that kind of work, and well knew that sometimes such blasts would miss fire and fall to go off, and that it was sometimes difficult for the man who put in blasts to ascertain whether all the blasts fired went off; that the danger from unexploded blasts was incident to this class of employment; that those engaged in the work of running the tunnel assumed the risk; that he voluntarily continued his services, with full knowledge of the risk, without objection; and that, if plaintiff was injured by the negligence of any one, it was the negligence of fellow servants, for which defendant was not responsible.

At the close of plaintiff's testimony, defendant moved for a nonsuit, which was granted, and judgment entered in favor of defendant. From this judgment, plaintiff appeals.

1. Counsel for appellant insists that, by the decisions of this court upon appeals from judgments of nonsuit, it is well settled that whatever the evidence tends to prove will be considered as proven, and that a judgment upon a nonsuit will not be sustained

unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had in any view which could be reasonably taken from the facts which the evidence tends to prove. *Cain v. Gold Mountain M. Co.*, 27 Mont. 529, 71 Pac. 1004; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Ball v. Gussenhoven* (Mont.) 74 Pac. 871; *Michener v. Fransham* (Mont.) 74 Pac. 448; *Nord v. B. & M. M. Co.* (Mont.) 75 Pac. 681; *McCabe v. Montana Central Ry. Co.* (Mont.) 76 Pac. 701; *Cummings v. H. & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852. Under this rule, however, the record must contain competent testimony fairly tending to affirmatively prove the allegations of the complaint. The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus, in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury. If the testimony leaves either the existence of negligence of defendant, or that such negligence was the proximate cause of the injury, to conjecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them, within the meaning of the rule above announced. The use of the word "tend" does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Deschenes v. Railroad*, 69 N. H. 285, 46 Atl. 467; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Atchison, T. & S. F. R. Co. v. Alsdurf*, 68 Ill. App. 149; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202; *Meehan v. Spiers Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; 2 Labatt on Master & Servant, §§ 283, 287, and notes. Justice Brewer uses the following language in *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361: "And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the



employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." The record discloses no direct evidence concerning the occurrence of the accident. Adams, the injured man, died before the trial of the case, and his administrator was substituted. The evidence concerning the actual facts occurring at the time of the accident is therefore entirely circumstantial, and the direct and proximate cause thereof is entirely a matter of inference, to be deduced from the circumstances and other facts detailed by the witnesses. We do not desire to be understood that a plaintiff may not make out a case of actionable negligence against a defendant by circumstantial evidence, but such circumstantial evidence must tend directly to establish the cause of action, and not some theory inconsistent therewith. In this case the accident is claimed to have occurred from an unexploded charge. This is possible. It is equally possible that it occurred from an unexploded piece of dynamite which had become dislodged from a loaded hole by other blasts, and intermingled with the waste which it was Adams' duty to clean up, or from the negligence of Adams himself. Many other theories of the accident present themselves, which are equally deducible from the facts disclosed by the record. Under the above authorities, this is insufficient to satisfy the rule that the burden of proof is upon plaintiff to show by competent proof that the defendant was negligent, and that the injury occurred as the proximate result of such negligence.

2. While it is a general rule that a master is bound to use reasonable diligence to provide a servant with a safe place in which to work, and to maintain such condition during the term of employment, such rule should have no application to a case when the plaintiff and his fellow servants are creating the place of work; when it is constantly being changed in character by the labor of the men working upon it; when it only becomes dangerous by the carelessness or negligence of the workmen, or by the negligent manner in which they use the tools or materials furnished for their work; when the dangers which arise are very short-lived; or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge. The Supreme Court of Utah, in the case of *Anderson v. Daly M. Co.*, 16 Utah, 28, 50 Pac. 815, uses the following language: "While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but in a place where the nature of the business is such that the conditions

are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. \* \* \* The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault." In *Davis v. Trade Dollar Cons. M. Co.*, 117 Fed. 122, 54 C. C. A. 636, the court says: "It is true that the law of master and servant requires that the former furnish the latter a safe place in which to work, but the master is not required to furnish the servant a safe place in which to work where the danger is temporary, and when it arises from the hazard and the progress of the work itself, and is known to the servant. The master is not required to be present at the working place at all times in person or by a representative, to protect a laborer from the negligence of his fellow workmen or from his own negligence in the constantly changing conditions of the work." In *Browne v. King*, 100 Fed. 561, 40 C. C. A. 545, the court says: "The danger was temporary. It was danger incident to the very work plaintiff was employed to perform. Until in the progress of the work the missed shot failed to explode, there was no danger." See, also, *Mancuso v. Cataract, etc., Co.* (Sup.) 34 N. Y. Supp. 273; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Finalyson v. Utica M. & M. Co.*, 67 Fed. 507, 14 C. C. A. 492; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; *Labatt on Master & Servant*, §§ 269, 588, 612. The cases of *Shannon v. Cons. & M. Co.* (Wash.) 64 Pac. 169, and *McMillan v. North Star M. Co.* (Wash.) 73 Pac. 685, are seemingly to the contrary, but clearly distinguishable from the case at bar, as to the facts involved. But however this may be, we are of the opinion that the rule adopted by this opinion is based upon the better reasons, and is better adapted to the conditions of this state, where the mining industry is of such vast importance. Any other doctrine would place the master in the position of an insurer.

3. We are of the opinion that no negligence of defendant was shown, and that no proof was offered which even tended to show such negligence. Negligence is a breach of duty. The duty of defendant was to exercise due diligence in furnishing and maintaining a reasonably safe place in which Adams was

to work. There is no evidence in the record tending to show that the tunnel was an unsafe place of itself, and it is only claimed that it became unsafe by reason of a blast left by the workmen on the preceding shift unexploded and undischarged. The negligence of defendant is claimed to exist in this case upon two theories: First, that the miners who worked in the tunnel at the point where Adams worked and was injured, during the preceding shift, prepared and loaded two holes, but did not fire them because directed not to do so by Winston, the foreman, and that such holes were left unexploded until the time of the accident, and that Adams was not notified of these facts; and, second, that an unexploded hole was left at the breast of the tunnel, and that Adams was not notified of the existence of such hole.

As to the first theory. The proof presented in the record discloses the following state of facts: Roberts and Lacourcier were working in the tunnel—Lacourcier at the breast thereof, and Roberts stoping ore about 10 feet back of the breast, above the roof of the tunnel; that Lacourcier had drilled and loaded ready for blasting two holes near the bottom of the tunnel, at its breast; that Roberts had stoped down ore which lay in the bottom of the tunnel adjacent to the place where the loaded holes were situated. Winston, the foreman, came into the tunnel. A conversation ensued between Roberts and Winston, whereby the attention of Winston was called to the fact that, if the holes were shot at that time, the waste arising from the shots would get mixed with the ore which Roberts had stoped down, and that Winston said that the carman (whose duty it was to remove the ore after it had been stoped down) was in the other tunnel, and would not be up there until after dinner. Winston then directed Lacourcier not to fire the holes. It is evident from these circumstances that the only reason Winston told Lacourcier not to fire the holes was because the waste from the blasts would become mixed with the ore that had been stoped by Roberts and lay on the floor of the tunnel. It will be noticed that no instructions were given to Lacourcier not to fire the holes after the ore had been removed. Lacourcier did not fire the holes at that time, but proceeded with his work of drilling other holes, but before the close of the shift at 6 o'clock in the evening Lacourcier fired three holes and Roberts fired three holes. The ore which lay in the bottom of the tunnel when Winston directed Lacourcier not to fire the shots must have been removed, as the only object of such directions was to prevent the waste becoming mixed with the ore. The result would have been the same by firing any of the blasts in the face of the tunnel. It is very evident that it was only intended by Winston, and understood by Lacourcier and Roberts, that the holes were not to be

fired until the ore was removed. Roberts testifies that they fired six shots—three holes that had been drilled and loaded by Roberts, and three which had been drilled and loaded by Lacourcier; that after lighting the fuses they retired some distance, and listened for the reports of the shots, and counted six of them. Roberts says he could distinguish the holes fired by himself from the holes fired by Lacourcier because the ground was softer, and he had put in larger charges. Lacourcier and Roberts then left the mine, believing that all the holes which had been loaded in the tunnel during the shift had been fired by them. The evidence discloses that Winston was not in the tunnel during the afternoon, and had no knowledge as to whether the holes which he had directed in the forenoon should not be fired, had been afterward fired by Lacourcier. There is no evidence tending to show that defendant or any of its officers or superintendent knew of the instructions of Winston, or had any knowledge as to whether the shots were left unfired before the close of the shift. There was, therefore, no negligence proven against either Winston or defendant.

As to the second theory. It is very doubtful whether, under the complaint, the plaintiff can claim that any negligence is alleged except that comprehended in the first theory, above discussed; but, inasmuch as the second theory of plaintiff is as equally unsupported by the evidence as the first, we will not pass upon the sufficiency of the allegations of the complaint in that regard. The second theory is based upon the proposition that there was an unexploded hole near the breast of the tunnel which the defendant knew about, or by the exercise of reasonable diligence could have known about, and did not inform Adams of its existence. We cannot conceive how the defendant could have known of an unexploded hole. Neither do we believe that it was defendant's duty, before allowing the next shift to go to work, to investigate the conditions, and ascertain whether all the holes fired by Roberts and Lacourcier had exploded. Roberts and Lacourcier went off shift at 6 o'clock, immediately after firing the holes. The testimony discloses that it would be unsafe for any one to go into the tunnel for some time after the explosions on account of the bad air generated by the explosions, and the danger of further explosions from parts of the charges which might not have been fully exploded. Adams went on shift at 7:30 in the evening. It was his duty to clean up the refuse in the tunnel caused by the explosions of shots fired by Lacourcier and Roberts. It was the usual custom, just before the close of every shift, for the miners who worked in the tunnel to fire their shots, and it was the duty of the incoming shift to clean up the refuse thrown out by such shots before going to work in the advancement of the tunnel. Adams knew

that shots had been fired. The testimony also discloses that all the miners knew that sometimes there might be a missed hole, which was extremely dangerous. No one knew or thought any hole had missed fire or was unexploded. Why any one should tell Adams that there was an unexploded or missed hole in the breast of the tunnel when nobody believed it existed is beyond comprehension. Testimony was given to show that it was the custom in that mine for the miners, when they went off shift, if there was a missed hole, to notify the shift succeeding them; but this was only in cases where the offgoing shift thought there might be a missed or undischarged hole. If the duty existed at all to inform Adams of the conditions of the mine as left by the preceding shift, it was a duty devolving upon his fellow servants, which Adams knew and well understood; and, if this duty was not complied with, it was the negligence of a fellow servant, and not of the defendant.

4. Plaintiff, in his brief and argument, presents a still further proposition to the court, and that is that it became the duty of the defendant to make reasonable rules and regulations for the protection of the miners, whereby they might be notified of hidden dangers from unexploded or missed shots in the breast of the tunnel. The Supreme Court of Oregon had this question under consideration in the case of *Johnson v. Portland Stone Co.*, 67 Pac. 1013, and use the following language: "It is also claimed that the defendant was negligent in not promulgating rules by the observance of which the accident could have been avoided. There was nothing in the nature of the business in which the plaintiff was engaged at the time of the injury which made it necessary for defendant to make and publish rules. The mere failure to adopt rules is not proof of negligence unless it appears that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such precaution. It is not suggested in this case what particular rules could have been adopted that would have been likely to prevent the accident." We agree with the doctrine thus announced. It was not shown what particular rules could have been adopted that would have been likely to prevent the accident. See, also, *Davis v. Trade Dollar Cons. M. Co.*, supra. But, again, it is clearly apparent that the method of driving the tunnel was only a detail of the work in which Adams was engaged, and it is well established that the master is never liable for any negligence in carrying out the details of the work if the place in which the work is conducted is in itself safe, and the dangerous condition is brought about only by negligence of the men working there. *Mancuso v. Cataract Cons. Co.* (Sup.) 34 N. Y. Supp. 273; *Davis v. Trade Dollar Cons. M. Co.*, 117 Fed. 122, 54 C. C. A. 636; *Johnson*

*v. Portland Stone Co. (Or.)* 67 Pac. 1013; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905.

We have not considered the questions as to whether plaintiff assumed the risk of danger from unexploded blasts, or as to whether Winston was a fellow servant or a vice principal, as neither is necessary to this decision. The unfortunate accident disclosed by the record arouses the sympathy of all, but, "in view of all the circumstances, as they appear by the evidence, the calamity seems to have been a casualty from a cause unforeseen, and not within reasonable apprehension" (*Mancuso v. Cataract Cons. Co.*, supra), and "no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs" (*Patton v. Tex. & Pac. Ry. Co.*, supra).

We therefore advise that the judgment appealed from be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

MILBURN, J., not having heard the argument, takes no part in this decision.

#### MAHONEY v. DIXON et al.

(Supreme Court of Montana. July 8, 1904.)

NOTARIES—FALSE CERTIFICATES—ACTIONS FOR DAMAGES—PROXIMATE CAUSE—QUESTIONS FOR JURY—BURDEN OF PROOF—APPEAL—STATEMENTS ON MOTIONS—EXTENT OF USE.

1. Under Code Civ. Proc. § 1736, providing that any statement used on motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial, the order disposing of the motion for a new trial is not a part of the statement itself.

2. There is no statute requiring the district court, in an order disposing of a motion for new trial, to specify the papers which were used on such motion.

3. Under Code Civ. Proc. § 1736, providing that any statement used on a motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial, but which fails to provide any means by which it may be ascertained that a particular statement was used on the motion for a new trial, it will be presumed, in the absence of a showing to the contrary, that a statement disclosed by the record before the Supreme Court as prepared, settled, and filed according to law was actually used upon the motion for a new trial, where it also appears that a decision on the motion was made.

4. Under Code Civ. Proc. § 1736, providing that any statement used on motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial, any question of law which is raised in the statement, if otherwise properly presented, will be considered and passed on by the Supreme Court; and thus,

while it cannot consider the question of the insufficiency of the evidence to support the verdict or decision, it can determine the question of law as to whether there is any evidence to support such verdict or decision.

5. There can be no recovery in damages against a notary for falsely certifying to an acknowledgment unless the person seeking such recovery relied upon the statements contained in the notary's certificate, so that the damages to him were proximately caused by the notary's wrongful act.

6. In an action against a notary for falsely certifying to an acknowledgment, where the question whether plaintiff relied upon the notary's certificate was put in issue by the pleadings, it was necessary that the fact of such reliance should be supported by the proof and submitted to the jury.

7. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced money, the measure of damages was the value of the security which plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and not the value of the property described in the mortgage.

8. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received, had the mortgage been valid.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Edward L. Mahoney against John M. Dixon and others. From a judgment for plaintiff, defendants appeal. Reversed.

There was an appeal to this court from the judgment entered in favor of the plaintiff in the lower court, and also an appeal from the order denying defendants' motion for new trial. Heretofore the appeal from the order denying a new trial was dismissed.

There is no controversy as to the existence of the following facts:

That the defendant Dixon was a duly appointed, qualified, and acting notary public in Silver Bow county; that the defendants Leonard and McDermott were the sureties on his official bond; that on the 10th day of January, 1900, one A. E. Reek introduced to Dixon a certain person as Andrew Nelson, who in that name had executed a mortgage on certain real estate situated in Butte, and who desired to acknowledge the execution of the same, and have his acknowledgment certified so as to entitle the mortgage to record; that Dixon took the acknowledgment, and attached to the mortgage his certificate as follows:

"State of Montana, County of Silver Bow—ss.: On this 10th day of January, 1900, before me, Jno. M. Dixon, a notary public in and for the county of Silver Bow, State of Montana, personally appeared Andrew Nelson, known to me to be the person described in, and who executed the foregoing instrument, and who severally acknowledged to me that he executed the same.

"In testimony whereof I have hereunto

subscribed my hand and affixed my notarial seal on the day and year in this certificate above written. Jno. M. Dixon, Notary Public in and for Silver Bow county, Montana. [Notarial Seal.]"

That, as a matter of fact, Nelson was not personally known to Dixon, and no other steps were taken by Dixon to establish the identity of the person whose acknowledgment he took and certified. Plaintiff alleges that the facts stated in the notary's certificate are false and fraudulent; that in fact Nelson never appeared before the notary at all; that the signature "Andrew Nelson" to the mortgage was forged by some one who impersonated Nelson; that the plaintiff relied on the truth of the facts certified by the notary, and was thereby damaged in the sum of \$1,800, which amount plaintiff had loaned on the security purporting to be represented by the spurious mortgage. These allegations are put in issue by the answer. The other allegations in the pleadings are not necessary to be considered.

Among others, the court gave instructions numbered 6 and 8, as follows:

"Instruction No. 6. The statute required that a notary shall state in his certificate that the person acknowledging was personally known to him to be the person subscribing the instrument. The plaintiff avers that Dixon made the statement required by the statute in his certificate, but that the same was false and fraudulent. If you find from the evidence that this is the fact, then, in the performance of an official act done by him as notary public, he violated an express provision of the statute, according to the case stated in the complaint. He and his sureties are therefore liable for the damage suffered by the plaintiff."

"Instruction No. 8. The jury are further instructed that the damage occasioned to the plaintiff by reason of the false certificate set forth and declared in plaintiff's complaint is the value of the property that would have been conveyed as security, provided the said note and mortgage had been valid, and not forged, up to the amount of the sum specified as the penalty of said bond; and if you believe from the evidence that the value of the property described in the complaint as lot 5 in block 3 of the Thornton Addition to the Butte town site was more than one thousand dollars (\$1,000), then you are instructed that the amount of your verdict should be for the full sum of the one thousand dollars (\$1,000) specified in said bond."

L. P. Forrestel, W. M. Bickford, L. O. Evans, and R. S. Alley, for appellants. John J. McHatton, Geo. F. Shelton, and T. J. Walker, for respondent.

HOLLOWAY, J. (after stating the facts). A question of practice is presented by respondent's motion to strike from the files and disregard the statement on motion for

new trial. It is contended that, as the appeal from the order overruling the motion for new trial has been dismissed, there is now properly before this court for consideration only the judgment roll. The question presented calls for a construction of section 1736 of the Code of Civil Procedure, which reads as follows: "Sec. 1736. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." Notwithstanding the statute provides that any statement used on motion for a new trial may be used on appeal from the final judgment, it has wholly failed to provide any means by which it may be ascertained that a particular statement was so used, for the order disposing of the motion for a new trial is not a part of the statement itself, and there is no statute which requires the district court, in any event, in such order, to specify the papers which were used. A statute similar to section 1736, above, has long been in force in California, and has been considered by the Supreme Court of that state a number of times. Spelling, in his work on New Trials & Appellate Practice, after carefully reviewing all these decisions, reaches this conclusion: That if the record before the Supreme Court discloses a statement prepared, settled, and filed according to law, and it is made to appear that a decision on the motion was made, it will be presumed, in the absence of any showing to the contrary, that such statement was actually used upon such motion. 2 Spelling on New Trials & App. Practice, § 423. We are disposed to accept the conclusion reached above, and adopt the practice therein indicated. The extent of the use which may be had of such statement on an appeal from the final judgment was determined, in *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934, to be for all purposes for which a bill of exceptions may be properly used. In other words, any question of law which may be raised in the statement, if otherwise properly presented, will be considered and passed upon by the Supreme Court. While we cannot consider the question of the insufficiency of the evidence to support the verdict or other decision, we can determine the question of law suggested

by the inquiry, is there any evidence to support it?

Instruction No. 6, above, given by the court, is indefinite. The jury should have been made to understand that it is only for damages proximately caused by the wrongful act of defendant Dixon that the plaintiff may recover. If, in fact, the plaintiff did not rely upon the statements contained in the notary's certificate, then the mere fact of the notary's violation of his official duty could not have been the proximate cause of plaintiff's injury. It was necessary for the plaintiff to allege, as he did, that he did rely upon such certificate, but this allegation is put in issue by the answer. It was, therefore, necessary to be supported by the proof, and considered and passed upon by the jury. Upon a retrial of this cause, this instruction may be modified in the particular indicated.

Instruction No. 8, above, is wrong. It submitted to the jury an entirely erroneous standard by which the jury might determine the measure of plaintiff's damages. By it the jury was told that the measure of such damages is the value of the property described in the spurious mortgage, not exceeding the amount of the notary's official bond. A simple illustration will show the absurdity of this position. Assuming that the property was of the value of \$4,500, and that there were prior mortgages or liens upon the property to the amount of \$4,000, in that event the utmost extent of plaintiff's loss would be \$500, for that would be the full value of the security which he would have had for his loan, had the mortgage been genuine. Therefore the value of the property is not necessarily the criterion for determining the measure of damages. On the contrary, the measure of damages in this instance is the value of the security which the plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and the burden of proof was upon the plaintiff to show such value.

We have examined the other assignments of error which are properly before us, but find no merit in them.

The motion to strike the statement on motion for new trial from the files is overruled, and the judgment is reversed, and the cause remanded for new trial. Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

## GOODELL v. SANFORD et al.

(Supreme Court of Montana. July 9, 1904.)

EXECUTORS AND ADMINISTRATORS—SALES—NATURE—DISCRETION—VENDOR AND PURCHASER—OBJECTIONS TO TITLE—ESTOPPEL—STATUTE OF FRAUDS—DECLARATIONS OF TRUST—BY WHOM SIGNED—LIMITATIONS—WRITTEN INSTRUMENTS—ACCRUAL OF ACTIONS—SET-OFF—DATE OF CREDIT.

1. Under Rev. St. 1879, p. 233, § 209, providing that, when authority is given in a will to sell property, the executor may sell without the order of the probate court, but must make a return of such sales as in other cases, and that no title passes until the sale is confirmed by the court, a private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power.

2. A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, empowered the executrix to convey real property to a trustee, who was to hold for a syndicate, which was to plat the same, and under the terms of which sale the purchase price, secured by a lien on the property, was made payable in installments.

3. In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor.

4. Beneficiary vendees under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, were estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.

5. Under Comp. St. 1887, p. 651, § 217, providing that no trust or power concerning lands shall be created or declared, unless by act of law or by deed or conveyance in writing subscribed by the party creating or declaring the same, and section 219 (page 652), providing that contracts for the sale of lands shall be void unless some note or memorandum expressing the consideration be made in writing and subscribed by the party to whom the sale is to be made, where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as the agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it.

6. Under Comp. St. § 41, as amended by Sess. Laws 1889, p. 172, providing that an action on any contract or liability founded upon an instrument in writing shall be commenced within eight years, an action to enforce a liability evidenced by a declaration of trust, in which a complaint was filed within eight years after a certain payment under the declaration became due, was commenced in time.

7. An action on a trust agreement, which authorized the trustee to sell the interest of a defaulting party at public auction and apply the net proceeds of the sale upon the payment of the amount due from such defaulting party

to plaintiff, and giving plaintiff an action against such defaulting party for the balance remaining due after such application, accrued when the trustee sold the property under the terms of the declaration of trust.

8. A set-off, made up of different items, should be credited as of the dates of the respective items.

Commissioners' Opinion. Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Catherine M. Goodell, administratrix of Dwight T. Goodell, deceased, against John B. Sanford and C. G. Evans. From a judgment for defendants, plaintiff appeals. Reversed.

McConnell & McConnell and Lewis Pennell, for appellant. Massena Bullard, for respondents.

CALLAWAY, C. The plaintiff brought this action as executrix of the last will and testament of Dwight T. Goodell, deceased. Trial was to the court, which entered judgment for the defendants. The plaintiff has appealed. The questions presented arise upon the judgment roll, which includes a bill of exceptions containing so much of the evidence as is necessary to elucidate the issues involved. The facts, in so far as they are necessary to a determination of the appeal, are substantially as follows:

The testator died December 31, 1888, leaving a will dated September 18, 1882, in which he appointed the plaintiff sole executrix. Paragraph "fourthly" therein reads: "I hereby authorize and empower my executrix, hereinafter named, to manage my said estate as in her judgment she shall deem best, and for that purpose to sell any portion or the whole thereof, whether real, or personal, or mixed, and to invest or use the proceeds thereof as she shall deem fit and proper, and no liability shall attach to her in any event for the exercise of the discretion here authorized." The will was admitted to probate, and letters testamentary thereupon were issued to plaintiff, prior to the occurrences hereinafter mentioned. On May 28, 1889, the plaintiff, as executrix, sold at private sale certain real estate belonging to the estate to a syndicate, composed of the defendants (who acted throughout the transaction as the firm of Sanford & Evans) and 11 other persons, for \$50,000. The agreement seems to have been that the syndicate should pay one-fourth of the purchase price in cash, and the remainder in three equal installments, falling due June 12, 1890, June 12, 1891, and June 12, 1892. On May 29, 1889, the plaintiff filed in the probate court a petition praying for the confirmation of the sale, in which she recited "that under and by virtue of said will power is given to your petitioner to sell all or any part of the real estate, hereinafter described, belonging to said estate, whenever and as to your petitioner may seem best and most to the interest of

said estate," and also "that in pursuance of the power in said will contained, and deeming it for the best interest of the estate, your petitioner has sold the said premises at private sale, without notice, to George H. Hill, trustee, for the sum of fifty thousand dollars (\$50,000.00); that said sum was duly and legally paid, and, as your petitioner believes, the amount for which the same has been sold is not disproportionate to the value of the property sold; and that a sum exceeding 10 per cent. of the purchase price in advance thereof, and excluding the expenses of a new sale, cannot be obtained for said property." Forthwith, upon the filing of the petition, the court made an order fixing June 10, 1889, as the time for hearing the petition. On June 11, 1889, there was also filed a written consent to the sale, signed by the heirs, in which they set forth that, whereas, the will provides, among other things, that the executrix, Catherine M. Goodell, might, "if she felt so disposed, at any time sell and dispose of any or all of the real estate hereinafter described for cash in hand, and invest the proceeds from such sale or sales as she thought best for the interest of the heirs of said estate; and, whereas, the said executrix is offered the sum of fifty thousand dollars for such realty, and upon the following terms and conditions, to wit: Ten thousand dollars cash down upon delivering the deed to said property hereinafter described, and the further sum of forty thousand dollars to be paid in installments, to be secured by mortgage upon said property—and being desirous of disposing of said property," they therefore urgently requested the court to confirm the sale. Thereupon the court made an order confirming the sale, in which it is recited that, the executrix having made a return of her proceedings under the provisions of the last will and testament of the decedent, "and the court having examined said return and heard the testimony of witnesses in support thereof, and it duly appearing to the court that in pursuance of said power of sale said Catherine M. Goodell sold the following described property, \* \* \* that at such sale George H. Hill, trustee, became the purchaser of said real estate above described for the sum of fifty thousand dollars (\$50,000.00), being the highest and best bidder, and the sum being the highest and best sum for said property, \* \* \* it is by the court ordered, adjudged, and decreed that the said sale be, and the same is hereby, confirmed and approved, and declared valid, and that proper and legal conveyances of said real estate are hereby directed to be executed to said purchaser by said Catherine M. Goodell, executrix." On the next day, June 12th, the plaintiff executed a deed to George H. Hill, trustee, whereby she conveyed to him "all the right, title, interest, and estate of said Dwight T. Goodell, deceased, at the time of his death, and also all the right, title, and

interest that the said estate, by operation of the law or otherwise, may have acquired, other than, or in addition to, that of said testator, at the time of his death, and all dower and right of dower of the said party of the first part, as the widow of said deceased or otherwise, in and to" the real estate in question.

During the month of June, 1889, all the members of the syndicate and Mrs. Goodell signed an instrument reciting the fact that on June 12, 1889, plaintiff had executed the said deed to George H. Hill, trustee, and directing Hill to convey the property to George B. Child, trustee. The signature of Sanford & Evans was written thereto by the defendant Sanford. Hill did as directed; his deed to Child, trustee, being dated August 5, 1889. On September 7, 1889, Child executed a declaration of trust, in which he acknowledged that the property was conveyed to him as trustee for the syndicate. The instrument sets forth the respective interests and liabilities of the several members of the syndicate therein, among which is found the following: "The said Messrs. Sanford & Evans own an undivided two-twentieths interest in the said property, and are indebted thereon to the said Catherine M. Goodell in the sum of three thousand seven hundred and fifty dollars (\$3,750.00)." The instrument then provides "that the said Catherine M. Goodell has a lien upon said property to secure the payment" of the sums due her according to the terms set forth therein. The three remaining payments are provided for as above stated, with interest payable annually. It is then certified that the trustee is to hold "the legal title in said premises for the said owners thereof, in the proportions or shares above specified, subject to the lien of the said Catherine M. Goodell, as aforesaid"; that he is to plat the premises mentioned in the deed as a town-site, to sell the same, to execute deeds to the purchasers, to collect the money therefor, and out of the proceeds to first pay Catherine M. Goodell the amount due her, together with the interest thereon; and "if any payments to be made to the said Catherine M. Goodell as hereinbefore provided shall not be made within the respective times in that behalf above specified, either from the sales of property or from other sources, then and in such event the party failing to make such payment shall be deemed and held to forfeit all right, interest, and estate of, in, and to the said described property, and the undersigned shall thereupon reconvey to the said Catherine M. Goodell all of the interest in said property owned by the party making such default, and in such event the payments that may have been made by such defaulting party shall be forfeited to the said Catherine M. Goodell and retained by her as fixed, settled, and liquidated damages, or, at the option of the said

Catherine M. Goodell, the undersigned, instead of so reconveying such interest to her, shall sell the interest of said defaulting party at public auction to the highest bidder, and apply the net proceeds of such sale upon the payment of the amount due from such defaulting party, and the said Catherine M. Goodell shall have her action against such defaulting party for the balance remaining due from such defaulting party after making such application of payment. Said Catherine M. Goodell shall make her election under such option by giving notice to said defaulting party, which notice shall specify the course she elects to pursue, and if, within ninety days after receiving such notice, such defaulting party shall have failed to pay the full amount, principal and interest, then remaining due upon said indebtedness, the right of the said Catherine M. Goodell to demand a reconveyance or a sale of said property in the manner hereinbefore specified, in pursuance of her election, shall be absolute, and the undersigned shall proceed to reconvey or sell, as the case may be, upon the demand of said Catherine M. Goodell." To this declaration there was annexed a bond, which was given by Child to Mrs. Goodell in the sum of \$20,000, with Erastus D. Edgerton and John B. Sanford as sureties. The bond recites the execution of the declaration, naming specifically Sanford & Evans, as well as all other members of the syndicate, and was conditioned to the effect that the trustee should "well, truly, and faithfully execute and perform all duties as such trustee." This declaration of trust and bond appear of record in Book 12, at page 41, in the office of the county clerk of Lewis and Clarke county.

Child continued to act as trustee for nearly six years. On April 25, 1896, the members of the syndicate, by an instrument in writing signed by them, requested Child, who had removed from Montana, to convey the property remaining in his hands to George F. Cope, trustee. The written request begins: "We, the undersigned, members of the syndicate named in a certain 'declaration of trust,' wherein George B. Child is trustee, said declaration of trust being of record in the office of the county recorder at Helena, Lewis and Clarke county, Montana, in Book 15, at page 41, to which reference is hereby made." The signature of Sanford & Evans to this paper the defendants admit to be genuine. In pursuance of this request Child, on July 31, 1896, conveyed the property to Cope, trustee. In this deed it appears that a considerable portion of the property conveyed to Child, trustee, in the year 1889, was thereafter sold, during the years 1889, 1890, 1891, and 1892, as parts of the "Hotel Park Addition." The sales of lots were made by the firm of Porter, Muth & Cox, which firm was a member of the syndicate; the proceeds being turned over

to the trustee, Child. On July 14, 1898, the defendants were notified by plaintiff, through her attorney, that on November 16, 1894, they were indebted to plaintiff in the sum of \$1,666.53 on account of the purchase price of the property. The defendants did not deny but that the statement was correct, and did not give any testimony tending to show that they had paid any portion of said amount. They say they sold Mrs. Goodell goods, wares, and merchandise aggregating \$156.41 during a period beginning May 1, 1894, and ending October 16, 1898, but say these sales did not apply upon the real estate purchase, but, on the contrary, Mrs. Goodell still owes them for the goods, etc.

On December 16, 1898, the plaintiff notified the defendants that, as they had failed to comply with the terms of the declaration of trust, she elected to direct the trustee to sell their interest in the property at public auction to the highest bidder, and apply the net proceeds of the sale to the payment due from them; that, if there remained a balance due her after applying the amount obtained from the sale, she would commence an action against them for such balance. They were given 90 days to make the payment, according to the terms of the declaration of trust. To this notice the defendants paid no attention. Thereupon the trustee, in pursuance of his duty, sold the defendants' interest in the property at public auction. The sum of \$50 was realized therefrom, and the net proceeds thereof were applied upon the indebtedness. Thereupon this action resulted. The plaintiff asks judgment for \$1,575.83 and interest thereon at the rate of 8 per cent. per annum from November 11, 1896, and for costs of suit. The transcript does not show when this action was begun, but the second amended complaint was filed April 16, 1900.

The defendants contend that, because of irregularities in the proceedings, there was no conveyance of title to them, and therefore there was no consideration for the transaction; consequently that no liability attaches to them; that the property was not sold to them, but was sold to Hill, trustee; that plaintiff never made a return of sale to defendants; that the court never confirmed any such sale as that alleged in the complaint; that the sale did not authorize the creation of a trust by the executrix. The most of these objections are purely technical.

In the first place, defendants err in assuming that the sale was a judicial one. It was not. It was a sale under the authority granted to plaintiff in the will. In *re Pearsons*, 98 Cal. 603, 33 Pac. 451; *Id.*, 102 Cal. 569, 36 Pac. 934. Section 209, p. 233, Rev. St. 1879, which was in force when the will was drawn, and presumably was in contemplation of the testator, provides: "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor



may sell any property of the estate without the order of the probate court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases, and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court." The same section was re-enacted in the Compiled Statutes (section 209, p. 328), which were in force when the sale herein referred to was made. In *Re Pearsons*, 98 Cal. 603, 33 Pac. 451, the court said: "A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale be confirmed give to it the incidents of a judicial sale. \* \* \* The purchaser from an executor at a sale under a power in the will deals with him in making the purchase as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property, and he can repudiate his contract for purchase only for the same reasons as he could in case he had bought from another. The executor is regarded as the donee of a power (*Conklin v. Egerton*, 21 Wend. 436; *Newton v. Bronson*, 13 N. Y. 592, 67 Am. Dec. 89), and the sale is treated as if made under a power; and the purchaser is required to examine the sufficiency of this power, as he is that of any other power under which a sale may be made (*Larco v. Casaneuava*, 30 Cal. 561). In this state it is essential that the will shall have been admitted to probate before the power can have any validity (*Castro v. Richardson*, 18 Cal. 478), but in all other respects the contract of purchase and sale between the executor and his vendee is attended with the same incidents, and is to receive the same construction as a similar contract between any other vendor and vendee."

In confirming a sale so made, "the scope of investigation by the court is limited to ascertaining whether the sale was legally made and fairly conducted, and the sum bid not disproportionate to the value of the property sold, and that a sum exceeding such bid at least 10 per cent., exclusive of the expenses of a new sale, cannot be obtained." Sections 2685, 2687, Code Civ. Proc. The court heard the proof adduced upon the return of plaintiff and confirmed the sale. It doubtless inquired into the terms thereof, and was satisfied that the sale was legally made and fairly conducted, the sum bid not disproportionate to the value of the property sold, and that a sum exceeding the bid as the statute requires could not be obtained. The sale as actually concluded was not the precise sale

to which the heirs consented; but it was equally as advantageous to the estate, if not more so, and it complied substantially with the sale to which the heirs consented. The plaintiff reserved a lien upon the land sold, with a right to have the same reconveyed to her, retaining all payments theretofore made by the syndicate, or to have the interests of the vendees sold at public auction, with a right to sue them for the deficiency. The heirs have never objected to the proceeding so far as the record discloses, nor has any creditor. What effect the consent of the heirs had, or could have had, upon the court's action, is not perceptible, except that the court was thereby informed that the sale was not for cash, but was upon a partial payment, with the remaining payments secured.

The plaintiff had the right to make the sale in the manner she did under the terms of the will. A correct construction of paragraph "fourthly" therein leaves no doubt that a very wide discretion was left to plaintiff, and she does not appear to have transgressed it. See *Huger v. Huger*, 9 Rich. Eq. 217; *Wright v. Ziegler*, 1 Ga. 324, 44 Am. Dec. 656; *Munson v. Cole*, 98 Ind. 502.

No warranty of title was made by the plaintiff. "In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement upon the subject, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123." In *re Pearsons*, supra. If defendants did not satisfy themselves of the title they were to get, it is their own fault. However, they have not shown us that they did not receive a perfect title, except as incumbered by their own contract. Their trustee entered into the possession of the property, platted a part of it into a townsite, sold portions thereof, and made payments upon the purchase price to plaintiff, all as he was empowered to do by the declaration of trust. Until defendants lost the property by foreclosure sale, all their acts, so far as the record discloses, were in direct affirmation of the trust agreement. The fact that they assented thereto for years, entered into possession of the property, sold portions thereof, made payments on the purchase price, and in all respects ratified the transaction between the syndicate and plaintiff, until sued for the balance of the purchase price due plaintiff, estops them from now saying they received no title, or that the sale was irregularly made. See *Harbin v. Levi*, 6 Ala. 399, 8 Smith's Con. Rep. 486; *Martin's Executor v. Truss*, 50 Ala. 95; *Adair v. Adair*, 78 Mo. 630; *Crumb v. Wright*, 97 Mo. 13, 10 S. W. 74; *Dupleix v. Debileux*, 26 La. Ann. 218; *Lacy v. John-*

son, 58 Wis. 414, 17 N. W. 246; *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049.

The evidence discloses clearly that the syndicate first designated Hill as trustee, and the deed was made to him by plaintiff in accordance with direction of the members of the syndicate. Hill was connected with the First National Bank, and presumably would keep the syndicate's money there. Edgerton, a member of the syndicate, was connected with the Second National Bank, and wanted the deposits. Through his influence Hill, trustee, was requested to convey the property to Child, trustee, and did so. Child executed the declaration of trust. This declaration was drawn by F. P. Sterling, Esq., attorney for the plaintiff. He testified that "there was a declaration of trust drawn, and it was entered into by all the parties interested." There seems to have been some difficulty in agreeing upon its exact terms. Sterling wrote and rewrote it seven or eight times, before it was finally agreed upon. To this declaration was attached the bond, conditioned for the trustee's faithful performance of his duties, and, as before stated, it was signed by Sanford, one of the defendants, as surety.

From the competent testimony in the record it is quite impossible to say that the defendants were not fully apprised, both in fact and in law, of the terms of the declaration of trust. Are they bound by its terms? When it was executed the Compiled Statutes of 1887 were in force. Section 217, p. 651, thereof, reads: "No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Section 219, p. 652, thereof, reads: "Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." The land was conveyed to Child, trustee, by direction of all parties interested. Hill was a mere intermediary. Child executed the declaration as the grantee of plaintiff. In so doing he was the agent of all parties to the syndicate. He was the proper person to make the declaration. To be charged by it, it was not necessary that the defendants should sign it. "When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and

evidenced by the trustee to whom the land is conveyed, or who becomes the holder of the legal title; and this may be done by a writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature." 2 *Pomeroy's Eq. Jur.* § 1007.

A case much in point is that of *Lowber v. Connit*, 36 Wis. 182, in which it was claimed by counsel for defendant that a contract for the sale and conveyance of real estate was not binding upon defendant, because he did not sign it. The court said: "This question is practically decided adversely to this view in *Vilas v. Dickinson*, 13 Wis. 488. That was an action upon a bond for the conveyance of real estate, brought by the obligor against the obligee to recover a portion of the purchase money. The objection was taken that the obligation was signed by the plaintiff only, and therefore was not binding upon the other party. But the objection was overruled, the court holding that a party who accepts and adopts a written contract, although it is not signed by him, is bound by its terms and conditions. But it is insisted that under the statute of frauds the defendant is protected, because he did not sign the instrument upon which the action is founded, and which creates an estate in lands. Our statute in substance enacts that any contract for the sale of lands or of any interest therein shall be void unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the sale is made. Section 8, c. 106, Rev. St. The distinction between this provision and the English statute, which requires the contract to be signed by the party to be charged, is pointed out by the Chief Justice in *Dodge v. Hopkins*, 14 Wis. 631, 641, 648, and need not be dwelt upon here. See, also, *Hodson v. Carter*, 3 Chand. 234. The signature of the party who makes the sale satisfies this provision of the statute. But then the question arises whether the contract signed and delivered by the plaintiffs, and accepted and adopted by the defendants as the agreement between them, binds the latter. This can hardly be said to be an open question, certainly not after the rule laid down in *Vilas v. Dickinson*, which was an action at law." Further on the court said: "But it seems that the real foundation of the rule is that the party who accepts and adopts a written contract, though not signed by him, should be deemed to have fully assented to its terms and conditions, and is therefore bound by them. He ought not to be in a position where he can hold the other party to a contract, and compel its performance, if advantageous to him, and at the same time be at liberty to avoid the contract on his part, if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound. And where the contract has been accepted

and adopted by the party not signing it, he does assent and agree to it on his part, and the law implies a promise to perform." And see *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

From what has been said, it follows that defendants were and are bound by the terms of a written instrument—the declaration of trust—to which they assented, and under which they acted for many years, and which they never sought to repudiate until the commencement of this action. This being true, the defendants' plea that the plaintiff's action is barred by the statute of limitations cannot be sustained. By section 41 of the Compiled Statutes, as amended (Sess. Laws of 1889, p. 172), which was in force when the declaration of trust was executed, it was provided that an action upon any contract, obligation, or liability founded upon an instrument in writing shall be commenced within eight years. Section 512 of the Code of Civil Procedure is to the same effect. As before stated, the record does not disclose when this action was commenced, but the second amended complaint was filed within eight years after the payment of June 12, 1892, became due.

But, irrespective of the eight-year limitation, under the facts in this case, we think plaintiff's right of action against the defendants accrued when the trustee sold the property under the terms of the declaration of trust. The sum for which plaintiff should have judgment is therefore but a mere matter of computation for the lower court. Plaintiff concedes that defendants are entitled to a set-off amounting to \$156.41. This latter sum is made up of several different items, which should be credited to defendants as of their respective dates.

We are of the opinion that the judgment and order should be reversed, and the cause remanded for further proceedings in conformity with this opinion.

CLAYBERG, C. O., and POORMAN, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for further proceedings in conformity therewith.

MILBURN, J., not having heard the argument, takes no part in this decision.

#### MURRAY v. CITY OF BUTTE.

(Supreme Court of Montana. July 11, 1904.)

EVIDENCE — STIPULATIONS — EFFECT—APPEAL  
—ERROR INDUCED BY PARTY—HARM-  
LESS ERROR.

1. Where plaintiff objected to the introduction of any evidence of conditions subsequent to a certain date, and his objection was sustain-

ed, he could not complain of the subsequent limitation of his own evidence to the showing of conditions prior to the date named.

2. A stipulation that certain streets within the boundaries of plaintiff's mining claim were used as public highways prior to the location of such claim, and had ever since been used as such, was, in effect, an admission by plaintiff of defendant's claim that the ground was occupied as a public highway at the time of the location of the claim.

3. Witness was asked whether he had any placer ground prior to 1875, and answered that he did not remember whether he bought a certain person out in 1875 or 1876. The court struck out the portion of the answer "concerning the buying of placer ground prior to 1875." Held, that the ruling was practically without meaning and harmless.

Commissioners' Opinion. Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Action by James A. Murray against the city of Butte. From an order granting plaintiff a new trial, defendant appeals. Reversed.

E. M. Lamb and J. L. Templeman, for appellant. J. E. Murray, M. J. Cavanaugh, and H. P. Napton, for respondent.

POORMAN, C. This is an action in ejectment. Verdict and judgment was rendered for defendant. Plaintiff moved for a new trial, which was granted, and the defendant appeals.

It appears from the record that the Smokehouse lode claim was located April 16, 1875; that the same is within the corporate limits of the city of Butte; that title to this claim, or an undivided interest therein, afterwards passed by mesne conveyance to this plaintiff; that in July, 1882, the plaintiff instituted this action, claiming to be the owner of the ground; that he had been ousted from the same by the defendant, who was then in possession. The action therefore appears to have been pending in the courts for about 22 years. The defendant disclaims any right to the possession of any part of the claim other than that conveyed to it by deeds, except its right to the use of that portion of the ground occupied by and used as streets and alleys, and alleges that this ground was so used and occupied prior to the location of this lode claim and under the act of Congress of July 28, 1866, c. 262 (14 Stat. 251), giving the right of way for the construction of highways over public lands, etc.

At the trial of the action the plaintiff introduced evidence of his title, and of the rental value of the ground occupied by the city, and rested. The defendant introduced evidence tending to show that the ground in dispute had been regularly laid out and used as streets and alleys of the town of Butte prior to April 16, 1875. Defendant also sought to show by evidence certain conditions existing and proceedings taken relative to the laying out of the town site of Butte subsequent to that date. The plaintiff, how-

ever, objected to the introduction of any evidence along that line after April 16, 1875, and the court refused to admit the evidence. The case was then tried upon the theory that no evidence relative to conditions existing subsequent to April 16, 1875, was admissible. The plaintiff, in his rebuttal testimony, sought to show certain conditions existing subsequent to this last-named date, but the court adhered to the former ruling which it had made in sustaining plaintiff's objection, and refused to admit the evidence. The court also refused to admit in evidence a photograph alleged to have been taken in October, 1875. The plaintiff assigned these rulings of the court as error, and the court granted a new trial.

It is evident that if it were error to refuse evidence tending to show conditions existing subsequent to April 16, 1875, the court was led into the error by the plaintiff; and as was said in *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738: "A party in an action is bound by his pleadings. He is also bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. 2 Herman on Estoppel, § 823, and note. A party is bound by his theory and presentation of his case. 'A party cannot get relief on one basis, and then seek a new chance to litigate, on the suggestion that he has a defense which he did not see fit to rely on before.'"

The photograph of defendant city taken in October, 1875, was offered in evidence. The court, in ruling thereon, said: "It may be introduced for the purpose of showing the condition of Butte prior to April 16, 1875." The plaintiff, however, refused to put the photograph in evidence for this restricted purpose; showing conclusively that the object of the plaintiff was to show conditions existing subsequent to April 16, 1875. The plaintiff could not complain of the action of the court in limiting this evidence to the time named.

It was further alleged that the court erred in not rendering judgment for the plaintiff on the stipulation filed. This stipulation is to the effect that Broadway street, Park street, Main street, and Granite street, within the boundary lines of what is known as the "Smokehouse Lode Mining Claim," were used as public highways prior to and at the time of the alleged location of the Smokehouse lode, and that the same have ever since been used as such. This stipulation was in effect an admission by the plaintiff of defendant's contention respecting the streets

named therein, to wit, that this ground was occupied as public highways at the time of the location of this mining claim.

It was further claimed by plaintiff that the court erred in striking out certain testimony of the witness Kroft relative to the existence of a placer claim on the ground in dispute. The question asked the witness was: "I will ask you if you had any placer ground within the limits of the Smokehouse lode location prior to 1875, or any other place?" To this question the witness replied: "I do not know when I bought Verson out—whether it was in 1875 or 1876. I bought him out in that time." The defendant moved to strike out this answer as being incompetent and immaterial, and as being too indefinite as to time. The court made this ruling: "Strike out that portion concerning the buying of placer ground prior to 1875." Inasmuch as there was no evidence of the buying of any placer ground prior to 1875, the ruling of the court was practically without meaning and harmless.

It was further maintained by the plaintiff, in urging his motion for a new trial, that the evidence was insufficient to sustain the verdict. This claim cannot be sustained. Several witnesses on the part of defendant testified to the existence of these streets and alleys prior to the location of the mining claim, and, while there was some evidence tending to show that some portions of some of the streets did not exist at that time, the variance is too slight to be regarded as a substantial conflict.

From the evidence presented in this record, but one conclusion can be reached, and that is embodied in the verdict of the jury. The evidence excluded was excluded in accordance with the theory of the case which the plaintiff himself had led the court to establish, and is therefore not error of which the plaintiff can complain.

We find no error in this record which would justify the court in setting aside the verdict of the jury and in granting plaintiff a new trial. We therefore recommend that the order granting the new trial be reversed.

CLAYBERG, CC., and CALLAWAY, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the order granting a new trial is reversed.

MILBURN, J., not having heard the argument, takes no part in the decision.

GERMAN INS. CO. OF FREEPORT, ILL.,  
v. ALLEN.

(Supreme Court of Kansas. July 7, 1904.)

INSURANCE—KEEPING BOOKS—WAIVER OF  
CONDITIONS—FORFEITURE.

1. A provision in a fire insurance policy that a merchant will keep books showing the purchase and sale of goods for cash, credit, and exchange, and produce the same, with the last inventory, in case of a loss, may be waived; and when an agent who issued a policy was informed, after the contract was made, as to the system of bookkeeping used by the insured, which did not include a cashbook, and then stated that the system was all right, and would be satisfactory, the insurance company cannot, after a loss, defend on the ground that a cashbook was not kept, but the requirement will be deemed to have been waived.

2. Where the adjuster of a fire insurance company, after a loss, learns of a noncompliance by the insured with a provision of the policy with regard to keeping books, and, instead of declaring a forfeiture therefor, negotiates with the insured for the making of other and better proofs, extends the time to make proofs, and requires the insured, at some trouble and expense, to submit to an examination under oath as to the fire and the property destroyed, the company will be deemed to have waived the right of forfeiture.

(Syllabus by the Court.)

Error from District Court, Coffey County;  
Dennis Madden, Judge.

Action by J. H. Allen against the German Insurance Company of Freeport, Ill.: Judgment for plaintiff. Defendant brings error. Affirmed.

Barnett & Barnett and Joe Rolston, for plaintiff in error. W. W. Brown and Kellogg & Madden, for defendant in error.

JOHNSTON, C. J. This was an action brought by Mrs. J. H. Allen against the German Insurance Company of Freeport upon a contract insuring a store building and a stock of merchandise therein against loss or damage by fire. The policy of insurance was issued on September 7, 1901, and the building and stock of goods were wholly destroyed by fire on September 24, 1901. Payment of the loss was refused by the insurance company because of alleged nonperformance of the conditions of the policy by the insured. The contract contained what is commonly spoken of as the "iron-safe clause," by which the insured agreed to keep a set of books, showing a record of the business transacted, including all purchases and sales, both for credit, cash, and exchange, as well as the last inventory of the stock, taken within 12 months prior to the happening of the loss, and keeping books and inventory securely locked in a fireproof safe at night and when the store was not actually open for business, and also the further provision that such books and inventory would be produced in case of any loss, and, in the event of a failure to produce the same, the policy should be deemed to be null and void. On the part of

the company it was contended that the insured had failed to keep the books showing her cash sales, or to produce any such books after the loss occurred. The insured contended that she had substantially performed the conditions and requirements of the policy, and, if she had failed to any extent, it had been waived by the company and its agents. Among other questions, that of waiver was submitted to the jury, and its finding was in favor of the insured, and she was awarded \$2,400—the full amount provided for in the policy—and also an attorney's fee in the sum of \$100.

The stipulation to keep a set of books, showing the purchase and sale of goods for cash, credit, and exchange, together with an inventory of the stock of merchandise, and the production of the same in case of loss, is an important feature of the contract. A set of books was kept by the insured, but it appears that no cashbook, or book showing the sale of goods for cash, was kept, and, of course, none was produced after the loss occurred. Whether the record of the business done by the insured could be fairly determined from the books actually kept, we need not now inquire.

After the contract of the insurance had been made, the attention of the agent of the company who issued the policy was drawn to the method of bookkeeping—that is, that she kept a daybook, a register, and a ledger—and he said that they were kept right. In effect, he declared that her method of keeping books would be sufficient, as well as satisfactory to the insurance company. This condition was intended for the benefit and protection of the insurer, and, like other provisions of the insurance contract, it might be waived by the company. As the agent issued policies, and had full power to represent and bind the company, his statement waived defects, if there were any, in the system of bookkeeping. This is not to be regarded, nor was it treated by the court, as a preliminary oral or contemporaneous agreement. If it had been of such a character, it would have been merged in, and could not be set up to contradict and overthrow, the final written contract. The jury were instructed that the statement of the waiver, to be effective, must have been made after the policy had been issued and delivered to the insured. There was testimony tending to show that it was made after the contract of insurance had been completed and the policy delivered. In addition to this waiver, the adjuster, although directly informed that no cashbook had been kept, did not declare a forfeiture, but negotiated with the insured about making other and better proofs of loss. At the same time, it is true, he declared that the company did not thereby waive any of the conditions of the policy or the rights of the company, but his conduct was hardly consistent with his declarations. Later he actually extended the time for making proof,

¶ 2. See Insurance, vol. 28, Cent. Dig. § 1071.

and, more than that, required the insured, at some trouble and expense, to appear in another town and submit to an examination under oath with respect to the property and the loss. At this time there was an extended inquiry as to the ownership of the stock of goods, the quantity, quality, and value, the inventory that had been taken, the goods on hand when the fire occurred, the probable origin of the fire, and the conduct of the insured at the time. These negotiations and transactions, after learning that no cashbook had been kept, amounted to a waiver of the requirement and of forfeiture, if any ground therefor existed. *Assurance Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335.

An attorney's fee was allowed, and an attack has been made on the statute under which the allowance was made. Several decisions have been made upholding the validity of the law, and the question is no longer open for debate. *Assurance Co. v. Bradford*, supra; *Alliance Insurance Co. v. Corbett*, 68 Kan. —, 77 Pac. 108.

The judgment of the district court will be affirmed. All the Justices concurring.

#### CORUM v. HUBBARD.

(Supreme Court of Kansas. July 7, 1904.)

##### BULING ON DEMURRER—REVIEW—RECORD— TIME OF FILING.

1. Where the court sustained the demurrer of plaintiff to one of the defenses contained in defendant's answer, and the trial proceeded on the remaining defenses of the answer, the ruling on the demurrer constitutes such an order of the trial court that, to be reviewed, the record thereof must be filed in the Supreme Court within one year after the sustaining of the demurrer.

(Syllabus by the Court.)

Error from District Court, Kingman County; P. B. Gillett, Judge.

Action by William W. Hubbard against L. M. Corum. Judgment for plaintiff. Defendant brings error. Affirmed.

Thos. B. Wall and T. A. Nofztger, for plaintiff in error. Garver & Larimer and Geo. L. Hay, for defendant in error.

ATKINSON, J. This is an action by William W. Hubbard to foreclose a mortgage for \$1,400 on a tract of 160 acres of land in Kingman county. It is the second foreclosure of this mortgage. The defendant, L. M. Corum, purchased the premises after they had been incumbered. By error in the former action of foreclosure, instead of making defendant, the owner of the legal title to the premises, a party to the action, the name of "L. M. Crum" was used. Service was by publication. Defendant made no appearance. Foreclosure was had, premises went to sale, were purchased by plaintiff, and a sheriff's deed issued to him therefor. Thereafter defendant denied to plaintiff possession of the

premises, and this second action in foreclosure was begun. Upon the first trial of this case the district court denied to plaintiff a second foreclosure of the mortgage. The case was then brought to this court (*Hubbard v. Corum*, 65 Kan. 309, 68 Pac. 1128), and was reversed and remanded. In this action a personal judgment was asked against defendant, based on a claim that, in the deed conveying the premises to defendant, he had assumed the payment of the mortgage. At the time of the commencement of the action a writ of attachment was issued, and levied upon other lands of defendant. This attachment subsequently, upon application, was discharged by the court.

Among other defenses interposed by defendant in his answer to plaintiff's petition was a claim or set-off for \$1,100 damages alleged by defendant to have been by him sustained on account of the wrongful attachment of his premises by plaintiff. A demurrer was by the court sustained to this fifth defense of the answer. Of this ruling of the court, error is assigned. Whether defendant's claim for damages would constitute a proper set-off to plaintiff's claim on foreclosure, it is not necessary to determine. The record discloses that more than three years elapsed after the sustaining of the demurrer before the petition in error was filed in this court. When the court sustained the demurrer to that portion of defendant's answer, he could have immediately brought that order of the trial court to this court for review. Code Civ. Proc. § 542. He could not bring it to this court after one year from the making of the order, and have it reviewed. *Id.* § 556; *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423.

While the case was pending in the Supreme Court, defendant, unsolicited, wrote several letters to plaintiff, residing in the state of New Hampshire, and later called on plaintiff at his home. While there defendant procured from plaintiff, for the sum of \$200, a release of the mortgage, which he caused to be placed of record. After the case was by this court reversed and remanded, defendant filed a supplemental answer, pleading the discharge and satisfaction of the note and mortgage sued upon. Plaintiff replied, alleging that the satisfaction of the mortgage had been by defendant obtained from plaintiff through misrepresentation and fraud. The case was tried before the court and a jury upon the question of whether or not the satisfaction of the mortgage had been obtained by defendant from plaintiff through misrepresentation and fraud. A verdict was returned in favor of plaintiff. The claim for a personal judgment against defendant was withdrawn. The court adopted the verdict of the jury, and entered judgment in foreclosure for the sum of \$1,880.

No material errors appear in the record. The judgment of the court below will be affirmed. All the Justices concurring.

## RANKIN v. BARTON.

(Supreme Court of Kansas. July 7, 1904.)

NATIONAL BANKS—STOCKHOLDERS' LIABILITY  
—ENFORCEMENT—LIMITATIONS—FAILURE TO  
MAKE ASSESSMENT IN REASONABLE TIME.

1. An action to enforce the individual liability of a stockholder in a national bank is governed by the statute of limitations of the state in which the action is brought.

2. Ordinarily, a cause of action on such liability does not accrue until the Comptroller of the Currency orders an assessment upon the stockholder; but that officer is subject to the rule that, where preliminary action is essential to the bringing of a suit upon a claim, and such precedent action devolves upon the claimant, he cannot prevent the operation of the statute of limitations by unnecessary delay in taking such action.

3. Where a national bank becomes insolvent, it is the duty of the comptroller to make an accounting, and determine the necessity for assessments upon stockholders, and, if any, the extent of the same, within a reasonable time; and if he fails to do so within that time the statute of limitations will then begin to run in favor of stockholders.

4. Where the facts alleged in his pleading disclose that an assessment against stockholders was not made within a reasonable time, the admission is not overcome by an averment that he did exercise diligence and made a second assessment as soon as he ascertained that the first assessment and the assets of the bank were insufficient.

(Syllabus by the Court.)

Error from District Court, Reno County.

Action by George C. Rankin, as receiver, against Edward B. Barton. There was judgment for defendant, and plaintiff brings error. Affirmed.

H. Whiteside, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

JOHNSTON, C. J. This was an action to enforce the individual liability of a stockholder in a national bank. In his petition George C. Rankin alleged that he was the receiver of the Hutchinson National Bank, which became insolvent in 1893; that after an accounting, and on July 19, 1894, the Comptroller of the Currency found it necessary and ordered an assessment of \$75,000 upon the individual liability of the stockholders, being \$75 on each share of stock, to pay the debts of the bank. It was further averred that after the application of the amounts collected on this assessment, and after a further accounting, it was found necessary to make, and the comptroller on November 20, 1900, did make, a further assessment of \$19,000, being \$19 upon each share of stock, and "that said assessment was made just as soon as discovered, in the exercise of diligence, to be necessary, and just as soon as it was ascertained that the first assessment and the assets of the bank were insufficient." It was alleged that the defendant owned 33 shares of stock, and that

his contribution under the second assessment was \$627, which he had failed to pay, and for which judgment was asked. This action was commenced on November 13, 1902. The defendant demurred to the petition because it did not contain sufficient facts to constitute a cause of action, and showed upon its face that the plaintiff's action was barred by the statute of limitations. The demurrer was sustained by the trial court, and the question argued here is whether the second attempt to enforce the individual liability of stockholders, made more than nine years after the insolvency of the bank, was in time to escape the bar of the statute of limitations.

Under the national bank act shareholders of a bank are made individually responsible for the debts of the bank to the extent of the par value of their stock in addition to the amount which they have invested in such stock. In case of the insolvency and liquidation of a national bank the Comptroller of the Currency is vested with authority to appoint a receiver to make an accounting, and, if necessary, enforce the double liability of stockholders. Whether a resort to this personal liability is necessary, and to what extent, is for him to determine. This was specifically determined in *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476, where it was said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver." It is contended that there is no enforceable liability until the comptroller exercises his judgment and discretion and makes an assessment, and that, his act in ordering an assessment being indispensable as a precedent to the commencement of an action to enforce payment, the time limited for the commencement of an action did not begin to run until the assessment had been made. Although the cause of action arose under an act of Congress, that body prescribed no limitation on the remedy against stockholders, and hence the statutory limitation of the state in which the action was brought necessarily applies. This was decided by the Supreme Court of the United States in *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280, in an action for the infringement of a patent, where it was remarked that "the

¶ 3. See *Banks and Banking*, vol. 6, Cent. Dig. § 935.

truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states." See, also, *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177; *Andreae v. Redfield*, 98 U. S. 225, 25 L. Ed. 158; *Barney v. Oelrichs*, 138 U. S. 529, 11 Sup. Ct. 414, 34 L. Ed. 1037; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316.

As the remedy and the time of its enforcement is governed by the local law, the next inquiry is, when did the cause of action accrue? The stockholder's liability was assumed when the contract of subscription was made; but it was not enforceable, and the right of action thereon did not arise, until action was taken by the comptroller. How long may action be postponed by that officer without sacrificing the remedy? Whatever the rule may be in other states, it is well settled in Kansas that essential steps preliminary to the bringing of an action must be taken within a reasonable time, and, if not then taken, the statute of limitations will begin to run. *Railroad Co. v. Burlingame Township*, 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578; *Rork v. Commissioners of Douglas County*, 46 Kan. 175, 26 Pac. 391; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; *Commissioners of Graham County v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Harrison v. Benefit Society*, 59 Kan. 29, 51 Pac. 893; *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Black v. Elliott*, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 23; *West v. Topeka Sav. Bank*, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. The condition of the bank, the preservation of the assets, and the adjustment of claims and payments of creditors all enjoined prompt action on the part of the comptroller. *West v. Bank*, supra, was an action to enforce a stockholder's liability. Payments on subscriptions to bank stock were to be made at intervals on the call of the directors. The bank became insolvent, and no call or demand for payments on subscription was made for some time, and it was held that the statute of limitations began to run, notwithstanding the omission to make the call. In speaking of the diligence necessary in such a case, Justice Burch remarked that: "Being insolvent, the duty of the corporation to satisfy its obligations became urgent and imperative. As creditor it had the power to fix at once its debtor's liability. Delay for a single day was inexcusable, and the statute commenced to run at once." And farther along in the opinion it was said that: "The principle of *A. T. & S. F. R. R. Co. v. Burlingame Township*, supra, is now so thoroughly engrained in the fabric of our jurisprudence that it is not sufficient in this

state to say, with the authorities just cited, that the statute does not commence to run until the unconditional liability is fastened upon the subscriber by a call or its equivalent. Since the corporation can fix the liability, and thereby start the statute, delay in doing so cannot prevent its running. To hold otherwise, and permit the liability of the stockholder to continue for an indefinite period, would defeat the policy underlying the statute." Of course, the comptroller is not required to make an assessment until he has had time to ascertain the condition of the bank by summing up the claims of creditors and appraising its assets. But nothing in the duties imposed upon that officer makes a long delay necessary to determine the necessity for an assessment or the extent of it. One assessment does not necessarily exhaust his power to make another, providing it is done within the time such liabilities may be enforced. In referring to the promptitude necessary in such cases, Justice Swayne, of the Supreme Court of the United States, in *Kennedy v. Gibson*, supra, said that: "A speedy adjustment is necessary to the efficiency and utility of the law. The interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better that there should be more than may prove to be needed than that the evils of delay should be encountered." The present action was brought nine years after the insolvency of the bank, and more than eight years after the first assessment had been made. The averment by plaintiff that he was diligent in the matter is no more than a conclusion, and does not overcome the effect of the allegations showing unreasonable delay and manifest negligence. It is not always easy to determine what is a reasonable time within which such action should be taken, but it does appear beyond dispute that the comptroller made an accounting and ascertained the condition of the bank eight years before the present action was brought. About a year elapsed between the insolvency and the first assessment, and that appears to have been a reasonable time within which the prerequisite steps towards fixing the liability of stockholders should have been taken. An accounting was in fact had, and on that the necessity was determined and the order was made. It may be said that the action of the comptroller in not making a full assessment in the first instance was out of consideration for the stockholders, and in order that he might not collect more than was necessary; but, as was said in *Kennedy v. Gibson*, supra, if too much is collected, and a surplus remains after satisfying the demands against the bank, it may be repaid to the stockholders. "It is better that there should



be more than may prove to be needed than that the evils of delay should be encountered."

Attention is called to the case of *Aldrich v. Skinner* (C. C.) 98 Fed. 375, in which it is held that the time limited for the commencement of such an action as this cannot begin to run until the assessment has been ordered. The court in that case, however, gave no consideration to the question presented in this, and that is whether the delay of the comptroller to take the prerequisite steps within a reasonable time would start the running of the statute. The court recognized that an action to enforce such liability is governed by the rule of the state in which the action is brought, and, if the question had been presented, would undoubtedly have followed the Supreme Court of the United States in *Bauserman v. Blunt*, supra, in holding that the prevailing rule in a state requiring a party to take the preliminary steps necessary to the bringing of a suit within a reasonable time, and, if he does not, that the statute will begin to run within a reasonable time after he could have taken the steps and perfected his right. This was the view taken by the United States Circuit Court in *Price v. Yates*, 2 Nat. Bank Cas. (Browne) 204, 10 Fed. Cas. p. 1322. The individual liability of stockholders being one created by statute, the period of limitation on the right to enforce it under our Code is three years, and, as more than double that time has elapsed, the action was barred, and the demurrer was therefore rightly sustained.

Judgment affirmed. All the Justices concurring.

#### WEBER v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas. July 7. 1904.)

#### CARRIERS—LOSS OF GRAIN SHIPPED—RIGHT OF CONSIGNEE TO RECOVER.

1. Under section 6 of chapter 100, p. 176, Laws 1893 (section 5943, Gen. St. 1901), the right to recover from a railway company for loss of grain delivered to it for transportation is expressly restricted to the consignee, his heirs or assigns. Held that, in an action based on the statute, the owner and consignor of grain delivered to such carrier cannot recover for loss or shortage of grain received by it for shipment.

2. In view of the decision in *Railway Co. v. Simonson*, 68 Pac. 653, 64 Kan. 802, 57 L. R. A. 765, 91 Am. St. Rep. 248, it is doubtful whether there is any vitality left in chapter 100, p. 175, Laws 1893 (sections 5938 to 5947, both inclusive, Gen. St. 1901), for the reason that, with that part of section 6 omitted which makes the bill of lading conclusive proof of the amount of grain received by the carrier, can it be said that the Legislature would have enacted the law?

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by Charles F. Weber against the Chicago, Rock Island & Pacific Railway Com-

pany. There was judgment for defendant, and plaintiff brings error. Affirmed.

Sherman & Fletcher, for plaintiff in error. M. A. Low, W. F. Evans, and Paul E. Walker, for defendant in error.

SMITH, J. This was an action against the railway company to recover for the loss of 11,200 pounds of wheat, of the value of \$114.80, part of a car load shipped by plaintiff in error from the station of Kanorado, Kan., to Kansas City, Mo., over the line of defendant in error, consigned to Goffe, Lucas & Carkener, commission agents at Kansas City. The action was based on the right to recover given by chapter 100, p. 175, Laws 1893 (sections 5938 to 5947, both inclusive, Gen. St. 1901). Section 6 (page 176) of the act (section 5943, Gen. St. 1901) reads: "Each railway company, operating a railway wholly or partly within the state, shall be required to give to any person delivering grain, seed or hay in bulk or in sacks to such company, for transportation, at any station entitled to track scales under this act, a bill of lading, in duplicate, which bill of lading shall state the exact number of bushels or pounds of grain, seed or hay so delivered to such railway company, by whom delivered and by whom consigned; and thereafter such railway company shall be responsible to the consignee named in said bill of lading, or to his heirs or assigns, for the full amount of such grain, seed or hay so delivered to such railway company, until it shall show that it has delivered the whole amount of such grain, seed or hay to such consignee or to his heirs or assigns: provided, however, that if the shortage on any car of grain, seed or hay shall not exceed one-fourth of one per cent. of the amount of grain, seed or hay put in the car, then the railway company shall be deemed to have delivered the whole amount of grain, seed or hay in the car. And in any action hereafter brought against any railway company, for or on account of any failure or neglect to deliver any such grain, seed or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed or hay so received by such railway company." It will be noticed that the liability imposed on a railway company by this statute is restricted to loss sustained by the consignee. The law, in express words, makes the railway company "responsible to the consignee in said bill of lading" for any shortage in the grain transported. Charles F. Weber, plaintiff below, brought the action in his own name. A demurrer was sustained to his petition. He complains that the court erred.

The law on which the right of action depends, in addition to the damages sustained by the loss of grain, permits the recovery of attorney's fees, which are demanded in this

action. It is agreed that all the grain received by the railway company at Kanorado was transported safely, without loss, and delivered by it to the Kansas City, Suburban Belt Railroad Company, a connecting carrier, for delivery by the latter to an elevator in Kansas City, Mo. Section 7 of the law under consideration fixes on the receiving carrier a liability, notwithstanding the shortage was caused by the negligence of a connecting railway, unless all the facts and circumstances of such loss or shortage on the connecting line be fully set forth in written pleadings, and affirmatively and fully proved by it. Plaintiff in error demands the application of this section in his behalf, and invokes its requirements to defeat the claim made by the railway company in denial of liability, for the reason that the facts and circumstances of the loss on a connecting carrier's line were not fully set forth in written pleadings filed in the action by defendant below.

We mention the nature of the action and the contention of plaintiff in error to show that his sole claim of right to recover is based on the different sections of chapter 100 (page 175) of the Laws of 1893, and not on the theory of a common-law liability. This being true, the action must conform strictly to the requirements of the law which affords the remedy. In *Sutherland on Statutory Construction*, § 371, it is said: "If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction. They will not go beyond the clearly expressed provisions of the act. Statutes which create a liability in favor of 'the widow and next of kin' of a person whose death has been caused by negligence are of this class. Actions founded on these statutes must strictly conform to them. Such an action cannot be given by implication. The relief or remedy provided is not extended to any other persons than those mentioned in the statute." In *Rodman v. Railway Co.*, 65 Kan. 645, 648, 70 Pac. 642, 59 L. R. A. 704, a recovery was sought from a railway company for wrongfully causing the death of plaintiffs' husband. The action was founded on section 422 of the Civil Code of Procedure. It was held that the two years given by the section within which the action must be brought was a condition imposed on the exercise of the right to sue, and that the time could not be extended by the pendency and dismissal of a former action. *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. 57, was an action in this state, under a statute of Missouri, to recover for the death of a person. The right of action was fixed by the statute in the husband or wife

of the deceased for six months after the death. After that time the right vested absolutely in the surviving minor children, if there were any. The court said: "The right thus conferred is a conditional one, and the plaintiffs in such action must bring themselves clearly within the prescribed conditions necessary to confer the right of action." To the same effect, see *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Miller v. Clark*, 62 Kan. 278, 62 Pac. 664; *Ryan et al. v. Ray et al.*, 105 Ind. 101, 4 N. E. 214. It follows that, the action not having been brought in the name of the consignees, the only persons authorized to maintain it, there can be no recovery. The fact that the plaintiff below was the owner of the grain cannot affect the question.

It is a well-known commercial usage for shippers to make drafts on their consignees, with bills of lading attached, and obtain the amounts drawn for at a bank before the receipt of the grain at its destination. The protection of the acceptors of such drafts from loss may have been the legislative purpose in permitting the consignees, their heirs or assigns, alone to maintain an action under the statute for shortage. Counsel for plaintiff in error refers to section 26 of the Civil Code of Procedure, which requires that every action must be prosecuted in the name of the real party in interest. It has no application. In *Rodman v. Railway Co.*, supra, the general provisions of the statute of limitations were held not to save an action given by special statute which contained in it a limitation inseparable from the right to pursue the remedy provided, and a part of it.

It is extremely doubtful whether, in view of the decision in *Railway Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248, there is any vitality left in the statute under consideration. With that part of section 6 omitted which makes the bill of lading conclusive proof of the amount of grain received by the carrier, can it be said that the Legislature would have enacted the law?

The judgment of the court below will be affirmed. All the Justices concurring.

#### BRODERICK v. BRODERICK.

(Supreme Court of Kansas. July 7, 1904.)

##### BENEFIT CERTIFICATE—CHANGE OF BENEFICIARIES—FRAUD.

1. In an action by the brother of the assured, as beneficiary, to recover upon a certificate issued by a fraternal order, where the minor daughter of the assured, as a defendant in the action, claimed the proceeds of the certificate, charging that plaintiff, by fraud, induced the assured, when enfeebled of body by disease, and weakened of mind from the excessive use of opiates, to change the beneficiary in the certificate from defendant to plaintiff, held not error to sustain a demurrer to the evidence, where there was no evidence tending to show

fraudulent inducements, except the inference that it was unnatural and improbable that the father would, without fraudulent inducements, have changed the beneficiary from his infant daughter to his grown brother; such inference alone not being evidence of fraudulent inducements.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Charles Broderick against the Grand Lodge of the Ancient Order of United Workmen and Grace Edna Broderick. Judgment for plaintiff, and defendant Broderick brings error. Affirmed.

J. Harvey Frith and I. V. McMillan, for plaintiff in error. Buck & Spencer, for defendant in error.

ATKINSON, J. George Broderick died intestate at Maryville, Mo., on the 13th day of April, 1902, leaving his daughter, Grace Edna Broderick, a minor, his only heir. At the time of his death he was the holder of a beneficiary certificate issued by the Grand Lodge of the Ancient Order of United Workmen of Kansas for \$2,000, in which his brother Charles Broderick was named as beneficiary. The grand lodge refused to pay the amount of the certificate to the beneficiary, for the reason that the guardian of the minor child of deceased made claim thereto. Charles Broderick, as beneficiary, then commenced an action against the grand lodge to recover upon the certificate, and made the minor, Grace Edna Broderick, a party defendant. It was averred in plaintiff's petition that the minor claimed some interest in the certificate, the nature of which was to plaintiff unknown. It was asked that the claim of the minor be adjudged null and void. By stipulation of the parties to the action, the \$2,000 in controversy was paid into court, and the grand lodge discharged from further liability. The minor, through her guardian ad litem, answered, in substance, that she was the sole surviving heir of George Broderick, deceased; that on October 30, 1897, a beneficiary certificate was by the grand lodge issued to said George Broderick for \$2,000, naming the minor, Grace Edna Broderick, as beneficiary therein; that at a time when the body of the assured was enfeebled by disease, and his mind weakened by the excessive use of opiates, plaintiff fraudulently procured the assured to change the beneficiary in the certificate held by him, and caused plaintiff to be named as beneficiary therein, instead of said minor, Grace Edna Broderick. It was also averred that among other inducing causes was the representation on the part of plaintiff to the assured that the proceeds of the certificate, if he was made beneficiary therein, would be by him applied and used in the care and education of the minor, Grace Edna Broderick; that in fact plaintiff

never intended to so use and apply the proceeds of said certificate, but intended to appropriate the same to his own use. It was averred that, for the reasons stated, the certificate by plaintiff sued upon was null and void; that defendant Grace Edna Broderick, for the reasons stated, was entitled to the money paid into court by the grand lodge. The court upon the trial placed the burden of proof upon the defendant. When defendant had rested her case, the court sustained the demurrer of plaintiff to defendant's evidence. Of this ruling of the court, error is assigned. There is in the record evidence disclosing that at the time of the change of beneficiaries, George Broderick was an invalid, and continued such to the time of his death, and that his mind was weakened from the excessive use of opiates; but there is in the record no competent evidence tending to show any inducements fraudulently made by plaintiff to the assured which induced the assured to make the transfer or change of beneficiary complained of. There is also in the record evidence disclosing that, at the time the change of beneficiary was made, George Broderick was not physically able to provide for himself and daughter, and was without means to pay the dues and assessments necessary to continue the certificate in force; that he and his daughter were provided a home with his brother, Charles Broderick; that within a short time prior to his death the attention of George Broderick was by relatives and friends directed to the matter of causing his daughter to be again made beneficiary in the certificate, and he expressed himself as satisfied with the situation as it then was. All of this evidence tended to weaken and discredit the position of defendant.

It is urged that it was unnatural, and for that reason improbable, that the father would, without the fraudulent inducements alleged to have been made, have changed the beneficiary from his infant child to his grown-up brother; that the inference arising therefrom was sufficient to have entitled the evidence of defendant to have gone to the jury upon the question that fraudulent inducements had been made by plaintiff to the assured to induce him to make the change of beneficiary. This inference, of itself, was not entitled to go to the jury for consideration without some evidence tending to prove the averments of defendant's answer that fraudulent inducements had been made by plaintiff to the assured to induce him to make the change of beneficiary. There having been no competent evidence tending to establish fraudulent inducements averred in defendant's answer, there was no error in the court sustaining the demurrer of plaintiff to defendant's evidence.

The judgment of the district court will be affirmed. All the Justices concurring.

**SORENSEN v. WELLMAN et al.**

(Supreme Court of Kansas. July 7, 1904.)

**OFFICERS—JUDICIAL ACTS—PAYING OVER MONEY PAID INTO COURT.**

1. In an action before a justice of the peace, a garnishee paid money into court. Judgment was rendered for plaintiff, from which, within 10 days, defendant appealed. After judgment, and before the appeal was taken, the justice paid the money to the plaintiff. In the district court the plaintiff dismissed his action. The defendant then sued the justice for the amount paid by him to the plaintiff. *Held*, that the justice acted judicially in the matter, and cannot be held liable for loss occasioned, however much he may have erred.

(Syllabus by the Court.)

Error from District Court, Saline County; R. F. Thompson, Judge.

Action by Knud Sorensen against Thomas H. Wellman and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

Frank O. Johnson, for plaintiff in error.  
David Ritchie, for defendants in error.

**MASON, J.** On January 7, 1901, N. A. Warder sued Knud Sorensen before T. H. Wellman, a justice of the peace, for \$166.85, and caused a garnishment summons to be served upon C. G. Bennett. The garnishee answered January 14th, showing that he owed Sorensen \$156.06, which, upon order of the justice, he paid into court. On the same day judgment was rendered for plaintiff for \$139.85 and costs. Sorensen made no appearance in the case until he gave an appeal bond, within 10 days after the judgment. The justice of the peace, after the judgment and before the giving of the appeal bond, paid the plaintiff the amount of his judgment out of the money paid in by the garnishee. Upon the calling of the case in the district court, the plaintiff, Warder, dismissed his action, without prejudice. Sorensen then sued the justice of the peace upon his bond for the amount he had paid to Warder, claiming that he should have held the money until the time for an appeal had expired. The trial court denied Sorensen any relief, and the only question raised by this proceeding is whether, upon these facts, he was entitled to recover.

Plaintiff in error argues that as the statute gave him a right to appeal at any time within 10 days, and as the appeal bond, when given, vacated the judgment, the judgment never became final, and could only have become final by the expiration of the 10 days without an appeal being taken; that the justice had no right to pay out the money until the judgment had become final; and that the precipitate payment to the plaintiff robbed the defendant of all substantial benefits of the appeal. Defendant in error responds that as the statute made no provision for a stay of proceedings pending the exercise by the defendant of the right of appeal, but permit-

ted an execution at any time after judgment (section 5365, 5369, Gen. St. 1901), the judgment was in full force from its rendition, and not only justified, but required, the payment to the plaintiff of the fruits of the garnishment; that, if defendant had desired to prevent the payment, he should have given an appeal bond at once, or before the payment was made. It is not necessary to a determination of this case that we decide which of these conflicting theories is correct. Their mere statement shows that the justice was confronted by the necessity of deciding, as a matter of law, a question not free from doubt—whether he was required to pay the money over on the demand of the plaintiff, or might hold it 10 days, so as to afford defendant that time in which to prevent the payment by giving an appeal bond. The justice had jurisdiction of the parties and of the fund. In passing upon the question of its disposition, he acted judicially, and, however egregiously he may have erred, he cannot be held liable for the consequent loss suffered by the defendant. *Clark v. Spicer*, 8 Kan. 440; *Connelly v. Woods*, 31 Kan. 359, 2 Pac. 773. A very similar question was presented in *Abrams v. Carlisle*, 18 S. C. 242. In a replevin action brought before a justice of the peace for the recovery of a mule, the plaintiff gave a bond, and procured an order of delivery. The defendant gave a redelivery bond, and the property was returned to him. Upon trial, judgment was rendered for the plaintiff. Under the statute the defendant had five days in which to move for a new trial or appeal. Without waiting for the expiration of this time, however, the justice issued an execution, upon which the constable at once seized the property and delivered it to the plaintiff. Within the five days the defendant moved for a new trial, and obtained it, and, upon a second judgment being rendered against him, appealed. He then demanded that the justice deliver him the mule, and, upon a refusal of the demand, brought action against the justice for damages resulting from the wrongful enforcement of the judgment before the expiration of the five days, but was defeated. Upon review in the Supreme Court, it was said: "The matter is reduced to the question whether the trial justice was authorized by law to issue his execution on the very day his judgment was promulgated, and have it executed by taking the property from one and giving it to the other litigant before the five days had expired which are allowed for appeal or motion for a new trial. We have no doubt that the trial justice during that time had the right to enter his judgment and lodge his execution, as it is sometimes said, 'to bind property'; but this case does not make it necessary to decide whether he had the right, in an action for personal property, to have his judgment executed by seizing and delivering the property before the time allowed for appeal or motion for a new trial had expired. Under ordinary circumstances,

we think it the better course for him to regard the case as still pending until the time allowed for a new trial or appeal has expired. But Milton A. Carlisle was a judicial officer, and the subject-matter was clearly within his jurisdiction. He had just decided the case, and when he entered his judgment, and execution to enforce it, he was acting judicially—as much so as when he rendered the judgment itself; and, even if he did make a mistake in having the mule delivered at once, without reference to the right of the defendant to move for a new trial or appeal within five days, he was not liable in damages for the consequences, unless he acted willfully and corruptly." The prevailing doctrine is that even a corrupt motive on the part of the justice will not render him liable under such circumstances. 18 Am. & E. Encyc. of L. (2d Ed.) 46. But this question does not arise here.

The judgment is affirmed. All the Justices concurring.

#### BETHANY HOSPITAL CO. v. HALE.

(Supreme Court of Kansas. July 7, 1904.)

#### LAW OF THE CASE—DEPOSITION—SUPPRESSION—PROBATE OF WILLS—PROCEDURE.

1. A ruling on a motion to suppress a deposition upon grounds not appearing therein does not become the law of the case, so as to require the court, when such motion is renewed in a subsequent trial, and supported by new proof of the invalidity of such deposition, to overrule it without consideration, and to do so is error.

2. The proper procedure to be observed upon the offer of a will for admission to probate, both in the probate court and upon appeal from an order denying probate in the district court, discussed.

(Syllabus by the Court.)

Error from District Court, Jewell County; R. M. Pickler, Judge.

In the matter of the will of William Swartz. From a judgment against the validity of the will, on the petition of Emma Swartz Hale, the Bethany Hospital Company brings error. Reversed.

R. W. Turner, Winfield Freeman, and Thos. J. White, for plaintiff in error. R. H. McBride, E. P. Hotchkiss, and T. S. Kirkpatrick, for defendant in error.

CUNNINGHAM, J. This was a proceeding originating in the probate court of Jewell county. Its purpose was to obtain the admission to probate of the will of William Swartz. This was denied by the probate court, and an appeal was taken by the proponent to the district court of that county. That court having denied probate to the will, proceedings in error were prosecuted to this court, where the case was reversed. *Bethany Hospital Company v. Emma Swartz Hale*, 64 Kan. 367, 67 Pac. 848. The matter coming on again to be heard in the district court,

probate of the will was again denied, and the case is now here for further review.

Prior to the first trial in the district court, the deposition of a witness was taken at a point in Missouri, and a motion was made to suppress this deposition on a number of grounds, going to its regularity and impeaching its validity. This motion was at that time overruled, but upon the condition that the proponent should have opportunity to cross-examine the witness whose deposition had been taken. Subsequently, when the parties went to conduct this cross-examination, they found that the witness had died shortly prior to the date set for his cross-examination. When the matter came on for a second hearing in the district court of Jewell county, the motion to suppress this deposition was refiled, accompanied by a notice that, upon its hearing, affidavits, depositions, and oral evidence would be offered in its support. When it was called for hearing, counsel for proponent requested permission to introduce evidence in addition to that considered when the motion was before the court at the prior trial. The court, however, declined to consider the motion, and the evidence offered in support thereof, both new and old, for the reason that he had once before considered this motion and passed upon it. This action is assigned as the first ground of error, and it is contended by the defendant in error that no error or abuse of discretion was committed by the court by this action, because, the motion having been overruled on condition once before, the court was not required to again take it up for consideration; citing the language of this court in 64 Kan. 371, 67 Pac. 848, in support of the claim that the question, once having been passed upon, became the settled law of the case. We are of the opinion that the court was in error in refusing to consider the motion the second time. The matters assigned in the motion for the suppression of the deposition were grave. If true, the deposition should have been suppressed. Evidence not before presented was tendered in its support. What this evidence was, we do not know, or what the action of the court should have been upon its hearing, we do not indicate; but at least the proponent should have had the opportunity to make its showing, and have the same considered, so that it might have gotten into the record the showing and the ruling thereon. A new trial of the issues was about to commence, and the proponent had a right to have presented its entire case in a connected and logical manner, so as to have it in proper form for review, should it so desire.

A number of errors are urged, arising out of the conduct of the trial on the question at issue before the district court. They are all quite closely related, and can best be solved by a general discussion of the nature, procedure, and effect of the trial of the issues arising upon the offer of a will for ad-

¶ 1. See *Motions*, vol. 35, Cent. Dig. § 53.

mission to probate. The issue upon such offer is whether the will was duly attested and executed, and whether the testator at the time of executing the same was of full age and sound mind and memory, and not under any restraint. Section 15, Wills Act. The burden of proving these things rests upon the proponent. The forum in the first instance is the probate court, where no jury is available. The witnesses are those who have attested the will, and such others as any person interested in having the will admitted to probate may desire to produce. This hearing is conducted in a somewhat informal manner, and without notice or pleadings. The order which may be entered is either for the admission to probate of the will, or the denial thereof. If the former, such order may be attacked at any time within two years in the district court, in an action for that purpose, by any person interested in the will or estate of the deceased. If the latter, an appeal may be had to the district court, where the order of trial, the character and burden of the proof, the same informality of procedure, will be had as before the probate court; the district court having only such powers and pursuing such procedure on appeal as would the probate court. All these matters will be found discussed in the case of *Lawrie v. Lawrie*, 39 Kan. 480, 18 Pac. 499. In both courts the procedure is of the most informal and perfunctory character, and when a *prima facie* case is made upon the several points as to validity of execution, testamentary capacity, and freedom from illegal restraint, the order of admission should be made, leaving for the more formal and regular proceedings provided by section 20 of the wills act the contest of the nicer and more difficult questions—a contest in which issues are duly formed, evidence properly produced, and the machinery for the obtaining of a jury, should one be ordered, found. Upon the application to admit to probate, a party interested in having the application denied may not, as a matter of right, demand the examination of his witnesses in opposition. Just to what extent this preliminary examination ought to go, it is difficult in any one case to say. It can be said, however, that it is not a contest. That is left for another proceeding in another forum. In the rough, it is probably sufficient to say that it should go only to the extent that a *prima facie* case is made in favor of the validity of the will. In this case it seems that the court and all parties treated the proceeding on appeal as though it were one to contest the will. This was improper procedure, and, had it been done over the objection of plaintiff in error, would have been material error. We have made the foregoing comments in view of the fact that, as the case will be reversed because of the error first noted, a more orderly procedure may be adopted on a subsequent trial.

Objection is made to the giving of various

instructions to the jury. These objections are largely based upon the improper scope of the inquiry in hand, and which will, no doubt, vanish in a trial properly conducted.

The judgment of the court below will be reversed, with instructions to proceed farther in accordance with this opinion. All the Justices concurring.

# SWEET et al. v. MONTPELIER SAV. BANK & TRUST CO.

(Supreme Court of Kansas. July 7, 1904.)

## ELECTION OF REMEDIES—CONVERSION OF FUNDS—INCONSISTENT REMEDIES—COLLECTION BY CORPORATION—LIABILITY OF OFFICERS.

1. Where the remedies afforded are inconsistent, the election of a remedy by a party with a full knowledge of the important facts affecting his rights operates as a bar against the adoption of another of such remedies.

2. Where money has been wrongfully converted to the use of a corporation, and the assets of the corporation, by its insolvency, have come into the hands of a receiver, the following of the funds in the hands of the receiver as a trust fund does not preclude the maintaining of an action to recover against the parties by whose wrongful act the funds were converted, the two remedies not being inconsistent.

3. Where there is sent to a corporation a note and mortgage for collection, with instruction to collect and remit, and the money is collected, but not remitted, a recovery may be had by the owner of the note and mortgage against the executive officers and managing agents having the active management, charge, and control of the affairs of the corporation for the conversion of the money by them for the use of the corporation, and also a recovery of them for such conversion of the money by subordinates, with the knowledge and acquiescence of such officers and managing agents.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by the Montpelier Savings Bank & Trust Company against T. B. Sweet and others. Judgment for plaintiff, and defendants bring error. Reversed.

Rossington, Smith & West, for plaintiffs in error. J. W. Gleed, J. L. Hunt (Gleed, Ware & Gleed, and D. E. Palmer, of counsel), for defendant in error.

ATKINSON, J. Defendants Sweet, Noble, and Sheldon, were president, vice president, and treasurer, respectively, of the Trust Company of America, a corporation having its place of business in the city of Topeka. They were also large stockholders in the corporation, and had the active management, charge, and control of its affairs. The business of the corporation, among other things, was that of receiving money in trust, executing trusts, and performing such duties as might be committed to it by any person or corporation. In June, 1898, at the request of the trust company, through Sheldon, its treasurer, plaintiff, a corporation with its

¶ 1. See *Election of Remedies*, vol. 18, Cent. Dig. § 16.

place of business at Montpelier, Vt., inclosed to the trust company the note and mortgage of J. E. Weaver for \$1,545, owned by plaintiff, with instructions to collect and remit. Accompanying the mortgage, as requested, was a release of the same, to be, with the mortgage, surrendered upon payment. During the month the trust company collected the amount of the note and mortgage. The amount collected was never remitted to plaintiff, nor was it known by plaintiff until in November following that the amount had been collected. In the meantime, about September 1st, a receiver was appointed by the federal court, who took charge of the property and effects of the trust company. In December, 1898, plaintiff filed in the federal court its petition of intervention asking that its claim be allowed as a trust fund, and decreed a first lien on the assets in the hands of the receiver. The petition was submitted to a special master, but no report made thereon. Subsequently this action was brought by plaintiff against defendants Sweet, Noble, and Sheldon to recover of them the said sum of \$1,545, charging that they had wrongfully converted the proceeds of the collection to the use of the trust company. Defendants denied liability, and pleaded that the proceeding of plaintiff by petition of intervention in the federal court constituted an election of remedies and a bar to this action. Verdict and judgment for plaintiff.

The right of plaintiff to follow the funds in the hands of the receiver as a trust fund is a recognized remedy. *Bank v. Bank*, 62 Kan. 788, 64 Pac. 634; *Hubbard v. Irrigating Co.*, 53 Kan. 637, 38 Pac. 1053, 37 Pac. 625. But it was not the only remedy open to plaintiff. It is conceded plaintiff had the right to select its remedy from among the remedies afforded; but it is claimed that, having elected to follow the funds in the hands of the receiver, plaintiff is held to its selection of that remedy; that such election constitutes a bar to plaintiff maintaining this action against defendants. The doctrine of the election of remedies has been frequently applied by this court. The cases hold that, where the remedies afforded are inconsistent, the election of a remedy by a party, with a full knowledge of the important facts affecting his right, operates as a bar against the adoption of another of such remedies. *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636; *Railway Co. v. Henrie*, 63 Kan. 330, 65 Pac. 665; *Bank v. Haskell Co.*, 61 Kan. 785, 60 Pac. 1062; *City of Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030; *Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111. Election goes not to the form, but to the essence, of the remedy. It applies only where the law supplies to a party two or more modes of procedure predicated upon inconsistent and conflicting theories. If the remedies afforded are predicated upon consistent theories, the suitor may use one or all of the remedies. There can be but one satisfaction.

Where the remedies afforded are inconsistent, the election of a remedy operates as a bar. Where the remedies afforded are consistent, the satisfaction of the claim operates as a bar. Is there inconsistency in following the trust property so far as it can be traced, and in recovering of the trustee damage which the beneficiary has sustained by reason of the misappropriation? In *Heidelberg v. National Park Bank*, 87 Hun, 117, 33 N. Y. Supp. 794, a large quantity of tin was shipped on the condition that the title to the same would be held in trust for the owner until he had received the proceeds of its sale. Sale was made by the trustee, who failed in business before remitting to the owner. The owner of the property presented his claim to the commissioners of the estate of the trustee, which was allowed, and a dividend paid thereon. Soon after the claim had been presented to the commissioners for allowance, the owner of the property commenced an action to recover from the bank to which the remittance for the proceeds of the sale of the property had been made, and recovered in the action to the extent of the amount of funds in the bank to the credit of the trustee at the time of his financial failure. The action against the bank was defended on the ground that the two proceedings to recover were inconsistent; that, plaintiff having elected to file his claim against the estate with the commissioners, he would not be permitted to maintain his action against the bank. The court, in passing upon the question, said: "An election once made is determined forever, and it may be determined by any decisive act made with full knowledge of all the facts, and the bringing of an action to enforce one of the remedies sufficiently evidences such election; but if a person has two or more consistent, instead of two or more inconsistent, remedies, for the recovery of the same debt, he may resort to all, although he can have but one satisfaction." The same view is expressed as to a trust fund in the opinion *Stoller v. Coates*, 88 Mo. 514. See, also, *Gambling v. Haight*, 59 N. Y. 354, and *Commercial Nat. Bank v. Kirkwood* (Ill.) 50 N. E. 219. In *Bowen, Executor, v. Mandeville*, 95 N. Y. 237, the court said: "A party may prosecute as many remedies as he legally has, provided they are consistent and concurrent." See, also, 7 *Encycl. of Plead. & Prac.* 362. In *Fowler, Executor, v. Bowery Savings Bank*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479, John White deposited money with the bank to the credit of his wife, Elizabeth White, but not as a special deposit. Both the husband and wife soon thereafter died. The executor of the estate of John White and the executor of the estate of Elizabeth White each made demand of the bank for the funds. The money was paid by the bank to the executor of John White. The executor of Elizabeth White brought an action and recovered judgment

against the executor of John White. Being unable to satisfy this judgment, he subsequently brought an action to recover the amount of the deposit from the bank. It was held that the relation of debtor and creditor existed between the bank and Elizabeth White at the time of her death; that, after the bank had paid out the money to the executor of John White, the executor of Elizabeth White had two remedies. He could have sued the bank as a debtor for the amount of the deposit, or he could have brought an action for money had and received against the executor of John White, and have recovered a judgment against either; but that he was not entitled to both remedies at the same time, or in succession. In the opinion it was said: "If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it, without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds wherever he can trace them, so far as the law will permit him to do so, without relieving the trustee." In *Hervey v. Rawson*, 164 Mass. 501, 41 N. E. 682, it was said: "The plaintiff cannot, of course, have more than one satisfaction, but the general rule in cases of trust is that, when the trust property has been misappropriated or misapplied by investing it in an unauthorized manner, the beneficiary may pursue and recover the trust property so far as it can be traced, unless the purchaser or holder of it has obtained a good title against the beneficiary, and can also recover of the trustee any damages which the beneficiary has sustained by reason of the misappropriation or misapplication." As appears from the averments of plaintiff's petition of intervention and from the petition filed in this case, plaintiff has at all times disaffirmed the wrongful act of defendants in the conversion of its funds. In neither proceeding is there a recognition of title to the funds in the trust company, nor a ratification of the wrongful act of defendants. The amount, if any, that may be recovered from the receiver will go to reduce the damage of defendants. There is nothing inconsistent in the two positions. There is nothing in the nature or the justice of the case which should preclude plaintiff from pursuing this course, which is for the interest of the defendants. To hold that the proceeding in the federal court ratified the act of the trust company or condoned the offense of defendants, and would relieve them of liability, would be carrying the doctrine of implied ratification

to an unreasonable and unjust extent. As to what are consistent and what inconsistent remedies is a matter to be determined by the facts in each case. No arbitrary rule can be enunciated the application of which will constitute a test for all cases. In the case at bar plaintiff, after filing its petition of intervention in the federal court, could have maintained an action against the trust company, the trustee in this case, to recover its damage for the misappropriation of the funds of plaintiff; the limitation being that there could be but one satisfaction of plaintiff's claim. The view we take of the case, if the conversion of the money was through the wrongful act of defendants, the same rule would apply to them. We find no inconsistency in plaintiff adopting the two remedies. Nor does it conflict with the former decisions of this court. There is in the two remedies no controversy as to the ownership of the trust property. There is no waiver of plaintiff's claim of ownership. There is no ratification of the act of defendants. There is no affirmation of an act or contract in the one proceeding and a disaffirmance of it in the other. The two proceedings are between different parties. There can be but one satisfaction of plaintiff's claim.

Error is assigned in the court giving to the jury the following instruction: "If you believe from the evidence in this case that in June, 1898, the plaintiff was the owner of the Weaver note and mortgage; that the Trust Company of America, then doing business in the city of Topeka, requested plaintiff to forward said note and mortgage to it for collection, and the same was forwarded, with instructions that, when collected, the money should be remitted to the plaintiff; that in pursuance to that request the plaintiff forwarded to the Trust Company of America the Weaver note and mortgage in June, 1898, for collection; that the Trust Company of America collected said note and mortgage, but failed and neglected to notify the plaintiff that the collection had been made, and withheld from plaintiff information of said collection; that plaintiff did not learn of the facts of said collection until about November 22, 1898; that the Trust Company of America appropriated the money so collected to the use of said company without the knowledge or consent of the plaintiff; that defendants had knowledge that the money so collected was a trust fund, and of its misappropriation; that the defendants, or either of them, participated in the misappropriation of the money, or knowingly permitted subordinates in the office to misappropriate the money to the Trust Company of America, and acquiesced in such misappropriation—then I instruct you that the defendants, or such of them as participated in the misappropriation, or knowingly acquiesced in the misappropriation of the money by subordinate employees, would be liable in this action." The above instruction fairly states the law applicable to this case,



where it is shown, as alleged, that defendants were the active executive officers of the corporation, and had personal charge and supervision of the business affairs of the corporation, directing and managing its affairs, receiving and disbursing moneys that came into the possession of the corporation. The personal liability of defendants to plaintiff, as alleged, is not statutory, but rests wholly on the common law. Upon the subject of the personal liability of the officers of a corporation for their wrongful acts to persons having dealings with the corporation, see the following authorities: *Anderson v. Daley* (Sup.) 56 N. Y. Supp. 511; *Hempfling v. Burr* (Mich.) 26 N. W. 496; *Winchester v. Howard* (Cal.) 69 Pac. 77, 89 Am. St. Rep. 153; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787; *Wolfe v. Simmons*, 75 Miss. 539, 23 South. 586; *Fusz v. Spaunhorst*, 67 Mo. 256; 3 *Thompson on Cor.* §§ 4138, 4140.

Complaint is made of the court giving to the jury the following instruction: "If the defendants were respectively president, vice president, and treasurer of the Trust Company of America, a corporation, and the principal place of business of said company was in the city of Topeka, and the defendants had personal charge and supervision of the office and the business affairs of said company, directing and managing its affairs, receiving and disbursing moneys that came into its possession, then the defendants would be held to have knowledge of all the business affairs of the corporation which came under their personal observation and knowledge of all the business affairs of the corporation which they might have known by the exercise of ordinary diligence in the conduct of the business affairs of the company." The corporation is primarily liable for the conversion or misappropriation of moneys by its employees. The employees of the corporation are its agents within the line of their respective duty. The instruction complained of, as to liability, would probably be applicable where an action is brought direct against a corporation for a conversion or misappropriation of money by its employees. The usual remedy in such cases is an action against the corporation for the recovery of the money misappropriated. A proceeding against the managing officers of a corporation, as in the case at bar, is a somewhat unusual and extraordinary remedy. But where there is sent to a corporation a note and mortgage for collection with instructions to collect and remit, and the money is collected, but not remitted, a recovery may be had by the owner of the note and mortgage against the executive officers and managing agents having the active management, charge, and control of the affairs of the corporation for the conversion of the money by them for the use of the corporation; and a recovery may be had against them for such conversion of the money by subordinates with the knowledge and acquiescence of such officers and

managing agents. That part of the instruction complained of holding defendants personally liable for the conversion of funds by the subordinates, of which they had no actual knowledge, but by the exercise of ordinary diligence in the conduct of the business affairs of the corporation they might have known, does not meet with our approval. The rule announced by the able trial judge in his charge to the jury holding such officers liable for ordinary negligence finds support in the following cases: *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *Marshall v. Farmers' & Mechanics' Savings Bank*, 85 Va. 670, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Soloman v. Bates* (N. C.) 24 S. E. 478, 54 Am. St. Rep. 725; *Delano v. Case*, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81. The cases following hold that such officers of a corporation are not personally liable to persons dealing with the corporation for mere acts of negligence: *Union Nat. Bank v. Hill* (Mo.) 49 S. W. 1012, 71 Am. St. Rep. 615; *Frost Mfg. Co. v. Foster* (Iowa) 41 N. W. 212; *Chick et al. v. Fuller*, 114 Fed. 22, 51 C. C. A. 648; *Deaderick v. Bank*, 100 Tenn. 457, 45 S. W. 786; 3 *Thompson on Cor.* § 4137. These latter cases more nearly meet our approval. It is a well-known fact that much of the business of this day and age is transacted by corporations, many of them employing numerous persons in the various departments of the work in which the corporation is engaged. Large amounts of money and property are daily handled by the employees of such corporations. The instruction complained of casts upon the executive officers and managing agents of such corporations an unreasonable degree of liability. It would be a great hardship to hold them liable for acts of misappropriation of money or property by subordinates of which they had no actual knowledge. The rule of personal liability of such officers for the misappropriation by subordinates adopted by the trial court is too far-reaching in its scope. Aside from the giving of the instruction complained of, the record discloses no material error.

For error in giving the instruction complained of, the judgment will be reversed, and a new trial ordered. All the Justices concurring.

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LIBBEY v. ATCHISON, T. & S. F. RY. CO.  
(Supreme Court of Kansas. July 7, 1904.)

INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

1. Evidence in action for injuries to a railroad employé held to show him guilty of contributory negligence.

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Mary F. Libbey against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bird & Pope, for plaintiff in error. A. A. Hurd and O. J. Wood, for defendant in error.

PER CURIAM. John R. Libbey, a railroad conductor, was struck by a moving train in the yards of the Atchison, Topeka & Santa Fé Railway Company, at Emporia, and from the injuries sustained he died. His widow brought this action to recover damages for the negligent act, and to the testimony introduced by her the court sustained a demurrer, holding that her own testimony showed that the injury was the proximate result of Libbey's negligence. A reading of the record satisfies us that the ruling must be upheld. Assuming that the company was negligent in running its trains through the yards at too rapid a rate of speed, and that no one was on the end of the train as it was backed toward Libbey, the testimony of the plaintiff showed that Libbey, who was talking to a co-employé in the yards, recklessly turned and stepped upon a track and in front of a moving train, without looking in the direction from which the train was coming. He was familiar with the yards and with the fact that two switch engines were continually moving cars backward and forward through the yards. Although it was nighttime, plaintiff's testimony showed that the cars could have been seen by Libbey for a short distance. He knew the dangers of the place. He voluntarily and unnecessarily put himself into a place of danger, and he took no precaution for his own protection. In stepping upon a railroad track in front of a moving train without looking or listening he ignored the plainest dictates of ordinary prudence, and plaintiff's testimony showed that his negligence contributed to the injury. The objections to rulings on testimony are not material.

Judgment affirmed.

ATCHISON, T. & S. F. RY. CO. v.  
WITHIERS.

SAME v. DEWESE.

(Supreme Court of Kansas. July 7, 1904.)

RAILROADS—INJURIES TO PERSONS ON TRACK—  
CONTRIBUTORY NEGLIGENCE.

1. One cannot knowingly stand upon a railroad track in a switchyard, or so near thereto as to be in an equally dangerous position, and, where he knows, or has reason to know, that cars may run at any time (another position being equally available), neglect to use his ordinary faculties to guard against danger, and, when injured through the negligence of the railroad company by a car passing along such track, recover damages. His contributory negligence bars such recovery.

2. The facts examined in this case, and held to bring the plaintiff within the above rule.

Cunningham, J., dissenting to second paragraph of syllabus and corresponding portion of opinion.

(Syllabus by the Court.)

Error from District Court, Jefferson County; Marshall Gephart, Judge.

Action by Margaret Withers and by Otis Dewese, administrator of the estate of Walter Dewese, against the Atchison, Topeka & Santa Fé Railway Company. Judgments for plaintiffs, and defendant brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error. Waters & Waters and S. B. Isenhardt, for defendants in error.

CUNNINGHAM, J. These two actions have been submitted together. They arise out of the same set of facts. The same act of negligence on the part of the railroad company occasioned the death of Mark Withers and Walter Dewese, to recover damages for which these actions were prosecuted. Judgment was entered against the defendant company in both cases, which it seeks to have reversed by these proceedings in error.

These men were killed upon Fourth street, a public street in the city of Topeka. This street runs approximately east and west. It is crossed at right angles by 13 tracks of the defendant's railroad. The tracks numbered from 1 to 10, commencing on the east side, are used for switching and yarding purposes, over and along which, especially during the evening and night, many cars are switched back and forth. These tracks are standard gauge, their rails being 4 feet 8½ inches apart. The distance between the tracks themselves is about 8 feet and 7 inches. A sidewalk on the north side of the street crosses all of these tracks from east to west. Over these tracks a large number of people pass, especially during the evening hours of Saturday. The street over its entire width across these tracks is laid with planks and filled with cinders so that its surface is even with the tops of the rails on the several tracks. The sidewalk spoken of above is made entirely of planks. No gates are maintained or watchmen kept to guard this crossing during the evening or night. The accident which resulted in the death of these men occurred about 9 o'clock Saturday evening, February 1, 1902. The night was dark. The wind was blowing with considerable velocity from the north. The weather was cold. There was some snow on the ground. Mark Withers on this date was in the employ of the railroad company, and had been for six or nine years theretofore. His business was that of a switchman in the company's yards at Topeka. He was thoroughly acquainted with those yards and with the frequency and manner of handling trains and cars therein. Walter Dewese was also an employé of the company as a laborer in its shops at Topeka, and had been such for about two months. It would seem that he was acquainted with the crossing in question, but was not familiar with the surroundings of the crossing as they then existed. They both knew, however, that they were crossing these tracks. Withers, in company with one Furman, started along the sidewalk on Fourth street shortly before

the occurrence of the accident, to cross the tracks, going eastward to his home. As they came near track 4 they observed a train switching along track 3, which obstructed their progress, and caused them to halt on or near track 4. Shortly thereafter they were joined by Dewese, coming from the same direction. Two other persons, Burt Sutton and Grover Stitt, and possibly others, were halted from the same reason. They, however, were standing in the space between tracks 3 and 4. All these men came from the west within two or three minutes of each other, and remained waiting for the passage of the train on track 3 from three to five minutes. It seems that these men, to protect themselves from the cold, had their collars turned up and their caps pulled down over their ears, but it does not appear that their sight or hearing was materially interfered with thereby; on the contrary, the jury find that their sight and hearing were good. North of Fourth street two blocks is a track known as a "lead track," on which another switching crew with an engine was operating. This crew, in order to locate a heavy refrigerator car upon track 4, kicked the same south on that track, expecting it would stop at some point before it reached Fourth street. This car was unattended by any one, unguarded by light or otherwise, unaccompanied by signal or warning. For some reason—perhaps because of an extra hard shove, or because of the wind blowing from the north, or both—this car, instead of stopping north of Fourth street, came on, running upon and over Furman, Withers, and Dewese, killing the last two named, and stopping near the south line of Fourth street. Sutton and Stitt were uninjured, though slightly hit by the car. Much evidence was introduced pro and con to show that the deceased men were standing upon track 4. That they were seems highly probable, though the jury found that they were not. But whether they were exactly upon the track or not seems of small moment, for the fact is that if they were not between the rails they were in a place of equal danger—near enough to them on one side or the other of the track to be struck by the oncoming car. It was not necessary for these parties to stand in a place of danger, as they could have stopped west of track 4, or could have safely stood between tracks 3 and 4. At the time there was a car standing on track 5, north of Fourth street, but just how far it does not appear; probably not very far. There was an arc electric light to the southwest about 120 feet away. There was a switchman's shanty or house on the north side of Fourth street close to the sidewalk, about 100 feet west of the place of accident. Under favorable conditions this oncoming car could have been seen for 40 feet north of the sidewalk. The jury specially find that the men were careful, and that they were not guilty of contributory negligence. It is further found that somewhere between the

switchman's shanty and track 4 they looked north, but saw nothing; that while they were standing waiting for the train to pass on track 3 they were looking east; that they listened for the purpose of determining whether a train or car was approaching while so standing, but heard nothing because of the noise of the other train; that, had they then looked north, they could not have seen the unlighted car approaching, being prevented by the car standing on track 5, north of the sidewalk, the running train on track 3, the smoke and steam from the engine drawing said train, the darkness of the night, and the absence of light or other signal on the oncoming car. At the close of the plaintiff's evidence, which showed the facts substantially as above set out, defendant demurred thereto. This was overruled. The defendant's evidence added little, and at its close the court was requested to instruct the jury to return a verdict for the defendant, which instruction was denied. These rulings are here relied upon for error.

The railroad company does not deny that it was negligent. Its contention is that it is relieved from this negligence by the contributory negligence of the deceased. We are of the opinion that the facts shown are such that clearly prove the culpable negligence of the deceased, and that the company is thereby relieved from liability for their death. They knew the conditions which surrounded them. They were in the full possession of their faculties. They knew they were within the limits of the yards, with its many tracks. They saw one train occupying the track in front of them. They knew that the other tracks were in frequent use for a like purpose; that at any moment any one of the other tracks might be occupied by moving cars. They knew that to stand upon a track, or near enough to one to be hit by a moving car, was a dangerous position to assume. Knowing all these things, and being plainly warned that they were in and upon this network of tracks, it was their plainest duty to see to it that they did not halt in a place of danger. There was ample room for them to have stopped in a place of safety. Others did so. Their exposing themselves to this obvious danger can only be accounted for upon the hypothesis of their reckless indifference to the danger which was so apparent, and to their own safety. We find nothing in the facts of this case to distinguish it from the case of *Zirkle v. The Mo. Pac. Ry. Co.*, 67 Kan. 77, 72 Pac. 539. The court there said: "This court has often said that a railroad track itself is a warning of danger, and that a person about to cross it must keep his faculties of sight and hearing in active exercise. In the present case the deceased turned his back in the direction from which the danger came, and was absorbed in conversation. His conduct negated all suggestion of vigilance, and showed a negligent disregard of the perils surrounding him. The fact that

the freight train which struck him was standing still on what was called the 'storage track,' 45 feet distant, when he started over the crossing, was not an assurance that it would remain stationary. The wheels of a railway car, adapted solely for the purpose of locomotion, are signals that the car may be moved at any time, as the wings of a bird indicate that it is prepared to fly. The indifference shown by the deceased in turning his back toward the train which ran upon him, and taking a position on the track, where death or great bodily injury was inevitable if the cars moved to the place where he stood, without diverting his attention from the conversation which engaged him, constituted contributory negligence, which cannot be excused. If negligence on the part of the company be conceded, the admission would not avail the plaintiff in error." To the same effect is the case of *Libbey v. A., T. & S. F. Ry. Co.* (just decided by this court) 77 Pac. 541. It cannot be that one may place himself upon the track of a railroad or in such a position as to be hit by a moving car, when no necessity therefor exists, resign himself to unwatching listlessness, and then be relieved from the results which a fairly prudent man ought to have guarded against.

We are of the opinion upon the entire case that the jury should have been instructed to return a verdict for the defendant in both cases. Therefore the judgment of the lower court is reversed, with instructions to enter judgment in defendant's favor.

JOHNSTON, C. J., and SMITH, GREENE, BURCH, MASON, and ATKINSON, JJ., concurring.

CUNNINGHAM, J. (dissenting). The foregoing is the opinion of the majority of the court, and not that of the writer thereof, who dissents therefrom. I am in hearty sympathy with the doctrine that one may not expose himself heedlessly and without excuse to the danger of being run over by a passing train, by standing upon or near a railroad track, giving no adequate attention to the dangerous surroundings, and then hold the company responsible for the result. But the circumstances of these cases are such that to my mind the question whether, under all the circumstances, the deceased persons were not excusable, was a debatable one; one on which the minds of men of equal experience and judgment might differ, and hence one peculiarly for the jury. It will be borne in mind that the night was cold and windy, the ground to some extent covered with snow, the tracks over which these parties were going but slightly, if at all, observable by reason of the fact that the tops of the rails were even with the sidewalk; that on the one side of track 4 was the moving train, on the other the standing car; the light of the electric lamp was at such an angle as

that the space between was unilluminated; the noise of the moving cars would prevent any one from hearing a car coming along track 4; the smoke and steam from the engine moving on track 3, the darkness of the night, and the absence of light, prevented the parties from seeing it. All these facts, and perhaps others, tended to relieve them from the charge of negligence in taking the position they did. At least it was so much of a question that the court should have submitted the question of contributory negligence to the jury, and, having submitted it to the jury, the jury's findings in favor of the plaintiffs should not be disturbed.

#### ST. PAUL FIRE & MARINE INS. CO. OF ST. PAUL, MINN., v. OWENS.

(Supreme Court of Kansas. July 7, 1904.)

##### INSURANCE—PROOFS OF LOSS—DEFENSES.

1. Unless an insurance policy in express terms provides for a forfeiture in case proof of loss shall not be made within 60 days after the destruction of the insured property, a forfeiture will not be declared by courts.

2. The negligence of the assured, resulting in the loss of his property by fire, which will defeat a recovery on an insurance policy, must be willful, and of such a degree as to amount to fraud.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by W. R. Owens against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

McFadden & Morris, Fyke Bros., and Snider & Richardson, for plaintiff in error. Sutton & Sutton, for defendant in error.

GREENE, J. This was an action to recover on a fire insurance policy, in which judgment was rendered for plaintiff. The defendant demurred to plaintiff's evidence, and also asked the court at the close of the evidence to instruct the jury to find for the defendant. These are the first two alleged errors. They involve but one question, viz., whether the failure of plaintiff to make proof of loss within 60 days after the destruction of the property by fire forfeited his policy. It is contended that by the condition of the policy the failure on the part of the assured to make such proof within that time, forfeited the policy. It might be pertinent to remark that proof of loss was made after 60 days, but before the action was brought, and that the action was brought within the time limited by the policy. A forfeiture is never declared by courts unless it is plainly and specifically provided for in the policy. The policy involved in this case does not declare that a forfeiture shall take place if proof of loss is not made within 60 days

¶ 2. See Insurance, vol. 23, Cent. Dig. § 1137.

from the date of the destruction of the property. It provides that proof of loss shall be made within that time, but does not declare that a failure to perform such condition shall work a forfeiture of plaintiff's right of action. The defendant insurance company is a Minnesota corporation, and the form of its policy is provided by the laws of that state. This question arose in the Supreme Court of Minnesota upon the same form of policy sued on in this action. *Mason v. St. Paul Fire & Marine Ins. Co.*, 82 Minn. 336, 338, 85 N. W. 13, 83 Am. St. Rep. 433. In that case it is said: "It is very generally held by the authorities in cases where this question has been presented that, unless the policy provides a forfeiture, or makes a service of proofs of loss within the time specified therein a condition precedent to the liability of the company, the time within which such proofs are required to be furnished is not of the essence of the contract. Where no forfeiture is provided by the terms of the contract, and the service of proofs of loss within the specified time is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment." On page 340, 82 Minn., page 15, 85 N. W., 83 Am. St. Rep. 433, the court says: "But the policy before us contains no provisions which will justify a holding that a strict compliance therewith in this respect is essential, and the matter must be referred to the Legislature to consider and adjust by proper amendment to the standard policy law, if such amendment shall be deemed just and equitable." We think this is a correct interpretation of the policy, and that a forfeiture did not follow by reason of the neglect to make the proof of loss within the 60 days.

It is contended that the court erred in refusing to instruct the jury, in effect, that if the plaintiff's residence was destroyed by fire through his own negligence he could not recover. It is said in *Phenix Ins. Co. v. Sullivan*, 39 Kan. 451, 18 Pac. 528, that "insurance policies are taken out to guard against the results of negligence and carelessness." It is not a defense to an action on an insurance policy to show that the property was destroyed through the plaintiff's negligence, unless such negligence was willful or was of such a degree as to amount to fraud.

It is also contended that the court erred in instructing the jury that under the pleadings and evidence the plaintiff was entitled to recover, unless the jury should find that the house, at some time during the life of the policy, had remained for a period of ten days unoccupied as a dwelling; that this instruction took from the consideration of the jury two important questions: (1) The question of the proofs of loss: (2) whether the assured, by his own negligence, caused the fire which destroyed his property. As to the first question, there is no contention that

proofs of loss were not in fact made, and the cause was litigated on the part of the defendant upon the theory that, such proofs not having been made within 60 days, the policy was forfeited. As to the second question, the answer does not charge that the negligence amounted to willfulness or fraud on the part of the assured, nor does the evidence tend to prove any such degree of negligence.

We think no error was committed by the trial court. The judgment is affirmed. All the Justices concurring.

#### MORTGAGE TRUST CO. OF PENNSYLVANIA v. BACH et al.

(Supreme Court of Kansas. July 7, 1904.)

#### MORTGAGE—DEFAULT IN INTEREST—OPTION TO DECLARE DEBT DUE.

1. A note secured by a mortgage bore interest at the rate of 6½ per cent. per annum, and provided that the failure to pay any interest coupon should mature the entire debt at the option of the holder, and it was stipulated that the note should draw interest after maturity at the rate of 10 per cent. per annum. There was default in the payment of interest, but the holder did not then elect to declare the whole debt due, nor until about a year afterwards, when a foreclosure action was brought. In the petition the holder averred that it then elected to declare the entire debt due as of the time when default was made. *Held*, that the holder could not, by a mere averment, give its declaration of election a retrospective effect, thus making the entire debt due and to draw interest at the increased rate about a year before the option was in fact exercised.

(Syllabus by the Court.)

Error from District Court, Pawnee County; Chas. E. Lobdell, Judge.

Action by the Mortgage Trust Company of Pennsylvania against Josie M. Bach and others. Judgment for defendants, and plaintiff brings error. Affirmed.

G. Polk Cline and Alex. A. Sharp, for plaintiff in error. H. S. Rogers and V. H. Grinstead, for defendants in error.

JOHNSTON, C. J. On January 1, 1902, Josie M. Bach and her husband executed and delivered to the Mortgage Trust Company of Pennsylvania a promissory note for \$3,000, due five years after date, with interest at the rate of 6½ per cent. per annum, payable semiannually. At the same time they executed a mortgage on real estate to secure the payment of the note. There was a provision in the note that on default in the payment of any interest coupon, or failure to comply with any of the conditions contained in the mortgage, the debt should immediately become due and payable, at the option of the legal holder thereof, and that the note and attached coupons should draw interest at the rate of 10 per cent. per annum after maturity. The mortgage provided that, for failure to pay any part of the interest or principal, the entire debt should immediately become due and payable, at the option of the holder.

without notice. The interest coupon maturing July 1, 1902, was not paid, and on July 1, 1903, the plaintiff commenced this action, asking judgment for the amount of the note, with interest from July 1, 1902, at the rate of 10 per cent. per annum. In the petition the plaintiff alleges that, under the terms of the note and mortgage, it elects to declare and does declare the amount due July 1, 1902. The court allowed interest at the rate of 6½ per cent. until the action was commenced, and 10 per cent. thereafter.

The only matter in controversy between the parties is whether interest should have been allowed at the rate of 10 per cent. from July 1, 1902, or from the date when the action was begun, viz., July 1, 1903. The increased rate did not apply until the maturity of the note. By its terms the note was to mature January 1, 1907, but maturity might be accelerated by default in the payment of any interest coupon, at the option of the holder. There was a default on July 1, 1902, and if the trust company had then exercised its option, and elected to declare the entire debt due, it would have been entitled to the increased rate. The option, however, was not in fact exercised until this action was begun. The allegation in the petition "that the interest due July 1, 1902, has not been paid, and the said plaintiff, under the terms of the said note and mortgage, elects to declare, and does declare, the entire amount due July 1, 1902," did not operate to set back the election to the time named. The plaintiff could not by mere averment give its declaration of election a retrospective effect, and thus make the whole debt due a year before the option was exercised. The default alone did not mature the debt. That circumstance afforded the holder ground for accelerating maturity, but until it in fact exercised its option, and declared the debt due by reason of the default, the note was not mature, and it was not entitled to the higher rate of interest. *Hutchinson v. Benedict*, 49 Kan. 545, 31 Pac. 147; *Keys v. Lardner*, 55 Kan. 331, 40 Pac. 644; *Kennedy v. Gibson* (Kan.) 75 Pac. 1044; *Investment Co. v. Mitchell*, 6 Kan. App. 317, 51 Pac. 57.

The judgment of the district court will be affirmed. All the Justices concurring.

#### STATE v. JETT.

(Supreme Court of Kansas. July 7, 1904.)

AIDING OFFENDER TO ESCAPE—INFORMATION.

1. The information in this case examined, and held not to state an offense under section 2289, Gen. St. 1901.

(Syllabus by the Court.)

Appeal from District Court, Clark County; E. H. Madison, Judge.

Henry Jett was informed against as aiding another, who had committed a felony, to escape. A demurrer to the information was sustained, and the state appeals. Affirmed.

C. C. Coleman, Atty. Gen., and J. M. Grasham (D. R. Hite, of counsel), for the State. Conly & Conly and H. C. Mayse, for appellee.

GREENE, J. Henry Jett was informed against under section 2289, Gen. St. 1901, which reads: "Every person who shall be convicted of having concealed any offender after the commission of any felony, or of having given to such offender any other aid, knowing that he has committed a felony, with the intent and in order that he may escape or avoid arrest, trial, conviction or punishment, and no other, shall be deemed an accessory after the fact, and upon conviction shall be punished by confinement and hard labor not exceeding five years, or in the county jail not exceeding one year nor less than six months, or by fine not less than four hundred dollars, or by both a fine not less than one hundred dollars and imprisonment in a county jail not less than three months." The information was in the following language: "In the name and by the authority of the state of Kansas, I, A. J. Myers, county attorney, in and for the county of Clark, in the state of Kansas, who prosecute for and on behalf of said state, in the district court of said county, sitting in and for the county of Clark, and duly empowered to inform of offenses committed within said county of Clark, come now here and give the court to understand and be informed that one Henry Jett, at the county of Clark, in the state of Kansas, and within the jurisdiction of this court, on the ——— day of March, A. D. 1903, then and there knowing that Claude Jett, in the county of Clark and state of Kansas, on or about the 20th day of June, A. D. 1902, had committed a felony, to wit, the crime of rape, by carnally and unlawfully knowing Anna Craig, she being a female woman under the age of eighteen years, and not his wife, did then and there, knowingly, unlawfully, and feloniously, give aid to said Claude Jett, with the intent and in order that the said Claude Jett might escape or avoid arrest, trial, conviction, or punishment for the commission of said offense of rape, and, with no other intent, aided the said Claude Jett in concealing the fact of the commission of said offense, and whereas the said Anna Craig had become pregnant by reason of the rape committed by said Claude Jett, and was about to be delivered of a child, the said Henry Jett did then and there take and convey the said Anna Craig from the county of Clark, in the state of Kansas, into the territory of Oklahoma, and did then and there, in a vacant house near Fort Supply, in Oklahoma Territory, deliver said Anna Craig of a child, it being the result of sexual intercourse with said Claude Jett in said act of rape, which said child then and there born of said Anna Craig he, the said Henry Jett, took and buried in a sand hill about one-half mile

from Fort Supply, Oklahoma, and said Henry Jett did then and there represent to sundry and divers persons that said Anna Craig was the wife of the certain man surnamed Harris, in the employ of said Henry Jett, and that the pregnancy of said Anna Craig, then and there represented by said Henry Jett to be Anna Harris, had occurred in wedlock, and was lawful and reputable; that the product of conception of said Anna Craig, then and there delivered as aforesaid, was incipient, immature, and diminutive, when, as the said Henry Jett well knew, the child then and there born of said Anna Craig, and buried by him, was eighteen inches in length and fully developed; and said Henry Jett did introduce the said Claude Jett to sundry and divers persons as Mr. Harris, the husband of said Anna Craig, and falsely represent that he was the lawful husband of said Anna Craig, and was surnamed Harris, and not Claude Jett; and afterward the said Henry Jett did convey said Anna Craig back to Clark county, Kansas, and cause her to exhibit herself in public places in order to create the impression that she had not been pregnant from sexual intercourse with Claude Jett, and did thereby purposely try to induce the citizens and officers of Clark county, Kansas, to falsely believe that no crime of rape had been committed upon the person of said Anna Craig by said Claude Jett, and thereby aided said Claude Jett in concealing the commission of said felony—contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas." The defendant moved to quash the information for the reason that it did not charge him with the commission of any offense. This motion was sustained, and the defendant discharged. The state appeals.

The specific acts charged against the defendant appear to have been done more to save the reputation of Anna Craig than to assist Claude Jett to escape punishment, and the immediate result was to protect her. The only act committed in Kansas was in taking Anna Craig out of the state. The allegation in the information explanatory of that act is that she might give birth to the child away from home. In *State v. Doty*, 57 Kan. 835, 48 Pac. 145, in construing this section of the statute, this court said: "The character of the aid is indicated by the particular words used in the commencement of the section, and it shows that it must be some substantial act of personal assistance. It will be observed that the concealing of an offender is first mentioned, and then there is added the giving of such offender any 'other aid,' and the argument may well be made that the other aid is of a similar character with that particularly specified. It is a familiar rule of interpretation that, where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which

precede." The acts charged against the defendant do not fall within the statute, under the interpretation there given, and we do not think it states an offense.

The judgment of the court below is affirmed. All the Justices concurring.

#### STATE v. WELLS.

(Supreme Court of Kansas. July 7, 1904.)

CRIMINAL LAW—PLEA—FORMER CONVICTION—TRIAL—JURY.

1. It is not error to sustain a demurrer to a plea of a former conviction where the plea does not contain a complete record of the former proceeding.

2. In the prosecution for a misdemeanor, the defendant, with the consent of the prosecuting attorney and the court, may waive a trial by a full jury, and consent to be tried by a jury composed of 11 persons, under section 5639, Gen. St. 1901, which provides that "the defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in cases of felonies."

(Syllabus by the Court.)

Appeal from District Court, Saline County; R. R. Rees, Judge.

William D. Wells was convicted of selling intoxicating liquors, and appeals. Affirmed.

David Ritchie and O. M. Holmquist, for appellant. O. C. Coleman, Atty. Gen., O. W. Burch, and Z. O. Millikin, for the State.

GREENE, J. The defendant was informed against for selling intoxicating liquors. He filed a plea of a former conviction in bar. To this plea the court sustained a general demurrer. The trial was then proceeded with, and the defendant, with the consent of the county attorney and the court, waived a trial by a jury of 12 persons, and tried the cause to a jury of 11 persons. A verdict of guilty was returned. Thereupon the defendant filed his motion for a new trial. Defendant alleged that he could not be legally tried by a jury of less than 12 persons; that, under the provisions of our Constitution, it was beyond his power to waive such a jury, and therefore the verdict was void and should be set aside. This motion was overruled, and sentence pronounced.

The first contention is that the court erred in sustaining a demurrer to his plea in bar. A plea in bar of a former conviction or acquittal should contain the complaint, indictment, or information upon which it is alleged such acquittal or conviction was had, and also a complete transcript, or so much of the proceeding as is necessary to show the final disposition of the cause; otherwise a court is unable to determine the question presented by the plea. Such question can only be determined from the record. *Bishop on Criminal Procedure*, vol. 1, § 815; *Orocker v. State of Georgia*, 47 Ga. 568; *Bailey v. State*, 26 Ga. 579; *Smith v. State*, 52 Ala. 407. The record in this court contains none of the

¶ 1. See *Criminal Law*, vol. 14, Cent. Dig. § 669.

proceedings had upon the trial of the alleged former conviction. We are therefore unable to determine the question presented on this ground of error.

The second contention is that, notwithstanding the defendant's agreement to waive a jury of 12 persons, and his consent to try to a jury of 11 persons, the verdict of such jury is void. The provisions of our Constitution upon which the defendant relies are section 5 of the Bill of Rights, which provides that "the right of trial by jury shall be inviolate," and section 10, which provides that, "in all prosecutions, the accused shall be allowed \* \* \* a speedy public trial by an impartial jury. \* \* \*". Authorities are numerous holding that the jury referred to means a common-law jury of 12 persons. It is not necessary to determine what the rule would be in this case in a prosecution for a misdemeanor in the absence of any statutory regulation. Speaking generally, however, a defendant in a prosecution for a misdemeanor was not always, as a matter of right, entitled to a jury trial at common law. We are relieved from an investigation of the right of the defendant to a jury trial at common law by the provisions of section 5639, Gen. St. 1901. This section reads: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in cases of felonies." If in such case the defendant may waive a trial by jury, and submit the trial and decision of his cause to the court, there is no constitutional or statutory provision prohibiting him from consenting to a trial by less than a full jury. We find similar statutory provisions in Indiana, Arkansas, Illinois, and Missouri. *Murphy v. State*, 97 Ind. 579; *State v. Ebert*, 40 Mo. 186; *State v. Mansfield*, 41 Mo. 470; *State of Missouri v. Larger*, 45 Mo. 510; *Darst et al. v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Warwick v. State*, 47 Ark. 568, 2 S. W. 335. These courts have universally held that in cases of misdemeanor the defendant, with the consent of the prosecuting attorney and the court, may waive a trial by a jury, and submit the cause to the court.

The judgment of the court below is affirmed. All the Justices concurring.

BURCH, J. (concurring specially). I concur in affirming the judgment of the district court, but the foregoing opinion does not meet the appellant's contention. He claims that the jury trial preserved inviolate by the Constitution is a trial by a common law jury of 12; that the Constitution itself makes no distinction between the trial of felonies and the trial of misdemeanors; and that the language of section 10 of the Bill of Rights, expressly providing that in all prosecutions the accused shall be allowed a speedy trial by an impartial jury, indicates that any such distinction is unwarranted. If this be true, the Legislature may not override the fundamen-

al law and authorize a trial by a jury of any other number in any case. The authorities cited in the majority opinion are inconclusive. The case of *State v. Ebert*, 40 Mo. 186, does not relate to trials by jury, but to the right to prosecute by information instead of indictment. The case of *State of Missouri v. Larger*, 45 Mo. 510, discusses nothing but the question of whether the waiver of a trial by jury must be express, or whether a mere failure to object to a trial by the court will conclude the defendant. The case of *State v. Mansfield*, 41 Mo. 470, was a felony, and not a misdemeanor, case. The statements in the opinion relating to the waiver of a jury of 12 in misdemeanor cases are dicta, and the syllabus limits the right of waiver to cases in which the penalty is a fine only. In the case of *Darst et al. v. People*, 51 Ill. 288, 2 Am. Rep. 301, the discussion of the question is completely contained in the following statement: "It is urged that a jury could not be waived, but we know no reason why it may not be in trials of misdemeanors." In *Murphy v. State*, 97 Ind. 579, the court does nothing more than proclaim, "It will not do to say, we think, that this right to a trial by jury is a right which the defendant may not waive, if he choose to do so, and if the law provides for such waiver;" and then, to clinch this argument, it is remarked that, if a defendant could not waive a trial by a jury of 12, he could not take a change of venue in face of the constitutional provision giving him the right to a trial in the county in which the offense was committed. In *Warwick v. State*, 47 Ark. 568, 2 S. W. 335, the statute authorizing a waiver was consonant with an express provision of the Constitution of the state of Arkansas authorizing the waiver of a jury in all cases. Manifestly there is here vouchsafed no reason whatever for making a distinction between the trial of felonies and the trial of misdemeanors, whether by statute or otherwise; and this court decided in *State v. Simons*, 61 Kan. 752, 60 Pac. 1052, that a trial by a jury of 12 cannot be waived in a felony case. The right to a trial by jury in all prosecutions is interpreted by the courts to mean the right as it existed in all common-law prosecutions. At common law many misdemeanors, including the offense of liquor selling, were triable without a jury, and this fact may afford a sufficient basis for the distinction made in methods of trial by the statutes of this state. In my opinion, however, a better position may be assumed. The provisions of the Constitution safeguarding the right of trial by jury are measures of protection, and not of coercion, so far as individuals charged with crime are concerned. If their interests were the sole consideration, they might waive the right, although they could not be compelled to do so. In felony cases, however, the consequences of a conviction are of so great importance to society that the state has an especial interest in the procedure by which



it may be accomplished. A convicted felon loses all his civil rights. He is civilly dead, and in certain cases may be condemned to death. Therefore, as was declared in *State v. Simons*, the state insists upon a trial by a jury of 12, not because of a demand for it by the accused, but because, from motives of public policy, it is to the interest of the state to accord it. In misdemeanor cases the reaction of the state is much less violent, and the consequences of a conviction are much less serious. The interest of society is relaxed, and the will of the accused may be allowed to prevail. When high motives of public interest no longer require that a waiver be absolutely inhibited, the Legislature may define the policy of the state respecting the manner of trials. It has done this by authorizing a trial by a jury of six, if the defendant consent, in misdemeanor cases prosecuted before a justice of the peace, and by providing for a waiver of a jury altogether in all cases except felonies, if the accused, the prosecuting attorney, and the court consent. Being allowed to waive a jury entirely, the defendant may waive the co-operation of one or more members of that body, and submit his cause to the others.

#### CITY OF ATCHISON v. MAYHOOD.

(Supreme Court of Kansas. July 7, 1904.)

##### CITIES—DEFECTIVE STREETS—SIDEWALK.

1. Where, for a term of years, there is a general use by foot travelers of the part of a public street lying outside of the improved roadway, the city may be deemed to have recognized such use and assumed responsibility for its being made safe, although no artificial sidewalk has been constructed.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Mary Mayhood against the city of Atchison. Judgment for plaintiff. Defendant brings error. Affirmed.

A. F. Martin (Jas. W. Orr, of counsel), for plaintiff in error.

MASON, J. This is a proceeding to review a judgment against the city of Atchison for damages alleged to have been occasioned by the neglect of the city to keep a street in proper condition for the use of foot passengers. The essential facts as disclosed by the petition and evidence are substantially as follows: At the place of the alleged defect the sidewalk area had not been paved or improved, but for some years there had been in general use a path running the length of the block and connecting at one end with a sidewalk running at right angles to it, and at the other with a plank walk built by the city extending across a street. A road-

way 40 feet wide had been made at a level several feet below the natural grade where the path was situated. Plaintiff had occasion to use the street at night and on foot. There was no sidewalk on the opposite side of the street. The roadway, by reason of recent rains, was muddy, the soil being clayey and much worked up by vehicles; so she followed the path described. She stepped upon a root which extended across the path several inches above the surface of the ground, her ankle turned, and she fell to the ground, breaking her leg, and receiving other injuries. The condition of the street complained of had existed for years, and the city council had actual notice of it.

Plaintiff in error contends that the petition did not state a cause of action, and that its demurrer to the plaintiff's evidence should have been sustained, and in support of this contention quotes the first paragraph of the syllabus of *City of Wellington v. Gregson*, 31 Kan. 99, 1 Pac. 253, 47 Am. Rep. 482: "While, generally speaking, it is the duty of a city to keep its streets in reasonably safe condition for public travel, it is not thereby implied that every street, and the whole width of every street, must be placed and kept in good condition. The city may, without incurring liability, leave certain streets entirely unopened, and in others put only a portion of the width in condition for use." That the doctrine thus stated cannot be held to cut plaintiff off from all chance of recovery and to exempt defendant from liability as a matter of law sufficiently appears from a consideration of the next paragraph of the same syllabus: "Whether, in any given case, a city can be charged with negligence in failing to improve and render safe for use the entire width of the street, and also whether, when it has put a portion in good condition it can be charged with negligence on account of posts, stakes, or other obstructions outside of the traveled track, are ordinarily questions of fact for the determination of a jury." The position of plaintiff in error could only be sustained by holding that a city can never be liable for injuries received by reason of the condition of the sidewalk area in a public street unless it has undertaken to build and maintain thereon an artificial walk, or otherwise by affirmative action to fit it for use as a footway. Such a view conflicts alike with reason and authority. It is justly held that where, for a term of years, there is a general use by pedestrians of the part of a public street lying outside of the improved portion, the city may be deemed to have recognized such use, and assumed the responsibility for its being made safe, although no artificial sidewalk has been constructed. "In cities, where it is customary for travelers on foot to use for that purpose a portion of the public streets on one or both sides of the track which is used for carriages and teams as a footway or sidewalk, the use of such footway or sidewalk by the people traveling along a

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. ¶ 1602, 1604.

public street in any such city for a series of years constitutes such footway or sidewalk a part of the traveled part of such street, and imposes upon the city the duty of keeping such footway or sidewalk in repair; and if the same becomes so defective as to render travel over the same unsafe, and the city takes no measures to warn the public against the use of such footway, the city becomes liable to any traveler who may suffer an injury from such defective footway without his fault." *James v. City of Portage*, 48 Wis. 677, 5 N. W. 31. "If between the sidewalk of a street in a city and that portion of the street wrought for a carriageway there is a grassed space, over which a footpath has been worn by use by persons having occasion to enter another street abutting on this street, but not crossing it, or to come in the opposite direction, the city is liable to a person injured by a defect in such path, if the path was known to and recognized by the city as a part of the wrought line of travel, in the absence of any path or other provision made by the city for crossing the street at or near the locality in question, or of any barrier or other warning to indicate that the path as actually used was unsafe or unsuitable." *Aston v. Newton*, 134 Mass. 507, 45 Am. Rep. 347, Syll. See, also, *City of Madisonville v. Pemberton's Adm'r* (Ky.) 75 S. W. 229.

Complaint is made that several instructions asked by defendant were not given. One of them included the charge: "If you find from the evidence in this case that the city did open for public travel only a part of the width of said street, leaving the other portion of said street in its original condition, then it was only bound to keep in safe condition for travel that portion so opened for public travel." The others involved the same proposition, and all of them ignored the possible effect to be given to the fact of the public use of the path. They were based upon the theory already held to be erroneous, and were properly refused.

Criticism is made of the instructions given, especially of one which it is claimed authorized the jury to base conclusions upon a comparison of the conditions present where the accident occurred with those existing elsewhere. We do not think the instruction fairly open to the construction sought to be given it. Considered as a whole, the instructions sufficiently advised the jury as to what view of the evidence would justify a verdict for plaintiff, and, reasonably interpreted, they were free from error.

The judgment is affirmed. All the Justices concurring.

#### JACOBS v. GASKILL.

(Supreme Court of Kansas. July 7, 1904.)

##### DIVORCE—PROPERTY RIGHTS.

1. A divorced husband is cut off from his rights of inheritance in his wife's estate by a decree of divorce.

Error from District Court, Douglas County; C. A. Smart, Judge.

Action by Bell Jacobs against Charles Gaskill. Judgment for defendant, and plaintiff brings error. Reversed.

Bishop & Mitchell and Edward T. Rilling, for plaintiff in error. Thomas Harley, for defendant in error.

**PER CURIAM.** The court below, in decreeing partition in this case, proceeded upon the theory that a divorced husband was not cut off from his right of inheritance in the wife's estate by a decree of divorce rendered under the statute of Kansas as it now stands until after the expiration of six months from the date of such decree. This was an erroneous view of the law. *Durland v. Durland*, 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959.

The judgment will be reversed, and the case remanded.

#### STATE v. KLUSMIER.

(Supreme Court of Kansas. July 7, 1904.)

##### CRIMINAL LAW—APPEAL.

1. In a criminal appeal to this court judgment will be given without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the appellant.

(Syllabus by the Court.)

Appeal from District Court, Jefferson County; Marshall Gephart, Judge.

William H. Klusmier was convicted of murder, and appeals. Affirmed.

Hayden & Hayden, J. A. Rokes, A. E. Crane, and E. D. Woodburn, for appellant. C. C. Coleman, Atty. Gen., H. F. Graham, and Welch & Welch, for the State.

**BURCH, J.** The defendant was convicted of the murder of his wife, and sentenced to hard labor in the penitentiary for 50 years. She had been beaten to death by blows upon the head with some blunt instrument, and by blows upon the body in the region of the heart, which produced a fracture of two ribs and copious internal hemorrhage. The defendant claimed she had opened the gates of death herself by that self-slaughter against which the Almighty has set his canon. It would offend the pages of the journal of this court to spread upon them a full account of the distillation of the deadly venom of the defendant's icy heart. Therefore the gruesome facts disclosed by the record of the district court, including the defendant's brutish treatment of the unpitied body of his wife, whose soul the accumulated bitterness of years had filled with wretchedness, will be referred to no further than is absolutely necessary to determine if the scales of justice were held by a steady hand throughout the prosecution.

The information was assailed by a motion to quash and by a motion to make more def-

inite and certain. Upon its face the information appears to be direct, specific, and plain. The objections to it were couched in general terms. No attempt has been made either in the brief or in the oral argument to point out any particular in which the defendant was any wise embarrassed or imperiled in making his defense by the supposed blindness of the charge, and the conclusion must be that the constitutional right of the defendant to demand the nature and cause of the accusation against him has been safeguarded. When the defendant was arrested he immediately wrote in dust and gave to the winds a monstrous fabrication concerning his wife's death by suicide. An autopsy revealed neither external nor internal evidence of any war whatever between her neck and a suspended noose. When asked of bruises on the body, he gave an explanation, and explanations multiplied as fast as his information of other mutilations grew. The examination of a witness disclosed that in the defendant's earliest narrative he had omitted to introduce the only invention adequate to account for the broken ribs. To escape from this predicament, the defendant's counsel asked the witness on cross-examination the following question: "But at that time it was supposed she came to her death by a blow on her head?" The witness was not allowed to answer, and the defendant claims the right to a new trial for that reason. The question made no reference to any statements concerning the cause of death which were in fact communicated to the defendant, and which might have absorbed his attention for the time. It related merely to the bubbles of conjecture and surmise which had been blown upon the pipe of rumor, and which were floating about in the idle wind of gossip. Counsel for defendant understood this at the time, and proceeded to draw from the witness the details of his conversation with the defendant. The details were that the witness had told the defendant his wife was wounded on the head and on the breast and on the thighs and on the abdomen, and that he did not tell the defendant she had come to her death by a blow on the head. The entire record considered, the assignment of error is trivial.

Some of the neighbors of the deceased woman were present at the coroner's inquest, and made a close examination of her neck. At the trial one of them said it was not in any other than a natural condition; and another said that, so far as he could see, it was in a natural condition. Technical objections to this testimony are argued at length, but it is not necessary to consider them. The testimony tended to negative the existence of external evidence of strangulation. There is no contradiction in the record of the fact that no such evidence existed. Some eight or ten witnesses examined the body when it was first discovered and exhumed, and found none. It was disinterred a second time, and a thoroughly scientific examination made,

with the same result. Then the defendant caused the much mutilated remains to be dug up and ravaged once again for some slight sign of exculpation, and no external evidence of suicide was found. Therefore the bits of evidence referred to were neither prejudicial nor important.

The defendant pretended that his wife had suffered an accident the evening before her death, which might have broken her ribs. He said he was present when it occurred, and claimed to have made the quick suggestion of a doctor's aid. Concerning other matters the defendant paraded himself as an ideally compassionate and sympathetic husband. On cross-examination he was required to answer the following questions: "How many times did you have a doctor when your children were born?" (there had been nine of them); and, "I will ask you if you did not complain of paying that ten dollars, time and time again, to your wife?" Counsel for the defendant say the questions were calculated to give the impression that he was a low, coarse, brutal, and degraded person. But the defendant proved himself to possess a character so low, coarse, brutal, and degraded that the vilest imputation which the state might make could not affect it. When, in his own defense, the defendant told upon the witness stand of hiding the bruised and naked body of his wife for a day between bales of hay in the barn, of loading it at night, without protection or covering, upon the frame of a grain drill, of driving with it afield, and then burying it face downward in a shallow ditch near the head of a ravine, he scaled a mountain peak of infamy at which the very fiends of hell must falter.

A Dr. Smith, who was introduced as a witness for the defendant, was not permitted to answer the following question: "You may state to the jury whether, in your opinion, after a person had been buried a month and a day, and an examination of the brain had, and the condition found as testified to by Dr. Tucker, whether a person could tell what caused the condition of that brain." It is said the question was intended to meet Dr. Tucker's opinion as the cause of the condition of the brain. Dr. Tucker had described the condition of the deceased woman's brain, and from many facts had given his opinion regarding the cause of death; but he had not assigned a cause for the condition of the brain. Therefore the reason given for the question fails.

Dr. Smith appears to have heard Dr. Tucker's testimony for the state on a given day. Subsequently Dr. Tucker was recalled, and gave additional descriptions of the result of the autopsy held on the body of the deceased, and gave opinions, based upon his complete investigation, as to the cause of death. These descriptions and opinions Dr. Smith did not hear. The court refused to permit Dr. Smith to give an opinion on the question whether or not the wounds he had heard Dr.

Tucker describe were necessarily fatal, and the defendant asks that the verdict against him be overturned for that reason. From the manner in which the record is prepared it is impossible to say upon what Dr. Smith's opinion would have been based had he been permitted to answer the question. Therefore error is not made manifest. But Dr. Smith was afterward recalled and examined by means of hypothetical questions, apparently to the extent of his knowledge and to the extent of counsel's ingenuity, and every vestige of prejudice, if the previous ruling were erroneous, was eliminated.

From the demeanor of the defendant as a witness in his own behalf it would appear that he was incapable of violence, even in the vibration of his vocal chords, and, probably for the purpose of rebutting the natural conclusion that he was cringing like a self-convicted felon, his attorneys undertook to prove that soft speech was habitual with him. The court permitted them to prove his usual tone of voice, but declined to allow a witness to compare it with the way he talked the day before. It is claimed the conviction of murder was unwarranted on this account. Without any precedents for guides, the court is inclined to follow the analogy of the common law, and to hold that, after the defendant's every-day tones had been established, the jury were as well qualified as anybody else to make the comparison between them and the defendant's witness-box voice. The practice here attempted to be inaugurated may be regarded as closed.

Certain questions were propounded to professional witnesses for the defendant, and excluded, which called for the probable acts of an individual suffering from puerperal mania, and for an explanation of the witnesses' understanding of the term "puerperal mania." The material matters then under investigation were the physical condition of the deceased, and the effect of that condition, if it were diseased, upon her mind. The causes and symptoms of any disease from which she might be suffering, and which would affect her conduct, were proper matters of inquiry, and the effect of any disease upon her conduct was relevant. But the court was not bound to permit the witnesses to wander further. Therefore the ruling of the court was correct. But the witnesses answered a series of carefully considered questions developing the fact that a certain organ of the deceased was not in a normal state, and that the diseased condition which it disclosed would likely cause puerperal mania—an unsound condition of the mind. They further described the symptoms of puerperal mania, and stated that it would produce an excited state, accompanied by wild talk and melancholia, a state of mental depression, and one of them expressed the opinion that a suicidal tendency might be exhibited. Therefore the whole matter sought to be elicited by the questions

to which objections were sustained was fully exploited in a proper, scientific way, and the only controversy left is that between the court and counsel over the form of interrogatories, which is no longer of any importance.

The defendant asked the court to instruct the jury that the state must prove the absence of certain facts in order to establish guilt—as the absence of self-defense, and of other justification or excuse. The request contained nothing more substantial than a play upon words. If a killing be willful, deliberate, and premeditated, it cannot be justifiable or excusable; and, if the burden be placed upon the state to prove a willful, deliberate, and premeditated killing, it already has the burden of proving a killing from which justification and excuse are absent. The burden was so imposed in this case. The same rule obtains with reference to all inferior degrees and crimes provable under the information, and the requested instructions were rightfully refused.

When a witness in his own behalf upon the trial, the defendant admitted that the only defense he had involved for its support the propagation of a prodigious lie, notwithstanding the fact that a lie will inevitably recoil upon the head of the liar, and that the truth is profitable to all men at all times. In this appeal no assignment of error has been presented which merits more than passing consideration. It is the law that whosoever crawls upon the belly shall eat dust, and the judgment of the district court is affirmed. All the Justices concurring.

#### MILLER et al. v. STUCK et al.

(Supreme Court of Kansas. July 7, 1904.)

##### QUIETING TITLE—HOMESTEAD—DECREE.

1. A defendant in an action to quiet title to a homestead tract is not prejudiced by a judgment that bars him from claiming an interest in the premises so long as it is occupied and impressed with a homestead character, when he, as a creditor of the estate, is asserting no claim to the premises in controversy while it continues so occupied and impressed with a homestead character.

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Elvira D. Stuck and others against M. G. Miller and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. W. Parker, for plaintiffs in error. C. B. Little, Jno. T. Little, H. L. Burgess, I. O. Pickering, and James P. Hindman, for defendants in error.

ATKINSON, J. In the year 1888 Isaac C. Stuck died intestate. He at the time owned and occupied as a homestead the land in controversy; the same being a tract in Johnson county, containing 160 acres. He left

as his only heirs a widow, Elvira D. Stuck, and seven children—four minors and three adults—the four oldest of whom were children by a former wife. The widow was appointed administratrix. The claims of creditors were presented and allowed against the estate by the probate court. The administratrix sold the personal property of the estate, the proceeds of the sale of which, after the payment of the expense of administration, paid 22½ per cent. on claims of the fifth class. There was no other real estate owned by the deceased at the time of his death than the homestead tract in controversy. The administratrix made final settlement and was discharged in December, 1891. Some of the children on attaining their majority sold and executed deeds of conveyance to their respective interests in the premises. The widow and those of the children who had not sold their interest in the premises made several attempts to sell the same. On each occasion when there had been found a purchaser for their interests in the premises, one or more of the creditors whose claim had been allowed against the estate, by claiming an interest present or prospective in the premises as a creditor of the estate, would defeat the sale. This action was brought by the widow and the children still owning an interest in the premises, and by the grantees of the children who had conveyed their interests, joining as plaintiffs, against the creditors of the estate whose claims had been allowed by the probate court as claims of the fifth class, to quiet the title of plaintiffs in said premises against the claims of such creditors. The court rendered judgment for plaintiffs. It was claimed by plaintiffs the premises had continued to be occupied by the widow and minor children, and were impressed with the homestead character, and for that reason defendants had no interest therein, and could acquire no interest therein, and that, if the premises had ceased to be impressed with the homestead character, defendants could have no claim therein or lien thereon, for the reason that the claim of each of the defendants against the estate had barred by the statute of limitations. The defendant creditors who asserted claims each in his answer expressly denied a present interest in the premises, or a right to enforce his claim against the premises at that time. It was urged by defendants that plaintiffs could not maintain an action to quiet title; that, if plaintiffs were entitled to maintain such action, it could only be for such time as the widow and minor children continued to occupy the premises, and the premises continued impressed with the homestead character; that the widow and minor heirs were liable to abandon the premises at any time; that the plaintiffs, who were grantees of the heirs, were never in the occupancy of the premises, and could not maintain an action to quiet title against defendants; that, if the claims of defendants were barred by the statute of limitation, be-

fore plaintiffs could ask equity they must do equity, and discharge the claims of defendants. The court made findings of fact and conclusions of law. The court found the premises in controversy to have been occupied by the widow and her minor child at the time of the commencement of the action; that as to the widow and minor child the premises were impressed with the homestead character; that the premises had never been abandoned as a homestead; that the interest of the plaintiffs and defendants claiming by deeds of conveyance from the heirs of Isaac C. Stuck, deceased, was acquired while the premises were impressed with the homestead character. The judgment barred the defendants, claiming as judgment creditors of the estate, "from setting up or claiming any right, title, or interest of, in, or to said lands as long as the same is occupied as and impressed with a homestead character." If the defendants, claiming as creditors of the estate, have, as claimed by each in his answer, a prospective interest in the tract in controversy—and whether they have, or have not, we do not here determine—they are not prejudiced by the judgment of the trial court. Each in his answer expressly denied a present interest in the premises, or a right to enforce his claim against the premises at the time of filing such answer. The judgment of the court bars each of the defendant creditors from setting up or claiming any rights in the premises so long as the premises are occupied and impressed with a homestead character. It is apparent that the defendants, in their claims against the premises, if any they have, are not prejudiced by the judgment rendered. Since defendants are not prejudiced by the judgment rendered, the errors assigned become unimportant, and will not be discussed.

The judgment of the court below is affirmed. All the Justices concurring.

#### WIENS v. EBEL.

(Supreme Court of Kansas. July 7, 1904.)

#### DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

1. The owner of property abutting on a city street dug a ditch across a cinder sidewalk in front of his premises, and left it unguarded. A woman on her way to church in the evening, when it was still light, saw the ditch, and stepped over it. On her return home there were many teams in the street adjacent to the walk, and the night was dark and rainy. She looked for the place where the obstruction was located, but failed to find it. In an action to recover damages by reason of falling into the ditch, held, that the question of her contributory negligence was for the jury.

(Syllabus by the Court.)

Error from District Court, Marion County; O. L. Moore, Judge.

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1755.

Action by Elizabeth Wiens against B. S. Ebel. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Carpenter and J. T. Dickerson, for plaintiff in error. Keller & Dean and S. Burkholder, for defendant in error.

SMITH, J. West street, in Hillsboro, an incorporated city of the second class, runs north and south along the western limits of the town. Defendant in error, who was defendant below, owns property on the west side of the street, and abutting thereon. South of his premises there are a number of residences, one of which was occupied by plaintiff in error at the time of the injuries complained of. There was no sidewalk on the east side of the street. About two years before plaintiff below was injured, Ebel took up a board sidewalk in front of his property, and substituted for it a cinder walk about 4 feet wide and 18 inches above the bottom of the gutter. The cinder walk was held in place by planks set on edge, and these were kept upright by pins or stakes driven in the ground against the planks on the street side. The walk was in general use by persons living south of Ebel's place, who had occasion to go back and forth to the business part of the town. Defendant below, desiring to drain his land into the gutter, dug a ditch across the cinder walk to a depth of between 12 and 18 inches, and about the same width, with perpendicular sides. It was left open and unguarded. On the evening of April 16, 1901, while it was yet light, plaintiff below, plaintiff in error here, went to church with her husband and young daughter, and passed over the cinder walk. They saw the ditch across the sidewalk, which had been dug that day, stepped over it without inconvenience, and noted its location so that they might avoid it on returning. After the meeting was over, Mrs. Wiens, accompanied by her husband and daughter, started home. When they reached the vicinity of the sidewalk in question, they found many teams in the road or street adjacent to the walk. It was a dark and rainy night. Plaintiff below, while walking slowly, fearing a fall into the ditch, did fall into it, and suffered injuries for which she sought to recover damages from Ebel. The court below sustained a demurrer to plaintiff's evidence on the theory that she was guilty of contributory negligence. She has come here alleging error.

Defending the ruling of the trial court, counsel for defendant below comment thus in their brief on the conduct of Mrs. Wiens: "Plaintiff knew of the ditch which defendant had cut through the walk for the purpose of draining his land into the gutter along the public road. She, in company with her husband and daughter, passed over it safely in daylight, about half past 6 o'clock, April 16th, on their way to a meeting. When they returned after the meeting was out, it was

dark. They did not provide themselves with a light to enable them to see the ditch. The plaintiff did not provide herself with a cane or other means for ascertaining the location of the ditch. She did not take hold of her husband's or daughter's arm to assist her in crossing the ditch, although her husband was only two steps ahead and the daughter not more than that distance in the rear. She took no precautions whatever to avoid stepping into the ditch, simply felt for it with her foot in the dark. She stepped down into the ditch, and was precipitated forward, and claims to have thus sustained the injuries complained of." The list of precautionary measures which plaintiff might have adopted could be extended beyond those suggested by counsel, and still leave the question of her contributory negligence to be decided by the jury. We cannot yield assent to the conclusion that, considering all the circumstances surrounding plaintiff below when she was injured, as a matter of law she was guilty of contributory negligence barring a recovery, and that, after plaintiff had rested, no question of fact was left for the jury to decide. It has been held often by this court that knowledge of a defective sidewalk will not debar a traveler knowing such fact from using it. In *Langan v. City of Atchison*, 35 Kan. 318, 326, 11 Pac. 38, 43, 57 Am. Rep. 165, Mr. Justice Horton, speaking for the court, approved what was said in *Maultby v. City of Leavenworth*, 28 Kan. 745, 748. In the latter case we find the following: "Now, in this case the plaintiff was intent on business. While he knew the condition of the sidewalk, he was cautious in his action. Ordinarily, a party is not obliged to forsake the sidewalk and travel in the street, for, while thereby he would avoid one kind of risk, he would expose himself to another, to wit, that of injury from passing vehicles. Besides that, the condition of a street on a rainy night is not such as to invite the steps of one traveling on foot. Neither is a party, although he is aware of the condition of the sidewalk, necessarily obliged to go around the block, or travel by another street. The reasonableness of his action depends upon the distance of the surrounding way and the urgency of his need. And all this presents a question of fact for the consideration and determination of a jury. We therefore think that the district court erred in discharging the jury and entering judgment for the defendant. Obviously, there was a question of fact as to whether the conduct of plaintiff was reasonably prudent." To the same effect, see *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *City of Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106; *Davis v. City of Holton*, 59 Kan. 707, 54 Pac. 1050; *Whitford v. Southbridge*, 119 Mass. 564; *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147; *Mellor v. Bridgeport*, 191 Pa. 562, 43 Atl. 365; *Dundas v. City of Lansing*, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457; *Mosheuev v. Dist.*

of Columbia, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170, 63 L. R. A. 571. There were many things justifying plaintiff in using the sidewalk. The darkness of the night prevented her from seeing the dangerous place. The many teams in the street, and its muddy condition, were circumstances to be considered in estimating the degree of care used. There is an implied invitation to the public to use a sidewalk. Defendant below did nothing to indicate that this invitation was withdrawn, which he could have done easily by guarding the excavation. If the plaintiff below exercised that degree of care which persons of ordinary prudence usually exercise under similar circumstances, she was not guilty of contributory negligence. *Chicago & N. W. Ry. Co. v. Prescott*, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

The judgment of the court below will be reversed, and a new trial ordered. All the Justices concurring.

(69 Kan. 312)

### ALLEN v. BURROW.

(Supreme Court of Kansas. July 5, 1904.)

#### ELECTIONS—NOMINATIONS—SPECIAL TRIBUNAL—CONSTITUTIONAL LAW—JURISDICTION OF COURTS—MANDAMUS.

1. The provision of the Australian ballot law creating a special tribunal for the settlement of disputes regarding nominations for public office, and making its decisions final, is not unconstitutional, as granting judicial powers to executive officers, nor as impairing the original jurisdiction of the Supreme Court. *Miller v. Clark*, 62 Pac. 664, 62 Kan. 278, affirmed.

2. A dispute as to which of two persons is the regular nominee of a political party for a public office can ordinarily be settled only by the special tribunal to which the statute commits the determination of such questions; but, if it is established that a majority of the members of such tribunal have entered into a corrupt agreement with one of the parties to give him the decision regardless of the merits of the case, the courts will take jurisdiction of the controversy, and decide it in a proceeding in mandamus to compel the certifying of the proper name for printing on the official ballot.

(Syllabus by the Court.)

Application by H. J. Allen for a writ of mandamus to J. R. Burrow. Motion to dismiss overruled.

W. S. Jenks and D. R. Hite, for plaintiff. C. C. Coleman, Atty. Gen., H. G. Larimer, F. B. Ogg, and J. J. Barker, for defendant.

**MASON, J.** This is an original proceeding in mandamus by which it is sought to require the Secretary of State to certify to the various county clerks of the counties comprising the Second Congressional District the name of Henry J. Allen as the Republican nominee for Congressman from that district. The affidavit for the writ discloses that two certificates of nomination have been filed with the Secretary of State, each purporting to be authenticated by the officers of the regular Republican congressional convention, one naming plaintiff as the nominee, the other naming J. D. Bowersock; that the ques-

tion as to which should be recognized has been considered by the officers to whom the statute (section 2703, Gen. St. 1901) commits the determination of such matters; and that a majority of them have decided in favor of the latter. To obviate the effect of that decision, three contentions are made: (1) That the statute creating such tribunal, and making its decision final, is unconstitutional, in that it devolves judicial functions upon executive officers, and in that it impairs the original constitutional jurisdiction of the Supreme Court in mandamus; (2) that the certificate filed with the Secretary of State on behalf of Bowersock was insufficient to be the basis of any inquiry, and that on account of certain matters of procedure the decision was without jurisdiction; (3) that the decision was wrong in fact and in law, and was made in pursuance of a fraudulent plan to prevent the placing of plaintiff's name upon the ballot, to which fraud the officers making the decision were parties.

An alternative writ has been issued, and an answer has been filed denying its material allegations. The defendant, however, by a motion to dismiss the proceedings, which is equivalent to a motion to quash the alternative writ, challenges the jurisdiction of this court to grant the plaintiff any relief, even assuming the facts to be as stated by him. The determination of this preliminary question is the purpose of the present inquiry.

The statute the benefit of which is invoked by defendant, and the validity of which is denied by plaintiff, reads as follows: "The certificate of nomination and nomination papers being so filed, and being in apparent conformity with this act, shall be deemed to be valid, unless objection thereto is duly made in writing within three days from the date said papers are filed with the proper officers. Such objections or other questions arising in relation thereto, in the case of nominations of state officers or officers to be elected by the voters of a division less than a state and greater than a county, shall be considered by the Secretary of State, Auditor of State, and Attorney-General, and a decision of a majority of these officers shall be final." The constitutionality of this statute was upheld by this court in *Miller v. Clark*, 62 Kan. 278, 62 Pac. 664, against the very attack now made upon it, supported by substantially the same arguments now urged upon our attention. In the brief of the plaintiff in that case it was said: "The power attempted to be conferred on the Secretary of State, Auditor, and Attorney General by section 144, c. 36, Gen. St. 1899 (section 2703, Gen. St. 1901), is clearly a judicial one. These officers belong to the executive branch of the government, and judicial power cannot be conferred upon them." This contention was held not to be well founded, and we are satisfied with the conclusion there reached. In the opinion the powers conferred upon the officers named is described as

quasi judicial. In *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, this term is applied to the functions of the State Board of Medical Registration and Examination, which is said not to be a judicial body, although by its determination a physician may be deprived of his means of livelihood. Executive officers are often charged with duties so far judicial in their nature that they require the investigation and decision of questions involving valuable rights. The principle requiring the separation and independence of the three departments of government—the executive, legislative, and judicial—does not demand the absolute isolation of each from the other. One person may exercise different duties not clearly assignable to the same department, where there is no inconsistency between them. But the same officer or body may not act in different capacities with respect to the same subject-matter. *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. Speaking of the law imposing upon probate judges the duty of issuing permits for the sale of liquor, Justice Brewer said, in the *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284: "It may be conceded that it would be more logical and less objectionable to say that the Legislature may create an office with specified duties, and then make the person holding the position of probate judge the incumbent of such office, than to hold that certain duties may be cast directly upon the person holding the office of probate judge. But substance is above form. That which may properly be done in one way ought to be upheld, if possible, though done in another way, and an act of the Legislature should be sustained whenever by any reasonable construction the act can be brought within the scope of the legislative power. If in this case the Legislature had created the office of commissioner of licenses, and provided that the probate judge should *ex officio* be such commissioner, there could be little doubt of the constitutionality of such an act. Substantially the same thing is accomplished by casting upon him the duties named in this act. And having in view the duty of upholding an act of the Legislature wherever possible, the past decisions of this court, the general recognition by all departments of the government—executive, legislative, and judicial—of the correctness of such exposition of constitutional limitations, and the substance rather than the form of this proceeding, we think the casting of this duty respecting permits upon the person holding the office of probate judge must be adjudged within the power of the Legislature."

Applying this reasoning to the present case, it may be said that the Legislature, having in mind the necessity of providing for the settling of disputes as to the nominations of political parties in a summary way, has created a special tribunal for that purpose, having a membership of three; that, instead of providing for the appointment or election of

the members of such board, it has enacted that it shall be made up of the individuals who at the time hold the offices of Secretary of State, Auditor of State, and Attorney General. These officers, in exercising the duties devolved upon them by this statute, do not, in any sense important to this discussion, act in their respective capacities of Secretary of State, Auditor, and Attorney General, and would not in such capacities be chargeable with any dereliction of which they might be guilty as members of such tribunal. See *State ex rel. v. Brown*, 35 Kan. 167, 10 Pac. 594. Other officers might have been designated for the purpose with equal propriety, instead of those selected. They were not chosen for any supposed connection between their respective departments and the matters to come before the new board. It is true that the Secretary of State happens to be the officer who has custody of the certificates of nomination, and who is required to transmit to the county clerk the names of the persons found to have been duly nominated. But this duty is purely ministerial, and can be controlled by mandamus. It is in no way involved with the matter of passing upon the question as to who are the regular nominees. The Attorney General is the constitutional adviser of the other two officers who are associated with him upon this contest board, but only in their respective capacities as Secretary and Auditor of State, not as members of the board. Upon questions of law arising before that body he has no more authority than either of the others. There is no possible interference or incompatibility between the duties laid upon these individuals as officers of the executive branch of the state government, and those imposed upon them as members of this special tribunal. And whatever term may be used in defining their functions while acting in the latter capacity, the statute is not within the reason of the rule forbidding the intermingling of the several governmental powers. With respect to the contention that the statute is unconstitutional by reason of impairing the jurisdiction of this court, nothing need be added to what is said in *Miller v. Clark*, *supra*.

Since the general adoption of the Australian ballot law the courts have frequently been called upon to settle disputes as to the regularity of nominations made by political conventions. The adjudications show little divergence of judicial opinion. The varying practice in the several states results mainly from statutory differences. Where two conventions are held, each claiming to be the authorized exponent of the same political party, the courts, from an unwillingness to undertake the settlement of purely political controversies, have generally required the nominees of each to be printed on the official ballot, where that was permitted by statute. *Sims v. Daniels*, 57 Kan. 552, 46 Pac. 952, 35 L. R. A. 146; *Phelps v. Piper* (Neb.)



67 N. W. 755, 83 L. R. A. 53; *Shields v. Jacob* (Mich.) 50 N. W. 103, 13 L. R. A. 700; *People v. District Court* (Colo.) 31 Pac. 339; *State ex rel. Sturdevant v. Allen* (Neb.) 62 N. W. 35; *State v. Piper* (Neb.) 69 N. W. 378. Where the statute forbids the printing of more than one set of nominees of the same party, and makes no specific provision for deciding which should be accepted as regular, when more than one are presented, the courts assume jurisdiction to determine the matter from necessity; there being no other way of settling the question. *State v. Falley* (N. D.) 83 N. W. 860; *Williams v. Lewis* (Idaho) 54 Pac. 619; *McCoach v. Whipple* (Colo.) 51 Pac. 164; *In re Fairchild* (N. Y.) 45 N. E. 943. But where the statute provides for the settlement of all such disputes by reference to some special tribunal, its decisions are held to be final. *Chapman v. Miller*, 52 Ohio St. 166, 39 N. E. 24; *Cain v. Page* (Ky.) 42 S. W. 336; *Moody v. Trimble* (Ky.) 58 S. W. 504, 50 L. R. A. 810; *People v. Baird* (Ill.) 45 N. E. 1081; *State ex rel. Burke v. Foster* (La.) 36 South. 32; *People v. Dist. Court* (Colo. Sup.) 74 Pac. 896. The case last cited arose under a statute which required all such controversies to be submitted to the state central committee of the party to which the disputants belonged, and made the decision of such committee final. The statute was attacked as unconstitutional on the ground that it was an infringement on the judicial department of the government, but was held to be valid.

An objection is made by plaintiff to the form of certificate filed with the Secretary of State by the opposing claimant. The statute (section 2697, Gen. St. 1901) requires that the certificate shall be signed by the chairman and secretary of the convention making the nomination, and that the person signing it shall make and subscribe an oath to its truth. Here the document filed consists of a statement signed by the officers of the convention, followed by the jurat of the officer administering the oath that it was sworn to. This seems a sufficient compliance with the statute, but the question is one upon which the board was competent to pass. It is also claimed that, if the contest board ever acquired jurisdiction in the matter, it lost it by postponing the hearing to a time more than five days after the filing of objections to the certificate. The statute requires the inquiry to be begun within five days, but does not forbid necessary continuances.

Complaint is made of lack of notice of the hearing, but the objection is not substantial.

It remains only to consider the effect of the allegations of the alternative writ that the majority of the contest board who made the decision against plaintiff did so in compliance with a corrupt and fraudulent agreement, to which they were parties, that plaintiff should be prevented from having his name printed upon the official ballot as the

Republican candidate for Congressman, regardless of the merits of his claim. So far as the allegations of conspiracy relate only to fraud practiced against the plaintiff by his political or factional opponents, in regard to choosing delegates, manipulating committees, organizing conventions, filing certificates, and all other matters affecting his right to be recognized by the contest board as the regular nominee of his party, they are not material in this inquiry, for the reason that they concern questions which under the statute must be decided by that board, and not by the courts. But the writ, following the affidavit on which it is based, in addition to various allegations more or less directly implicating the officers referred to in its charges of fraud, includes this express averment: "Said J. D. Bowersock, as a part of his said fraudulent scheme and design, early in said campaign for the nomination for Congress from the Second Congressional District, fraudulently and corruptly conspired and entered into an arrangement with the defendant, J. R. Burrow, Secretary of State, and with C. C. Coleman, Attorney General (such persons constituting a majority of said contest board), whereby it was provided, understood, and agreed that if the said J. D. Bowersock would procure from a bolting and fraudulent assemblage of persons claiming to be the congressional convention of the said congressional district a false, spurious, and fraudulent certificate of nomination, and would file the same in the office of the Secretary of State, defendant herein, that they (said Burrow and said Coleman), being a majority of the contest board provided by statute for the hearing of contested nominations, would recognize such false, spurious, and fraudulent certificate of nomination, notwithstanding any objections thereto, and notwithstanding clear and convincing proof of the fraudulent character of the assemblage which had pretended to authorize the execution of the same, and notwithstanding the fact that clear, positive, and conclusive proof should be presented before said board of the regular nomination of H. J. Allen for the said office." In *Miller v. Clark*, supra, it is said: "We do not hold, however, that if the action of the officers specially designated to pass on the merits of such a controversy was induced by bad faith, or was the result of arbitrary acts showing wrongful conduct amounting to fraud, or their findings resulted in personal benefit to themselves, equity would not interpose to prevent a candidate from being thus wronged, or that the remedy by mandamus, sought to be employed in this case, might not be invoked." It has often been said of special tribunals established by statute to pass upon matters expressly committed to them that their jurisdiction is exclusive and their determinations final, and that courts will not review their conclusions, nor inquire by what method they were reached; but always with an express or implied reser-

vation that the statement holds good only where the action of such tribunal is characterized by good faith, and is free from fraud, corruption, and oppression. *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247; *School Dist. v. Davies* (Kan.) 76 Pac. 409; 23 A. & E. Encyc. of L. (2d Ed.) 372. No rule is better settled than that courts will not interfere with public officers in the discharge of any duty involving the exercise of judgment or discretion. But this rule presupposes the existence of good faith, and relates to acts done under the guidance of opinions honestly formed, however mistaken in fact. It has no application to acts done under the influence of a corrupt motive. Even arbitrary and capricious conduct, amounting to an abuse of discretion, will justify mandamus to compel a proper performance of duty, upon the theory that there has been in fact no real exercise of judgment. 19 A. & E. Encyc. of L. (2d Ed.) 737-739. And courts have jurisdiction to prevent by injunction the consummation of a willful fraud attempted to be perpetrated under the guise of the exercise of the discretionary powers confided by law to public officers. *Davis v. Mayor of New York*, 1 Duer, 451. The bias, prejudice, partisanship, and unfairness imputed to the members of the board cannot alone be made the basis of the relief sought. It is reasonable to suppose that such conditions were foreseen and taken into account in the framing of the statute under consideration. They might have been provided against in various ways—for instance, by an arrangement allowing challenges upon sufficient reason against any of the officers constituting the board, and the substitution of others for them. From the absence of any such provision, it may be inferred that the Legislature, rather than to risk making the procedure unduly cumbersome and dilatory, in an effort to secure impartiality, preferred to permit the officers named to act even in cases in which they are interested, upon the theory that other considerations must be required to yield to the compelling necessity for reaching some quick and final result. But it cannot be thought that it was ever intended that no remedy should be afforded against their actual fraud. The question presented by the allegations of their corruption is not difficult, and requires no extended discussion. If the decision of the contest board was in fact made in virtue of a corrupt agreement between Bowersock and his associates, on the one hand, and the two members of the board against whom the accusation is lodged, on the other, that the matter should be determined against Allen, regardless of what the circumstances might be or what questions might arise, then it was not made in the exercise of any real judgment—not even of a judgment warped and perverted by interest or passion. The announcement of a conclusion so reached would not be an adjudication at all; it would have

none of the attributes of a judgment; it would be a mere sham and pretense, entitled to no respect, requiring no attention from a court of justice—not even to be set aside. It would be preposterous to suppose that any one could be concluded by such an announcement, and that the courts were powerless to grant relief.

Assuming the facts to be as stated in the alternative writ, this situation is presented: It would obviously be futile to attempt to compel further action by the contest board. The same considerations that vitiate its former decision would prevent any effective determination of the controversy at its hands. Its disqualification is complete and absolute. It is as though there were no such board. In effect, there is none. Yet here are two persons, each claiming the right to have his name printed upon the official ballot as the Republican candidate for Congressman from the Second District. The law permits but one name to be so printed. In some way a decision must be made between the rival claimants. There is no board in existence, competent to pass upon the matter. As in cases arising where the statute makes no special provision for determining such questions, from very necessity the courts must take jurisdiction.

If it shall be established that the charges of fraud against the members of the contest board are well founded, this court will not hesitate to examine into the facts with a view to determining the merits of the original controversy between Allen and Bowersock, and to make an order in this proceeding for the Secretary of State to certify to the county clerks the name of whichever candidate may be found to be the rightful nominee. But as the jurisdiction of the court to make such inquiry depends wholly upon the disqualification of the statutory tribunal, it will not be entered upon unless such disqualification shall be established, nor until it shall be. Issues are already joined upon this as upon the other questions involved. By an order to be hereafter made, after receiving suggestions from counsel as to a suitable time for such hearing, opportunity will be afforded for the production of evidence bearing solely upon the question whether the decision of the contest board was made in pursuance of a fraudulent scheme to which the members who joined in the decision were parties. If upon such hearing the plaintiff shall fail to establish such fraud on their part, an order will be made denying the peremptory writ. If the evidence shall sustain the charges, further provision will thereafter be made for a hearing upon the questions thereby opened up for investigation, and in that event the occasion for making Bowersock a party will be considered. But before any further step is taken in the case, it is ordered that the plaintiff cause the Attorney General to be made a party hereto, adding his name as a defendant, and serving

notice upon him of the pendency of the action. This course is pursued, not in response to the suggestion that in his absence there is a technical defect of parties, but entirely irrespective of any question of that character. Since the immediate subject of inquiry is the good faith of the board, the charges made affecting him equally with the Secretary of State, the taking of evidence will not be entered upon without enabling him to participate in the proceedings, with whatever advantage may be derived from being a party to the litigation, and as such entitled to be heard in his own defense as a matter of right.

For the reasons stated, the motion to dismiss is overruled, and the cause is retained for the purposes indicated. All the Justices concurring.

(69 Kan. 706)

**WOOLVERTON v. JOHNSON et al.**

(Supreme Court of Kansas. July 13, 1904.)

**APPEAL—RECORD—AGREED STATEMENT OF FACTS—WILLS—CONSTRUCTION.**

1. An agreed statement of facts upon which a trial is had cannot be made a part of the record by inserting it in the journal entry of judgment, preceded by the recital that the court made such agreed statement its findings of fact.

2. Where a case is tried upon an agreed statement of facts, and is brought to this court for review upon a record which does not include the agreed statement, notwithstanding such omission an inquiry may be had into the question whether the judgment was warranted under the pleadings.

3. A will directed that the property of the testatrix should be sold, and the proceeds placed with trustees, to be expended by them for the support and education of her two minor children. It was fairly inferable that the trust was to end when the children became of age, but no provision was made for the payment to them of any surplus that then might remain. From the apparent value of the estate, it was reasonable to believe that the testatrix assumed that if the children, or either of them, lived to the age of 21, its proceeds would be exhausted before that time. The will concluded with the words "and in the event of the death of each of said children, Donald Johnson and Kenneth Johnson, that in such an event, the residue of my estate, whatever it may be I give and bequeath to my brother John Olson." Kenneth Johnson died before his mother's death; Donald, shortly after. *Held*, that the unexpended portion of the estate goes to the testatrix's brother, and not to the heirs of Donald Johnson.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by L. S. Woolverton, as executor, etc., against William Johnson and others. From the judgment rendered, plaintiff and certain defendants bring error. Reversed.

W. F. Schoch and F. G. Drenning, for plaintiffs in error. Troutman & Stone, for defendants in error.

**MASON, J.** On January 18, 1901, Jennie Johnson was granted a divorce from her husband, William Johnson. On June 5, 1901,

she made a will, the general purpose of which was that her property should form a fund for the education and maintenance of Donald and Kenneth Johnson, the two minor children of herself and William Johnson. Kenneth Johnson died before the death of his mother. She died July 17, 1901. Donald Johnson died intestate March 15, 1902. This litigation involves the question of the disposition of the property left by Mrs. Johnson, and its result turns principally upon the construction to be placed upon her will. The trial court sustained the contention of William Johnson, that, as Mrs. Johnson died within six months of the date of the divorce, he was still her husband at the time of her death, and was entitled to one half of the property in virtue of that relation, and that he was entitled to substantially all of the other half as the sole heir of his son Donald Johnson, who had acquired an absolute title thereto under the will. John Olson, one of the plaintiffs in error, a brother of Mrs. Johnson, contends that by the terms of the will all of the property then unconsumed, except for a small specific legacy, passed to him upon the death of Donald Johnson.

A preliminary question arises upon an objection to the sufficiency of the record to present any question for review. The case was heard upon an agreed statement of facts, and is brought here by transcript. The transcript includes what purports to be a copy of the agreed statement, but, as that was not incorporated in a bill of exceptions, and did not become a part of the record, it is not properly before us, and cannot be considered. *Patee v. Parkinson*, 18 Kan. 465; *Morrow v. Co. of Saline*, 21 Kan. 484, 515; *F. C. Austin Mfg. Co. v. Johnson*, 89 Fed. 677, 32 C. C. A. 309; *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956. An attempt has been made to remedy this defect by adding to the transcript the copy of an order recently made by the district court amending the entry of judgment by inserting therein *nunc pro tunc* the agreed statement, preceded by a recital that the court made such statement its findings of fact. Apart from any question of the time of such attempted correction, we do not think the agreed facts can be brought upon the record in this manner. A trial court cannot make findings of fact different from those agreed to by the parties. *Brown v. Evans*, 15 Kan. 88; *Gray v. Crockett*, 30 Kan. 138, 148, 1 Pac. 50. When a cause is submitted upon an agreed statement, all issues of fact are eliminated. *Ritchie v. K. N. D. Ry. Co.*, 55 Kan. 33, 50, 39 Pac. 718; *Atkins v. Nordyke*, 60 Kan. 354, 56 Pac. 533. There is therefore no occasion for any findings of fact. Having no function to perform, they are of no effect if made. What the court does under such circumstances is to apply the law to the facts as agreed to by the parties. To describe this operation of the mind as including an adoption of the agreed statement as findings of fact does not change its

§ 1. See Appeal and Error, vol. 2, Cent. Dig. § 2356.

character, nor authorize the agreement to be made a part of the record by being spread upon the journal. But under the somewhat exceptional circumstances of this case these considerations do not preclude a review of the important questions involved. This litigation was begun April 17, 1902, by a petition filed by L. S. Woolverton, the executor and trustee under the will, asking the direction of the court as to the disposition of the property in his hands. All persons having any interest were made parties. On November 20, 1902, Olson filed an answer and cross-petition in which he set out the facts upon which his claim was based, attaching complete copies of the will and the decree of divorce. On December 6, 1902, Johnson filed an answer to the petition, and a motion to strike matter from the answer and cross-petition of Olson. This motion appears never to have been passed upon, and there was no further pleading on the part of Johnson. He filed no answer to the cross-petition of Olson, between whom and himself the real controversy lay; none of the other parties having any personal interest in the result. It is only applying the ordinary rules of pleading to hold that the allegations of Olson's cross-petition were admitted by Johnson's failure to deny them. The record therefore fairly presents the question whether the judgment of the court is consistent with the allegations of Olson's cross-petition, and with those of the answer of Johnson to the petition of plaintiff. The agreed statement is only the equivalent of evidence, and cannot change the issues presented by the pleadings. *Comm'r's of Marion Co. v. Comm'r's of Harvey Co.*, 28 Kan. 181; *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956. And no matter what the agreed statement may have contained, the judgment cannot stand if it is inconsistent with the uncontradicted facts as disclosed by the pleadings. It is true that, where a case is decided upon an agreed statement of facts, defective pleadings will ordinarily be considered as having been corrected by amendment, in order that substantial justice may not be defeated by inadvertent omissions. *Reynolds v. Reynolds*, 30 Kan. 91, 96, 1 Pac. 388. And if the agreed statement were properly before us, and it appeared from that and from the judgment that the parties and the court had proceeded as though Johnson had denied the allegations of Olson's cross-petition, or had set out new matter affecting them, justice would not only permit, but require, that the case should be treated as though such denial had in fact been made, and as though Johnson had pleaded any new matter conforming to the agreed statement necessary to sustain the judgment. But it is evident from his answer to the petition that there was no material controversy, except as to the divorce and the will, and that there was no serious intention on his part of disputing the terms of these as alleged by Olson, that they were

practically admitted, and that the only disagreement was as to their legal effect. And the conclusions of law framed by the court were directly responsive to the very questions raised by the pleadings as they stood. There is nothing in any aspect of the affair to justify indulging in strained inferences in Johnson's behalf, lest an injustice may be done him. To now give him the benefit of a pleading which he did not file would not be promoting justice. It would be aiding a technical objection to an inquiry into the legal merit of a claim barren of equity.

The claim of Johnson to a part of the property in virtue of having been Jennie Johnson's husband at the time of her death, on the theory that the decree of divorce did not have the effect of severing the marital relation of the parties until the expiration of six months, is disposed of by the interpretation given the statute in *Durland v. Durland*, 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959, decided since the judgment in this case was rendered.

The will declared in a preamble that the testatrix was desirous of making provision for the custody, education, and keeping of her minor children. It directed the appointment of John Olson, L. S. Woolverton, and Mrs. Emma Rhodes as their guardians, and made the same persons trustees of her estate, to receive its proceeds, and expend them in the care, maintenance, and education of the children. Her household goods were given to Mrs. Rhodes, to be used for the comfort of the children. Apart from this property and a life insurance policy of something less than \$1,000, the estate consisted of the half interest in a house and lot in Pueblo, which was directed to be sold. It was recited that Olson had agreed to furnish a home for the children and for Mrs. Rhodes. Provision was made for replacing any of the trustees who might die before the children became of age. The entire controversy turns upon the interpretation to be placed upon the concluding paragraph of the will, which reads as follows:

"It is my will and I further direct that in the event of one of my sons should survive the other, that the surviving son shall have and receive all the property belonging to them, jointly or otherwise, and in the event of the death of each of said children, Donald Johnson and Kenneth Johnson, that in such an event, the residue of my estate, whatever it may be I give and bequeath to my brother John Olson."

In Olson's behalf it is argued that the will created only a life estate in the children, with a remainder over to him. Such a construction involves great difficulties, one of them being the requirement that the phrase "in the event of" the death of the children shall be deemed the equivalent of "upon" their death. Although there is no direction that any of the property shall ever be turned over to the children, the provision for repla-

cing any trustee who may die before their majority points to an assumption that the trust would then cease, and may justify an inference that any surplus remaining was then to be paid to them. Had the testatrix intended the property to be held in trust for her children after they became of age, and for the entire period of their lives, it is reasonable to suppose that language would have been selected more clearly expressive of so singular a purpose.

On the other hand, the contention urged by Johnson and adopted by the trial court is that Olson was to take the property only in the case of both children dying before their mother, and that either child surviving her was to take an absolute title, capable of descending to his heirs upon his death. The argument in favor of this view is based chiefly upon the circumstance that the death of the children is spoken of as a mere contingency. Inasmuch as it cannot be supposed that any one regards death as otherwise than certain to occur at some time, it is the usual and just presumption that, whenever a testator refers to it as something that may or may not happen, he has in mind, not whether it will occur, but when it will occur—for instance, whether before or after some other event. And where a will directs something to be done if some person die, in the absence of anything to suggest a different theory, it is natural to assume that the testator means that it is to be done if such death take place before his own, because that explanation presents itself readily and naturally. Upon this reasoning it is said in 3 *Jarman on Wills* (Randolph & Talcott's Ed.) p. 606: "Hence it has become an established rule that where the bequest is simply to A., and in case of his death, or if he dies, to B., A., surviving the testator, takes absolutely." But it is further said in the same discussion (pages 611, 612): "But although, in the case of an immediate gift, it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and consequently, where there is another point of time to which such dying may be referred, as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession. \* \* \* On this principle, too, it should seem that in the case of a bequest to A. at the age of twenty-one years, and, in the event of his death, then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time."

And in *Arminstead's Ex'rs v. Hartt* (Va.) 33 S. E. 616: "The words 'in the event of' import a contingency, and must refer to death before some period or event contemplated by the testatrix, but not expressed, for otherwise they would be useless and meaningless, as there is no contingency about death, nothing being more certain to happen. There is no express designation in the will, nor is there anything in its language, to indicate the period or event to which these words refer; and, since they must be given some effect, they must be construed as having reference to that period or event which under the circumstances is the most natural." And in 1 *Underhill on Wills*, § 342: "Where the death of the legatee can, from the character of the disposition which is made in case of death, be referred to another period than the life of the testator, the court will not hesitate so to construe it. Accordingly, when the gift to the primary beneficiary is after a life estate in express terms, or where a legacy is to vest in legatees when they are twenty-one years of age, and apparently where payment only, and not vesting, is postponed, with a gift over in case of the death of a legatee, the term will be taken to mean death at any time either before or after the death of the testator."

It may be that the present problem could be properly solved in accordance with the last suggestion, by considering that the bequest to the children became absolute upon their reaching 21 years of age, and that the devise to Olson was intended in case they died before that time. But a more plausible solution presents itself. The important inquiry in an effort to reach the intention of the testatrix is, of what was she thinking? What had she in mind as likely to happen before the death of her children? The answer may be sought not merely in the language of the will, but in all the conditions existing when the will was drawn. In *Cowley v. Knapp*, 42 N. J. Law, 297, a disposition of property indicated in case of the death of the testatrix and her husband was held to have reference to their death while upon a journey they were about to undertake when the will was drawn. In the opinion it was said: "Her mind was upon the travels abroad, for which she and her husband were preparing, and her purpose was that if, in the course of those travels, death should overtake them, then this will should be operative. This was the contingency which led her to speak of their death as a thing which might or might not happen." In the present case it is to be noted that the only property available for the support of the children, apart from the insurance money and the household goods, was the Pueblo real estate. The value of this is not shown; the plaintiff placing it at \$2,000, and Johnson asserting that it was greater. Obviously Mrs. Johnson did not think it of a character to yield an income sufficient for the support of the children, or

she would not have ordered it sold. One of the children was a mere infant. It is clear that she realized that she was not leaving sufficient property for the care, maintenance, and support of her children until they were 21 years old. Her mind was upon the probability—the practical certainty—that long before that time her estate would be exhausted, and they thrown upon their own resources, or left to depend upon the charity of friends and relatives. And what she had in mind when she spoke of their death as a thing which might or might not happen was that it might or might not take place before that condition arose. If it should, there would remain a part of the property undisposed of, which in that event she wished Olson to have. If it should not, then no such bequest could be made, for there would be nothing to which it could apply. This seems a reasonable explanation, which does no violence to the language used, and adapts itself to the circumstances by which the testator was surrounded. It also accounts for the will omitting to provide for the money remaining in the hands of the trustees being paid to the children at their majority. No such provision was made, because it never occurred to the mother as possible that there could be any such surplus. She realized that the sum was inadequate to the purpose to which she devoted it, if the children lived to maturity, and made her arrangements accordingly.

Another consideration supporting the conclusion just stated is this: If both children had survived their mother, and then one of them had died, it could hardly have been contended that his share of the property would have passed to his father instead of to his brother. And yet such a contention could be supported by the same argument now made in behalf of Johnson's claim. The language of the will is, "in the event of one of my sons should survive the other, that the surviving son shall have and receive all the property belonging to them, jointly or otherwise." Now, it was just as certain that one of the sons should at some time survive the other, as that both should at some time die, unless both should expire at the same moment; and that contingency is, in the nature of things, so remote that it would be absurd to imagine the testatrix basing the disposition of her property upon it. It follows that the words quoted must be taken to mean either that one of the children should take all of the property in the event the other child died before his mother, or that one of them should take all the property in the event the other died before the property was exhausted. For all the reasons suggested by the preceding discussion, and for others which readily suggest themselves, we think the latter the correct interpretation. And if in the first half of the sentence the mother spoke of the death of one son as something

that might or might not happen, because she had reference to his death before the complete expenditure of her money, it is only reasonable to account in the same way for the fact that in the second part of the same sentence she spoke of the death of both of them as an uncertainty. This reading also accounts for the use of the word "residue" in the paragraph quoted. Ordinarily this word, when found in a will, is held to signify the property of the testator, the disposition of which has not otherwise been indicated—what remains after the payment of charges and specific legacies. It cannot well be thought to have been so used here. There was no portion of the estate remaining otherwise undisposed of by the will. All the property of the testator had been given to the trustees for the benefit of the children, excepting the household goods, which had been given to Mrs. Rhodes to be used for their comfort. There was no property to which the term could apply, other than that already set apart for the children. But it is clear that the word must have been used to signify what remained of something after taking away a part. Had it been the purpose to express the wish that, if the children died before the mother, her property should go to Olson, the language naturally selected to convey the idea would have been to the effect that all of her estate should go to him in that event. There would have been no occasion for the use of the word "residue," and nothing to suggest it. But plainly the testatrix assumed that, in whatever contingency she had in mind, only a part of the property would remain. What did she consider would have become of the rest of it? Obviously that it would have been used up in the only way authorized by the will—by being expended in the care, maintenance, and education of the children after her death.

We adopt the interpretation indicated, and it results that John Olson is entitled to so much of the estate of Jennie Johnson as remains unconsumed. Defendant in error William Johnson contends that at all events he is entitled to the unexpended portion of the proceeds of the life insurance policy referred to, on the ground that such proceeds were never a part of the estate of Mrs. Johnson; the policy before her death having been made payable to Donald Johnson. This contention seems well founded, although, owing to the condition of the record, we cannot be sure as to the fact. This consideration does not affect the conclusion announced. In the foregoing discussion the insurance money has been spoken of as a part of the assets of the estate, but only for the purpose of arriving at the intention of the testatrix, it being so treated in the will.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views here expressed. All the Justices concurring.

## STATE v. RAMBO.

(Supreme Court of Kansas. July 7, 1904.)

## CRIMINAL LAW—FAILURE OF DEFENDANT TO TESTIFY—CONSIDERATION BY JURY—EVIDENCE OF JUROR.

1. A defendant on trial for murder did not testify in his own behalf. After conviction, one of the jurors was sworn in support of a motion for a new trial. He stated that while deliberating on the verdict he mentioned in the hearing of the other jurors that defendant did not testify, and said, in the jury room: "If anybody put anything like that [meaning a charge of murder] over my shoulders, I would talk for myself," and explained that he meant, "If anybody blamed anything on me that I was not guilty of, I would think my own talk [meaning testimony] would do me more good than anybody else's." *Held*, that the statements of the juror show a consideration by him of the circumstance that the defendant did not testify prejudicial to the latter, which vitiates the verdict.

2. After confessing the misconduct shown in the above paragraph, the juror testified that the failure of defendant to take the witness stand in his own behalf was not considered by him in arriving at a verdict. *Held*, that such general denial did not overcome the obvious fact, apparent from the juror's testimony, that the refusal of the person on trial to testify was considered by him to the prejudice of the defendant.

3. Section 5657, Gen. St. 1901, being section 215 of the Code of Criminal Procedure, provides that the neglect or refusal of a person on trial to testify shall not raise a presumption of guilt, nor shall the same be considered by the court or jury. *Held*, that the testimony of a juror, on the hearing of a motion for a new trial, reciting comments made by him in the jury room on the failure of the person on trial to testify, is in effect the same as a narrative by him of extraneous facts not in evidence, and not proper to be considered, and is admissible to impeach the verdict. *Gottlieb Bros. v. Jasper & Co.*, 27 Kan. 770.

(Syllabus by the Court.)

Appeal from Court of Common Pleas Wyandotte County; Wm. G. Holt, Judge.

William Rambo was convicted of murder, and appeals. Reversed.

Angevine & Cubbison and I. F. Madlam, for appellant. C. C. Coleman, Atty. Gen., James S. Gibson, and B. S. Smith, for the State.

SMITH, J. Appellant, William Rambo, was found guilty of murder in the second degree. On the motion for a new trial, the affidavit of L. G. Eike, one of the jurors, was filed by defendant in support of his application. The material part reads: "When the jury retired to consult and deliberate upon their verdict, the fact that William Rambo, commonly known as 'Toots Rambo,' defendant, did not go upon the stand to testify in his own behalf, was freely commented upon and discussed in the jury room, and the jurors, while so deliberating, expressed their opinion that the fact that said Rambo did not testify in his own behalf was an indication and some proof that said Rambo was guilty. Several of us talked about this matter. I mentioned it first, and Mr. Hill mentioned [it], and so did Mr. Price. I think every juror

said something about it. The juror was also sworn, and testified orally in support of the motion as follows: "Q. Now, the fact that he did not go upon the stand and testify—that fact was mentioned, was it? A. Yes, sir. Q. How often do you think that fact mentioned—that he did not go upon the stand? A. I think that was only mentioned once. Q. Do you remember the words used at that time? A. No; I do not remember. Q. Do you remember who mentioned the fact that he did not go on the stand and testify? A. I think I did. Q. What did you say? A. I said if anybody put anything like that over my shoulders I would talk for myself. Q. You meant— What did you mean by that? A. I meant by that, if anybody blamed anything on me that I was not guilty of, I would think my own talk would do me more good than anybody else's. Q. You meant your testimony as a witness? A. Yes, sir. Q. Do you remember anything else that you said at that time? A. That is all I said. \* \* \* Q. When you went out Thursday night there were some members of the jury voted 'not guilty,' were there not? A. Yes, sir. Q. And there were members of the jury that voted 'not guilty' all day Friday? A. Yes, sir. Q. And there were members of the jury that voted 'not guilty' on Saturday morning? A. Yes, sir. \* \* \* Q. You were voting for conviction at the time you made that statement to the jury? A. Yes, sir. Q. And up to that time some had been voting for acquittal? A. Yes, sir." This juror and the 11 others who sat in the case testified that the defendant's failure to take the stand as a witness in his own behalf was not considered by them, and did not influence them in arriving at a verdict.

Section 5657, Gen. St. 1901, being section 215 of the Code of Criminal Procedure, provides: "No person shall be rendered incompetent to testify in criminal causes by reason of his being the person \* \* \* on trial or examination; \* \* \* provided, that the neglect or refusal of the person on trial to testify \* \* \* shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." This section of the statute is peremptory in its declaration that the refusal of a defendant on trial, charged with crime, to testify, shall not be considered by the jury. We may give credence to the statements of the jurors other than Eike who testified that they did not give consideration to the failure of Rambo to be a witness in his own behalf. The assertions of Eike, however, to that effect, must be taken in connection with his confessed misconduct in the jury room, and his words spoken there must serve as a true index to the operations of his mind. A stultifying denial that he did not consider the refusal of appellant to testify will not overcome the force of the application which he made of Rambo's failure to take the witness stand to

a supposed case of his own, when he said he meant, "If anybody blamed anything on me, that I was not guilty of, I would think my own talk [meaning testimony] would do me more good than anybody else's." This and the accompanying statements of the juror set out above must convince the meanest understanding that he did consider the refusal of defendant to testify as a circumstance weighing against him while the question of his guilt or innocence was under deliberation in the jury room. From the language employed by the juror, prejudice to the defendant is evident. Obvious language, expressive of an opinion, indicating thought on a matter respecting which the words are used, is the best evidence that the person speaking has, to a greater or less degree, considered the subject to which the language relates. "Out of the abundance of the heart the mouth speaketh." A mere incidental mention, however, of the fact by a juror that a person on trial did not testify in his own behalf—a remark noting the circumstance, unaccompanied by an opinion that an explanation would be of service to the accused—might fall short of showing a consideration of the matter by the speaker, and not violate the statutory injunction. *State v. Mosley*, 31 Kan. 355, 2 Pac. 782; *State v. Goff*, 62 Kan. 104, 61 Pac. 683.

The court instructed the jury that defendant's failure to testify was not to be construed by them as in any manner affecting his guilt or innocence. This admonition was not heeded. The juror himself not only considered the neglect of defendant to testify, but his opinion deduced from that fact was expressed in the hearing of others with an evident intent to have his fellow jurymen consider what he said.

In Texas a section of the statute reads: "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented upon by counsel in the cause." Code Crim. Proc. art. 770. In *Tate v. State*, 38 Tex. Cr. R. 201, 205, 42 S. W. 595, a conviction for murder was reversed on the strength of an affidavit made by one of the jurors that the failure of the accused to testify was considered in the jury room; that one of his fellow jurors asked why defendant was not put on the stand. He answered that if he had testified, when cross-examined by the district attorney, he would have been bound to convict himself by his own testimony. The court said: "As stated above, the statute is plain in its terms, and it does not stop to estimate the question of injury; it inhibits the failure of the defendant to testify from being used as a circumstance against him; and this court has often reversed cases where this matter was discussed by counsel for the state before the jury." To the same effect, see *Wilson*, alias *Garner*, v.

*State*, 39 Tex. Cr. R. 365, 46 S. W. 251; *Thorpe v. State*, 40 Tex. Cr. R. 346, 50 S. W. 383; *Buessing v. State*, 43 Tex. Cr. R. 85, 63 S. W. 318.

That part of section 5657, Gen. St. 1901, supra, which prohibits any attorney prosecuting in a criminal case for referring to the circumstance that the person on trial did not testify, has been considered and passed on several times by this court. *State v. Mosley*, supra; *State v. Tennison*, 42 Kan. 330, 22 Pac. 429. *State v. Balch*, 31 Kan. 465, 469, 2 Pac. 600, was a prosecution for criminal libel. The accused did not testify. The county attorney, in his opening argument to the jury, stated "that the defendant, Balch, had not offered any testimony denying that he signed and circulated the libel; that he had failed to go on the witness stand \* \* \* and deny that he had not signed or circulated that libel." The court, in reversing the judgment of conviction, said: "It must be remembered that this statement of the county attorney was not provoked or called forth by anything said by the defendant or his counsel, nor was it said incidentally in some argument addressed to the court; but it was said in an argument addressed to the jury, and in an argument upon the merits of the case, and for the purpose of influencing the jury and obtaining from them a verdict that the defendant was guilty of the offense charged. In all probability, this statement was made innocently and inadvertently by the county attorney, as he had been acting in that capacity only a very short time, and this was among the first cases prosecuted by him. But still the rights of the defendant cannot be ignored or overlooked for that reason, nor can the principle be tolerated that convictions for violated law may be procured or brought about by the inauguration and accomplishment of other violations of law. It is also true that in this case the court below instructed the jury that the statement made by the county attorney should not be allowed to work any prejudice to the rights or interests of the defendant. But, under the authorities, the evil done by such an infringement of the law—an infringement of law by the prosecuting officer of the state—cannot be remedied or cured by any mere instruction from the court. The only complete remedy, if the defendant is convicted, is to grant him a new trial on his motion." See, also, *State v. Baldoser*, 88 Iowa, 55, 55 N. W. 97.

The testimony of the juror Elke on the motion for a new trial was a narrative by him of extraneous facts not in evidence, and not proper to be considered. The court did not err in receiving it. *Gottlieb Bros. v. Jasper & Co.*, 27 Kan. 770; *A. T. & S. F. R. Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741; *State v. Burton*, 65 Kan. 704, 70 Pac. 640.

Other questions in the case are discussed by counsel, but the references in the briefs to the record do not correspond with the pages of the bill of exceptions before us, and for this reason we have not considered them.



The judgment of the court below will be reversed, and a new trial granted. All the Justices concurring.

### BLOOD v. SHEPARD.

(Supreme Court of Kansas. July 7, 1904.)

#### PLEDGES—MORTGAGES—FORECLOSURE.

1. The law of pledges is materially different from that of mortgages. The lien resulting from a pledge is subject to strict foreclosure. That resulting from a mortgage is not.

2. Where choses in action, the payment of which is secured by a real estate mortgage, are pledged as collateral security for the payment of a debt, and such real estate mortgage is foreclosed by the pledgee, and the title to the property taken by him under sheriff's deed, and he takes possession of the property thereunder, such title is vested in him, and is substituted for the pledged choses in action, and is governed by the law of pledges, and not of mortgages.

3. In such case the pledgor is not entitled to have the pledgee's claim foreclosed as though it were a mortgage, but the pledgee is entitled to have his legal title quieted in such land if the pledgor shall fail after a reasonable time to pay the amount found due the pledgee.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Patrick H. Shepard against Mrs. W. H. Blood. There was judgment for plaintiff, and defendant brings error. Affirmed.

Reed & Reed and A. I. Smith (T. E. Dewey, of counsel), for plaintiff in error. A. L. Berger and Nathan Cree, for defendant in error.

CUNNINGHAM, J. On December 3, 1895, Cassandra F. Clark borrowed of the defendant in error, Patrick H. Shepard, \$2,300, and gave her note therefor, due in two years after date, drawing interest at the rate of 10 per cent. per annum from date. To secure the payment of this note, certain bonds of the Rosemont Land Company, the payment of which was secured by mortgage upon real estate in Wyandotte county, Kan., were assigned and delivered to Mr. Shepard, and a written agreement relative thereto was made by the parties; the same being as follows:

"This agreement made and entered into the 3d day of December, 1895, by and between Cassandra F. Clark of Kansas City, Missouri, party of the first part, and Patrick H. Shepard of Kansas City, Missouri, party of the second part, witnesseth:

"The party of the first part has this day borrowed from the party of the second part the sum of Twenty-three Hundred (\$2,300) Dollars for which she has given to the party of the second part her promissory note of even date herewith, payable two (2) years from its date at the Interstate National Bank of Kansas City, Kansas, with interest at ten per cent. per annum from date, payable annually. And for the purpose of securing

the payment of her note, the party of the first part hereby assigns and transfers, or causes to be assigned or transferred, to the party of the second part thirty-eight (38) bonds of the Rosemont Land Company, issued by said company on the 4th day of May, 1891; twenty of same being of the denomination of one hundred (\$100) dollars each, and eighteen (18) of the same being of the denomination of five hundred (\$500) dollars each; the payment of which said bonds is secured by trust deed or mortgage given by the Rosemont Land Company, the maker of said bonds, upon a tract of thirty-two (32) acres of land situated in section eight (8), township eleven (11), range twenty-five (25), Wyandotte County, Kansas, all of which said bonds were issued by said Rosemont Land Company, to the Commonwealth Loan & Trust Company; and which said bonds have been endorsed and assigned by said Commonwealth Loan & Trust Co. and now belong to the assignee of the People's Guaranty Savings Bank of Kansas City, Missouri, which said bonds are to be held by the party of the second part for two years or until party of first part fails to comply with this contract as collateral security for the payment of the note given by the party of the first part to the party of the second part.

"It is further agreed between the parties hereto that the party of the first part shall within twenty (20) days after the date of this contract, cause to be instituted in the proper court in Wyandotte County, Kansas, a suit to foreclose the trust deed or mortgage above referred to securing the payment of said bonds; that said foreclosure proceedings shall be begun and maintained in the name of the party of the second part, or his assigns; but the party of the first part, or her assigns, shall employ and pay the attorneys therein, and shall pay all costs of said proceedings; that on the termination of said foreclosure proceedings, the party of the second part, or his assigns or representatives, should he or they become the purchasers of said land under said foreclosure proceedings, shall convey to said party of the first part, her heirs or assigns, the land so purchased at said foreclosure sale, upon the payment by the party of the first part, her heirs or assigns, to the party of the second part, his heirs or assigns, the amount of the principal and interest then due on the note given by the party of the first part to the party of the second part, and when all of the other terms and conditions of this contract have been complied with by the party of the first part, her heirs or assigns.

"It is further agreed that should the party of the first part fail, neglect or refuse to pay the interest upon her said note given to the party of the second part, or fail to comply with all the terms and conditions of this contract, the party of the second part may sell, or cause to be sold, in any manner he may see fit and with or without notice, the

bonds above referred to and which he holds as collateral security for the payment of the note given by the party of the first part to the party of the second part.

"In witness whereof, the parties hereto have set their hands and seals to duplicate hereof at Kansas City, Kansas, this 3rd day of December, 1895.

"[Signed] Patrick H. Shepard. [Seal.]

"[Signed] Cassandra F. Clark. [Seal.]"

Shortly after the execution of this contract, Mrs. Clark, in accordance therewith, caused an action to be brought in the proper court in the name of Mr. Shepard for the foreclosure of the mortgage against the Rosemont Land Company, and deposited \$15 as security for costs of the action. This is all she did under the terms of the contract, or in payment of her note, or interest thereon, unless she paid two years' interest, which is disputed. The foreclosure action proceeded to judgment, and at the sheriff's sale Shepard became the purchaser of the land, and received a sheriff's deed therefor, which was dated September 19, 1899. He went into possession, and paid the delinquent and current taxes and the costs of the foreclosure suit, including attorney's fees. From the date of the sheriff's deed up to the commencement of this action, February 28, 1902, Shepard was in undisputed possession of the land in question, renting, using, managing, and in all respects treating it as his own. At no time has Mrs. Clark or the plaintiffs in error, who are her heirs at law—she having deceased—ever offered to pay Shepard the amount due him upon his note or his expenditures.

The foregoing quoted contract was placed upon record; constituting, as Shepard thought, a cloud upon the title of the land in him. For the purpose of having this removed, and having the respective rights of all parties determined, he brought this action, wherein, after setting out the facts substantially as above, he prayed: "That the court order and decree that unless said amount as claimed by the plaintiff herein be paid within a reasonable time from the rendition of the decree herein, that said contract be canceled, and for a further order declaring said contract to be null and void and of no force, and that the right, title, and interest, if any the defendants might have, be forever barred."

The defendants' answer admitted the giving of the note by Mrs. Clark, the assignment of the collaterals, the execution of the agreement, the foreclosure of the Rosemont Land Company mortgage, and the purchase by the plaintiff at the sheriff's sale of the land in question, but averred that the legal effect of all this was that of a mortgage to him upon the land, that defendants were the owners and holders of the title to the real estate, that whatever was due to Shepard upon the note and for expenditures was a lien upon the real estate, and prayed that

an accounting might be had, and the amount, if any, due determined; the same to be declared to be but a mortgage lien upon the land, and, upon its payment, Shepard be directed to convey the title to the defendants.

Upon these issues the court, upon evidence, found the amount due, and directed that, if this amount was paid to the plaintiff within 10 days from the date of the judgment, he should convey the premises by a quitclaim deed to the defendants, but, in case of failure to make such payment within that time, that they and all persons claiming under them should be forever barred and foreclosed of any right to redeem, or right, title, or interest in the land. To reverse this order, the defendants below bring this proceeding in error.

The only claim of error of serious moment made is that the court took a wrong view of the character of this transaction; that it should have held that the title which Shepard was holding, acquired as it was, constituted as between the parties a mortgage to secure to him the amount of money due him, and that, being a mortgage, the court could not decree, as it did, a strict foreclosure, but should have, after ascertaining the amount due, decreed that amount a lien upon the land, and directed the sale of the land as upon foreclosure of a mortgage. This presents the inquiry as to the character of the transaction between Shepard and Mrs. Clark. Was it such as to create but a mortgage upon the land in favor of Shepard, and did the subsequent purchase of the lands by Shepard under the foreclosure proceedings instituted by Mrs. Clark simply place in him a defeasible title, amounting only to a mortgage, which would have to be regularly foreclosed? It must be borne in mind that it was the bonds of the Rosemont Land Company which Mrs. Clark assigned, transferred, and delivered to Shepard for the purpose of securing her note. This was a pledge of these bonds, and not a mortgage upon the land. This created the relation of pledgor and pledgee, not of mortgagor and mortgagee. The relations that exist between pledgor and pledgee and mortgagor and mortgagee are entirely different under the law. A pledgee must take possession of his pledge. A mortgagee may not, in the absence of stipulations to that effect. A pledgee may retain possession of his pledge until his debt is satisfied, and is not bound to dispose of the pledge by formal sale, even upon the maturity of his debt, but may, if he choose, have strict foreclosure of his lien by summary sale upon advertisement. A mortgagee, under our statute, is never entitled to strict foreclosure, but must proceed by proper action, and await the period of redemption. Were the transaction one involving simply the choses in action, there being no real estate mortgage securing them, there would probably be no contention as to the character of the holding or the right of

the pledgee, but these bonds of the Rosemont Land Company were secured by mortgage. This, however, was but an incident to them; and the law is that when a mortgage which secures choses thus held is foreclosed, and the land bid in by the pledgee, the land becomes, by substitution, the collateral security, instead of the choses which the mortgage had before that secured, and, as such, is governed by the law of pledges, and not mortgages. *Ross v. Barker*, 58 Neb. 402, 78 N. W. 730; *Dalton v. Smith*, 86 N. Y. 176; *Brown v. Tyler*, 8 Gray, 135, 69 Am. Dec. 239; *Colebrook on Collateral Securities* (2d Ed.) § 183; *Jones, Pledges & Collateral Securities* (2d Ed.) § 660. Therefore the land in Shepard's hands occupied the same position as did the bonds prior to the foreclosure. The relation of mortgagor and mortgagee never existed between Mrs. Clark and Shepard. A mortgage is a grant, and, like all other grants, there must be a grantor, grantee, and an estate to be granted. Mrs. Clark never had any estate in this land. She could therefore convey none by mortgage or otherwise. But beyond the questions which would arise under the law of pledges, had there been no agreement between these parties, there is the question of the relationship created by the quoted agreement. It provides that Mrs. Clark shall institute and prosecute to fruition a foreclosure action, and pay all of the expenses of such action. This certainly implies her assent to such proceeding. It further provides that, should Shepard become the purchaser of the land under such foreclosure proceedings, he should convey it upon the payment to him of the amount due. This implies Mrs. Clark's consent to his purchase of the land, and agreement that it thereby should become his, to be held by him unless she should pay the amount found due to him within a reasonable time. Clearly this agreement does not constitute a mortgage. The most that could be claimed in this would be the right of Mrs. Clark or her heirs to redeem upon the payment of the amount due, and to receive back from Shepard the full title which he had legally acquired.

Shepard's action was one to determine the amount due to him, and afford the representatives of Mrs. Clark an opportunity by its payment to obtain a conveyance of the land to them, or, in default of such payment, that any claim they might make, or color of claim that might arise by reason of the record of the agreement, should be extinguished. This was clearly the extent of their right under the law, and especially so under the agreement.

It is suggested that the limit of 10 days which the defendants were given within which to redeem was unreasonably short. The length of this time was a matter resting within the sound discretion of the court. We cannot say that this discretion was

abused. The answer itself set up that the defendants were ready and able to discharge the amount found due. No great fault should be found with the court for having taken them at their word. Neither was there specific objection made on account of the shortness of time.

Complaint is made that the amount found by the court to be due Shepard was excessive, at least by two years' interest upon Mrs. Clark's note. Shepard's petition alleged that there was due to him the face of the note, with interest from December 3, 1897—an implication that the interest upon the note from its date to the time it fell due had been paid. However, had the allegation been specific, we do not think that Shepard would have been irrevocably bound thereby. His object was not to recover on the note, but to give opportunity for redemption of the land if defendants desired it. His prayer was that the amount due to him should be ascertained. The defendants joined in this prayer. The court was endeavoring to ascertain the amount due. There is sufficient evidence in the record to justify the finding made by the court in this respect.

We find no error in the record, and hence affirm the judgment. All the Justices concurring.

#### In re JEWETT.

(Supreme Court of Kansas. July 7, 1904.)

#### HABEAS CORPUS—CONTEMPT—JURISDICTION.

1. The third clause of section 671 of the Code of Civil Procedure, which relates to procedure in habeas corpus, and which forbids the discharge upon such proceedings of one held for contempt, does not apply to a case of one so held where the order under which such person is being held was made without jurisdiction. In such a case the jurisdiction of the court to make such order may be inquired into.

2. One held, under an order made without jurisdiction, as for contempt, need not first raise the question of the jurisdiction of the court or judge making the order before such court or judge, but may raise that question in an independent proceeding in habeas corpus.

3. The jurisdiction of the several courts of this state, and of the judges thereof, is regulated by the Constitution and laws of the state.

4. The jurisdiction of the several district courts of this state, and of the judges thereof, in civil matters, is confined to their respective districts.

5. The remedy sought in a habeas corpus proceeding is a civil one, and hence judges of district courts have no jurisdiction to direct the issuance of the writ to persons outside of their districts to bring into their districts the body of one detained outside the district.

(Syllabus by the Court.)

Application by E. B. Jewett for writ of habeas corpus. Petitioner discharged.

By this original proceeding in habeas corpus, the petitioner, E. B. Jewett, seeks to obtain his discharge from an alleged illegal

¶ 1. See *Habeas Corpus*, vol. 25, Cent. Dig. §§ 20, 96.

detention. The facts out of which this detention arose are as follows: William Howard was convicted of a felony in the district court of Johnson county—it being one of the counties of the Tenth Judicial District—and sentenced to confinement in the State Penitentiary at Lansing, in Leavenworth county, which is not in the Tenth Judicial District. Conceiving that his detention was illegal, Howard brought his proceeding in habeas corpus in the district court of Johnson county, Kan., against Jewett, the petitioner here, who is warden of the State Penitentiary, and as such was holding Howard under the judgment resulting from the conviction already spoken of. Upon his petition, which showed the above facts, the writ was issued by Hon. W. H. Sheldon, the judge of the district court of Johnson county, sitting at chambers, to said Jewett, as warden, directing him to bring Howard before the said judge, at Olathe, the county seat of Johnson county. This writ was served upon Jewett by the sheriff of Johnson county at the penitentiary in Leavenworth county. On the return day the county attorney made special appearance on behalf of Jewett, and moved to quash the writ on jurisdictional grounds, which motion was overruled. Jewett, failing to produce Howard in pursuance of the command of the writ, or to make further return, was, after proper citation, arrested in Shawnee county, which county is not in the Tenth Judicial District, for contempt of the court's order in the habeas corpus proceeding. This is the detention which is here complained of as being illegal. As the petition in Howard's habeas corpus proceeding showed the place of, and the reason for, his detention, it therefore showed that the writ was issuing to one outside of the judicial district of the judge issuing it. The claim of the petitioner here is that habeas corpus proceedings are civil in their nature, and not criminal; that the jurisdiction of a judge of the district court in civil matters does not extend beyond the limits of his district; that this writ, going, as it did, beyond these limits, was not within the jurisdiction of the judge to order, and imposed no obligation upon Jewett to respond to; and hence that he was not in contempt for not obeying. The claim is further made that, even though the judge had jurisdiction to issue the writ, its service outside of the district conferred no jurisdiction of the person of the petitioner, and, further, that in any event no jurisdiction was conferred, because the service was made by the sheriff of Johnson county outside of his county.

C. C. Coleman, Atty. Gen., and Jay F. Close, Asst. Atty. Gen., for petitioner. C. B. Little and C. L. Randall, for respondent.

CUNNINGHAM, J. (after stating the facts). At the outset of the discussion we are met by respondent's contention that we cannot inquire into the merits of the peti-

tioner's case, and this for two reasons. Under the article of our Code relating to habeas corpus (section 671) is found this language: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: \* \* \* third, for any contempt of any court, officer or body having authority to commit; \* \* \* fourth, upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." The claim being that, inasmuch as the petitioner is in custody under order of Judge Sheldon for his contempt in refusing to obey the direction to produce the body of the petitioner, Howard, an inquiry into the legality of such detention is forbidden by the third subdivision above quoted.

In order that any court or other tribunal may make an order of commitment—that is, a valid order of commitment—there must be jurisdiction so to do in the court, officer, or body making such order. Jurisdiction generally to make such orders must not only rest in such court, officer, or body, but jurisdiction over the person and in the matter to which the order of commitment is sought to apply. It would hardly be contended that even though a district judge has general authority, on proper occasion, to commit for contempt, such an order made by such judge while he is out of his district would be of binding force, and, were it sought to enforce such order, that any competent court might not intervene to protect therefrom. So that at the bottom of this question, as well as fundamentally in the others presently to be discussed, is the inquiry as to Judge Sheldon's jurisdiction in the entire premises, and if, from that discussion, we shall conclude he had no jurisdiction in the matter of the issuance of the writ of habeas corpus on the petition of Howard, then its disobedience was not contemptuous, and would form no proper foundation for the commitment of this petitioner because of its disobedience.

The second objection to our inquiry into merits has for its reasons the matter found in the fourth subdivision above quoted, and for its support the argument that the petitioner should yield himself to the adjudication of Judge Sheldon, and that upon such consideration it being presumed that, if there was no jurisdiction to arrest for contempt, Judge Sheldon would so decide and discharge the petitioner, and, if he did not do so, it would then be time enough to invoke the interference of another court. In other words, that it was the duty of the petitioner to present his cause in the court from which the order for his arrest issued. In support of this contention the case of *In re Gray*, 64 Kan. 850, 68 Pac. 658, is cited. That was a case where the petitioner, being in legal custody, sought to raise the question of the consti-

tutionality of a law, the violation of which was charged, by a proceeding in habeas corpus. This court there held that he might not do this; that he must present his entire case to the court which had jurisdiction of his person, and of the matter which he sought here to present. Clearly a very different question would be presented in the case where the petitioner was restrained by an order made entirely without jurisdiction. In such a case it would be little short of a farce to require a petitioner to yield himself to a court having no jurisdiction of his person, in order that that court might determine whether it had jurisdiction. In speaking upon this identical question, this court, in *Re Dill*, 32 Kan. 688, 5 Pac. 47, 49 Am. Rep. 505, after an exhaustive review of authorities, used the following language: "Under the authorities before cited, and on principle, we think that section 671 of the statute does not prohibit one court, by and under proceedings in habeas corpus, from examining the judgment or commitment for contempt of another court under which a person is restrained of his liberty; and if, on such examination, it appears, and the record shows, that the court rendering the judgment was without jurisdiction to render it under some circumstances, or if the charge on which the petitioner is convicted and imprisoned does not constitute an offense for which punishment can be inflicted, or that the court has rendered a judgment which it had no authority to render, or has exceeded its authority, from discharging the petitioner from imprisonment." The same view was taken in the case of *In re Smith*, 52 Kan. 13, 33 Pac. 957, where the court in the syllabus of the case, said: "The Supreme Court may, upon proceedings of habeas corpus, examine the judgment or order of a district court committing a party for contempt; and if, upon such examination, it appears that the district court was without authority to commit, under the particular circumstances of the case, the petitioner may be discharged." So that this objection, as well as the first, must find its solvent in the determination of whether the judge had authority to direct the issuance of the writ on Howard's petition.

We are therefore come to the discussion of the fundamental question, did Judge Sheldon have jurisdiction to make the original order in Howard's habeas corpus case, for, if this order was without jurisdiction and void, then its disobedience by Jewett was no contempt, as he would not be bound to obey an order which the judge had no authority to make. Upon this proposition it is said in *Am. & Eng. Enc. of Law*, vol. 15, p. 178: "But if the court did not have jurisdiction of either the party or the subject-matter, or if, having jurisdiction in both respects, it exceeded its powers in making any order or determination, the disobedience of which was the contempt charged, or in making a commitment, habeas corpus is the proper mode

of obtaining relief, as in case of other void judgments." Very many other authorities could be cited in support of this. We content ourselves with the following: *Church on Habeas Corpus*, p. 154; *Ex parte Arnold*, 128 Mo. 256, 30 S. W. 768, 1030, 33 L. R. A. 386, 49 Am. St. Rep. 557; *Ex parte Clark*, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; *State v. Dist. Court*, 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645; 9 Cyc. p. 9, where a large number of authorities are cited. It must be borne in mind that Howard's petition showed upon its face the nature and place of confinement; that he was being detained by Jewett, as warden of the State Penitentiary, at the Penitentiary in Leavenworth county, which was outside of the territorial limits of the Tenth Judicial District. If, under these facts, Judge Sheldon had no authority to require the production of Howard's body within his district, then the order made upon Jewett to do so was void. What, then, is the jurisdiction, under our Constitution and statutes, bestowed upon judges of the district courts? Article 3, § 6, of the Constitution, provides: "The district courts shall have such jurisdiction in their respective districts as may be provided by law." Section 16 of the same article: "The several judges and justices of the courts of record in this state shall have such jurisdiction at chambers as may be provided by law." Section 1924, Gen. St. 1901, gives certain civil jurisdiction to judges of the district court, and provides that the same shall be exercised "within their respective districts." By the Code of Criminal Procedure, warrants for the arrest of offenders and processes for the procurement of the attendance of witnesses may issue to any county within the state, and by section 270 of that Code provision is made for the issuance of writs of habeas corpus to inquire into the detention of persons held under sentence of punishment of death. Speaking generally, then, we may say that as to civil matters the jurisdiction of the district court, or the judge thereof at chambers, is confined to the limits of his district, while, as to criminal matters, such as is pointed out in the statute, process may go to any portion of the state. This brings us to the inquiry as to whether a proceeding in habeas corpus is in its nature civil or criminal. If the former, then Judge Sheldon's order upon Jewett to produce the body of Howard before him, both being outside of the Tenth Judicial District, was without jurisdiction and void. Under the provisions of article 1 of the Code of Civil Procedure, the remedies to be had in a court of justice are divided into, first, actions; second, civil proceedings. An "action" is defined as "an original proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Article 1, § 4.

As to their kind, actions are classified into civil and criminal: "A criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof." Article 1, § 7. It would seem that by no possible construction, under these definitions, could it be held that a habeas corpus proceeding was criminal in its character. The state is not a party thereto; the person against whom it is directed is not charged with a public offense, except it might be in some cases as an incident; and in no case is it the object of the proceedings to punish for any offense. On the other hand, the object of the writ of habeas corpus, as defined in section 660 of the Code, "is to inquire into the cause of the restraint upon the petition of one who claims to be restrained of his liberty, and to deliver therefrom if found illegal." In other words, it is to procure for one deprived thereof the civil right which all naturally have to their liberty, and to award to them the necessary orders, upon the one depriving them of it, for the enforcement of that civil right. In *Ex parte Tom Tong*, 108 U. S. 559, 2 Sup. Ct. 872, 27 L. Ed. 826, Chief Justice Waite, in speaking to this proposition, says: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In the recent case of *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, it is said: "Regardless of what a habeas corpus proceeding should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is, to all intents and purposes, a civil suit—a proceeding in the nature of a special action—in which the party seeking to establish his right to personal liberty is plaintiff, and the person charged with the wrong is an adverse party, to all intents and purposes a defendant, regardless of the name by which such a person is commonly known in such a proceeding." The question under consideration at bar is discussed at length in this case, many cases being there cited. See, also, *Church on Habeas Corpus*, §§ 70, 174; *Hurd on Habeas Corpus*, p. 129. Indeed, this court, in *Gleason v. Com'rs*, 30 Kan. 54, 492, 1 Pac. 384,

2 Pac. 644, in explicit language, though perhaps but incidental to the case, held "that habeas corpus is not a criminal action, within the definition given in the Code." By the provisions of section 672 of the Code of Civil Procedure, the civil remedy by habeas corpus is made to perform the function of an appeal from an order of a committing magistrate in cases when bail has been denied upon a preliminary hearing, for the purpose of having the questions therein involved reconsidered. To this extent its use may fairly be considered criminal in its nature (In re Snyder, 17 Kan. 552; *Gleason v. Com'rs*, 30 Kan. 54, 492, 1 Pac. 384, 2 Pac. 644); this character being imparted to it by reason of the statute, rather than by its inherent quality.

It is urged that the habeas corpus proceedings by which Howard sought relief were but a prolongation and part of the original prosecution under which he was sent to the penitentiary, and that inasmuch as Judge Sheldon might, if he had committed error in the imposition of the sentence, cause Howard to be again brought before him for sentence, he could compel this to be done by a proceeding in habeas corpus. We do not agree with this contention. Howard's proceeding was an entirely independent one. It was one in which he was asking relief from the false imprisonment which he alleged he was suffering at the warden's hands. He was contending that his rights were being violated. It was for the purpose of having this question settled that his action or proceeding was instituted. Of this subject-matter Judge Sheldon had jurisdiction, but he acquired no jurisdiction of this petitioner by the writ outside his district. As well might he claim jurisdiction of a nonresident defendant upon whom a summons had been served outside the state. It is suggested that this view will result in hardship: that, if there had been error in the imposition of the sentence, the judge imposing the sentence would be deprived of the obvious right and duty of correcting such error, inasmuch as he would have no means of compelling the production of the criminal before him for sentence. This does not necessarily follow, for, were it ascertained in a proper manner, and in the proper forum, that error in this respect had been committed, the petitioner would, of course, be remanded to the court where sentenced for a proper sentence. Certainly no hardship could be imagined, equaling the one that would result from a holding such as the respondent would have us make, for under such holding the probate judge of the remotest county in the state might require the production before him of every one confined, not only in the State Penitentiary, but in all of the county jails and various houses of detention within the state—a result which would serve much to deter us from reaching such a conclusion, if deterrent were necessary.

We feel satisfied that Judge Sheldon had no jurisdiction to direct the issuance of the writ to run outside his district, and that its service upon the petitioner outside such district gave the judge no jurisdiction of the petitioner, and hence that petitioner's arrest for contempt because of disregard of the void writ was without authority and void. The petitioner will be discharged from custody. All the Justices concurring.

### SIMON v. SIMON.

(Supreme Court of Kansas. July 7, 1904.)

APPEAL—REFEREE'S REPORT—APPROVAL—EVIDENCE—CONSIDERATION—PRESUMPTION—FINDINGS—SUFFICIENCY—FAILURE TO EXCEPT.

1. Where the district court entered judgment upon the report of a referee, and subsequently, upon motion asserting that the judgment was not supported by sufficient evidence, the judgment was set aside and a new trial granted, and the record filed in the Supreme Court contained the report of the referee, but did not contain the evidence taken before the referee, and contained no special recital that this evidence was not before the court when passing upon the motion for a new trial, *held*, it will be presumed the evidence taken before the referee was before and considered by the trial court in passing upon the motion for a new trial.

2. Where the trial court failed to make specific findings upon certain items of an accounting in controversy, but found in the aggregate instead, *held*, the failure of the trial court to make the specific findings requested will not be reviewed by the Supreme Court, where it is not shown the attention of the trial court was directed to its failure to comply with such request.

(Syllabus by the Court.)

Error from District Court, Nemaha County; Wm. I. Stuart, Judge.

Action by Clara L. Simon against Adam Simon. There was judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Stillwell and Wells & Wells, for plaintiff in error. Emery & Geary and P. L. Burlingame, for defendant in error.

ATKINSON, J. Clara L. Simon commenced this action in the district court of Nemaha county to recover from Adam Simon on an accounting. She recovered a judgment for \$785.20. Defendant was the father-in-law of plaintiff. George O. Simon, the son of defendant and the husband of plaintiff, died in Colorado, leaving a large amount of personal property, mostly cattle and horses, which he bequeathed to his wife. Defendant undertook to care for and dispose of this personal property for plaintiff, and account to her for the proceeds. It was claimed by plaintiff that defendant failed to account to her for a portion of the proceeds of the sale of this property, and it was to compel an accounting, and to recover a judgment for the balance found due, that she

commenced this action against defendant. The case was first referred to a referee to make findings of fact and conclusions of law, and report the same to the court. The referee found and reported defendant indebted to plaintiff, as a balance on account of the moneys received by him in the conduct of her business, the sum of \$518.15, but found the obligation barred by the statute of limitations, and denied plaintiff a recovery. Thereupon the court rendered judgment against plaintiff for costs. Subsequently plaintiff filed a motion for a new trial upon the ground of error of law occurring at the trial and excepted to by plaintiff, and also upon the further ground that the judgment and decision were not sustained by sufficient evidence and were contrary to law. The court, upon the hearing of this motion, granted plaintiff a new trial. Of this ruling of the court in granting plaintiff a new trial, error is assigned. It is contended on the part of defendant that the report of the referee attached to and forming a part of the record discloses no error of law occurring at the trial and excepted to by the plaintiff. In this contention, defendant is correct.

It is claimed this was the only ground upon which the court could have made its order granting a new trial. It is urged the record discloses the court had before it on the consideration of the motion for a new trial none of the evidence upon which the referee made his findings of fact and conclusions of law, and for that reason could not have reviewed the report of the referee upon the question of the sufficiency of the evidence. The record before us will not bear out this construction. It does disclose that no evidence was offered by either party upon the hearing of the motion for a new trial, but does not disclose that the evidence taken before the referee was not before the court for consideration in passing upon the motion for a new trial. While this evidence is not found in the record, we must presume it was before the trial court. The record fully bears out this presumption. We are not at liberty to presume the trial court committed error in granting a new trial. The trial court may rightfully exercise a large discretion in the matter of granting or refusing a new trial, and this court will not review its action thereon unless satisfied that such action of the trial court was wholly unwarranted and an abuse of its discretion. *Investment Co. v. Hillyer*, 50 Kan. 446, 31 Pac. 1064; *Ireton v. Ireton*, 62 Kan. 358, 63 Pac. 429. This is more particularly the case where it is claimed the court has committed error in granting a new trial.

The principal controversy on the trial of the case before the district court was whether or not the claim of plaintiff was barred by the statute of limitations. The trial was before the court without a jury. The court made special findings of fact. Whether or not plaintiff was barred of a recovery de-

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 1322.

pended upon facts, the testimony to establish which was conflicting. It was left to the trial court to weigh the conflicting evidence and determine these facts, and also to determine, upon conflicting evidence, the amount of plaintiff's recovery, many items of which were in dispute. There is in the record some competent evidence to support every material finding of the court. The facts found by the court are sufficient upon which to predicate its judgment.

Complaint is made that the court failed to make specific findings upon certain items in controversy, but found in the aggregate instead. The trial court is not required to make findings upon immaterial facts, nor to make findings on material facts in greater detail than is necessary to enable a reviewing court to review and correctly decide the questions of law involved in the case. In this case, however, it does not appear the attention of the trial court was subsequently directed to its failure to have made the specific findings complained of. Defendant should have called the attention of the court to its failure to make these specific findings requested. *Briggs v. Eggan*, 17 Kan. 590. Not having done this, the failure of the court to comply with the request will not be reviewed by this court.

Other errors assigned have been examined, and not found material or prejudicial. The judgment of the trial court is affirmed. All the Justices concurring.

### UHLS v. ALLARD, City Clerk.

(Supreme Court of Kansas. July 7, 1904.)

#### ELECTORS—RESIDENCE—STATE AND MUNICIPAL EMPLOYÉS.

1. Chapter 232, p. 404, Laws 1903, provides "that for the purpose of voting, no person who is in the employment of this state or any municipal subdivision thereof in any civil capacity shall be deemed to have gained or lost a residence by reason of such employment, but all such officers or employes shall be considered as residents of the place from whence they were elected or appointed." *Held*, that the mere fact that a person is an officer or employé of the state or any municipal subdivision thereof does not affect his right to become a qualified elector at a place other than that where he resided when elected or appointed, if it is his intention to abandon his former place of residence.

2. State officers or employes retain their residence, and have the right to vote at the places they lived when elected or appointed, if that is their intention, although, for the better discharge of their official duties, they may have removed therefrom with the intention of remaining away during their terms of office or periods of employment.

(Syllabus by the Court.)

Application by L. L. Uhls for writ of mandamus to J. W. Allard, city clerk. Awarded.

This is an original proceeding in mandamus to compel the clerk of Osawatimie, a city of the second class, to register the name of

plaintiff on the pollbooks as a voter in said city. The agreed facts are as follows:

"(1) That the plaintiff, L. L. Uhls, is a natural born citizen of the United States, of the age of forty-seven years.

"(2) That in the year 1899, and prior to that time, he was an actual resident and citizen of the city of Paola, Kansas, and that in July of that year, while so residing in said city of Paola, he was appointed superintendent of the State Hospital at Osawatimie.

"(3) That subsequent to such appointment, and in July, 1899, the plaintiff moved himself, his family, and his household goods from Paola, Kansas, to the State Hospital, which is situated in the First Ward of said city of Osawatimie, and changed his church and lodge membership from Paola to Osawatimie, and has annually been assessed for personal property taxes since that time in said city of Osawatimie and has paid his poll tax in said city, and has registered and voted in the First Ward of said city in the years 1899, 1900, 1901, and 1902, and registered as a voter and offered to vote in the First Ward of said city in the year 1903, but was denied that privilege by the judges of election, and at all times mentioned in this paragraph plaintiff has claimed and still claims to be a resident of the First Ward of the city of Osawatimie, Kansas.

"(4) That, to fulfill the duties of his employment and official position, it was necessary that plaintiff be continually present at and in said Osawatimie State Hospital, and, in order that he might so fulfill such employment and official position, he moved from Paola to Osawatimie, and took up his abode in said State Hospital, as has been hereinbefore stated.

"(5) That at all times since said date the plaintiff, with his family, has dwelt in said State Hospital, as superintendent thereof, and has at all times occupied said official position of superintendent, and still dwells there and occupies such position.

"(6) That the plaintiff retained no home at Paola, and has had no intention of returning to Paola, and has not had and has not now any present intention of removing from his place of abode, at the State Hospital, in the First Ward of the City of Osawatimie, Kansas.

"(7) That the said city of Osawatimie is, and was at all times herein mentioned, a city of the second class, duly organized as such under the laws of the state of Kansas, and that the defendant, J. W. Allard, is the duly appointed, qualified and acting city clerk of said city of Osawatimie, and has been such at all times during this year 1904.

"(8) That in the month of May, 1904, the plaintiff appeared in person before the defendant at the city clerk's office in the said city of Osawatimie during the usual office hours, and applied to the defendant to be registered as a voter in said city, and that the plaintiff offered to give to the defendant

¶ 1. See Elections, vol. 18, Cent. Dig. § 71.



his name, age, and occupation, and particular place of residence, and to furnish all necessary proofs as to the facts affecting his qualifications as a voter.

"(9) That the defendant, notwithstanding, refused and refuses to register the plaintiff's name as a voter in said First Ward of said city of Osawatimie, upon the ground that, having moved to said State Hospital at Osawatimie upon his appointment as superintendent of the State Hospital, and residing there and in the hospital as such superintendent in the employment of the state, he was not entitled to be regarded as a resident of said First Ward of the city of Osawatimie for the purpose of voting."

W. S. Jenks, for plaintiff. Harvey & Osborn, for defendant.

SMITH, J. (after stating the facts). Article 5, § 1, of the Constitution, reads: "Every male person of twenty-one years and upwards belonging to either of the following classes—who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote, at least thirty days next preceding such election—shall be deemed a qualified elector: (1) Citizens of the United States. (2) Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization." It is plain from the facts that plaintiff was an elector of the city of Osawatimie after residing there 30 days. He left Paola in July, 1899, and has claimed a residence in Osawatimie ever since. The controversy turns on the application of chapter 232, p. 404, Laws 1903, entitled "An act prescribing a rule for the determination of the residence of voters who are officers or employees of this state or any municipal subdivision thereof." Section 1 reads: "That for the purpose of voting, no person who is in the employment of this state or any municipal subdivision thereof in any civil capacity shall be deemed to have gained or lost a residence by reason of such employment, but all such officers or employees shall be considered as residents of the place from whence they were elected or appointed." The right of plaintiff to registration as a voter in Osawatimie would be certain, but for the last clause of section 1 of chapter 232, p. 404, Laws 1903, copied above, which provides, "but all such officers or employees shall be considered as residents of the place from whence they were elected or appointed." *Cory v. Spencer*, 67 Kan. 648, 73 Pac. 920. After plaintiff had established a legal residence in Osawatimie in 1899, and voted there in that year and in 1900, 1901, and 1902, we are clear that such resident and legally qualified voter cannot by legislative fiat be constructively deported to Paola, and made an elector of the latter city against his will. *Wade on Retroactive Laws*, § 175. Section

2572, Gen. St. 1901, provides: "First, that place shall be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." The law of 1903 can mean nothing more than that state officers or employees in the service of the state when they move to the capital or place where their official duties are performed become residents and electors of the latter places if they so intend. Mere employment by the state does not affect the question of residence one way or the other. Taken literally, the words "all such officers or employees shall be considered as residents of the place from whence they were elected or appointed" are inconsistent with what precedes them. In one clause of the section a person holding an office or employment under state authority is not to be considered as having either lost or gained a residence by that fact, and in the succeeding clause the residence of such officer or employee is fixed at the place from whence he was elected or appointed. In view of the constitutional provision above set out, respecting the qualifications of voters, we must hold that state officers and employees retain their residences at the places where they lived when elected or appointed, if that is their intention. We have no doubt that the Governor and the several Justices of this court could establish a residence at Topeka, in Shawnee county, by moving here during their terms of office, with the intention of making this city their place of permanent abode. A removal here, however, without such intention, with a purpose to remain during a term of office only, does not deprive a state officer of his right to vote in the city or county where he lived when elected or appointed, if he does not intend to abandon the latter as a place of residence. The construction of the law contended for by counsel for respondent would prevent an officer or employee of the state, city, county, or school district from changing his residence during his official term, from the fact alone that he was such officer or employee. We cannot give to the statute such an absurd interpretation. The clause under consideration, if standing alone and disconnected from the language preceding it, would be manifestly unconstitutional. Under the facts, the city clerk had no discretion to refuse to enter plaintiff's name on the poll-books as a qualified voter.

A peremptory writ of mandamus will be awarded. All the Justices concurring.

(69 Kan. 587)

#### BOWDEN v. KANSAS CITY.

(Supreme Court of Kansas. July 7, 1904.)

**MUNICIPAL CORPORATIONS—DANGEROUS PREMISES—LIABILITY TO EMPLOYE.**

1. A municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employee

for personal injuries sustained, resulting from a neglect on the part of the corporation to furnish him a reasonably safe place in which to work.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by D. E. Bowden against the city of Kansas City. Judgment for defendant, and plaintiff brings error. Reversed.

True & Sims (Hutchings & Keplinger, of counsel), for plaintiff in error. J. W. Dana and M. J. Reitz, for defendant in error.

GREENE, J. The plaintiff prosecutes error from a judgment sustaining a demurrer to his petition. The material facts stated in the petition, which present the question discussed in this opinion, briefly stated, are that the city of Kansas City is a city of the first class, and, as such, maintained a fire department and fire stations; that plaintiff was an employé of said city in charge of fire station No. 3, in which, for extinguishing fires, was kept a hose cart, and horses for drawing the same; that it was plaintiff's duty to clasp the collar on the horses when they dashed from their stalls to the tongue of the hose cart upon the alarm of fire; that the floor between where the horses stood and the tongue of this cart, which had been laid with wooden blocks, had become rotten and so worn that a large hole was made in the runway over which the horses had to pass from their stalls to the tongue of the hose cart; that the city had negligently permitted said hole to remain for a long period of time, notwithstanding the fact that the attention of the fire marshal had frequently been called to such defective condition, and he had repeatedly promised to cause it to be repaired; that the city knew said floor was out of repair, and had negligently omitted to put it in order; that on the occasion of plaintiff's injury he was in the discharge of his duties when a fire alarm was turned in, and one of the horses made a dash for the tongue of the hose cart, where plaintiff was waiting to receive it to clasp the collar of the harness, when the horse stumbled into the hole, causing it to fall heavily against plaintiff, resulting in serious injuries, for which he sought to recover in this action.

It is contended that the petition does not affirmatively show the city had notice of the defective and dangerous condition of the floor, and that the allegations of the petition affirmatively show that the plaintiff assumed the risk of injury which would probably result from such defective condition of the floor. Neither of these contentions are well taken. In some particulars the petition is not very specific in its allegations, but it is not fatally defective in either of the respects mentioned. It is plain that the court below did not sustain the demurrer on either of these grounds.

The important question, and the one to

which counsel have directed their attention, is, can a municipal corporation be made to respond in damages to the plaintiff for injuries sustained through its negligence in not furnishing him a reasonably safe place in which to perform his duties as an employé in one of its fire stations? Nonliability is asserted on the ground that municipal corporations are created by the state to assist in the administration of its laws; that the maintenance of a fire department is a governmental duty, and, in the performance of such duty, cities are limited sovereignties or miniature states and are exempt from all liability for the misfeasance of their agents. Whether the corporation in this instance was acting as a governmental agency—in a public capacity representing the inhabitants of the city—or in its private corporate capacity is not a material question. In either instance it was acting within the scope of its delegated authority. It possessed the power to provide and maintain a fire department for the protection of the property of the inhabitants, and in this respect it was performing a public duty. In order that this power might be more effectually executed, the office of fire marshal was created. The mayor and council were given power to appoint such officer, prescribe his duties, provide for his salary, and control him in the discharge of such duties as were imposed upon him, and hold him responsible for the manner in which he should perform them. Therefore the fire marshal, while so acting, was the agent of the city, and not an officer of the state.

In determining the necessity for a fire department, the number and location of fire stations, the kind, quality, and number of fire extinguishers, and all matters involving the efficiency of such department, the council are in the exercise of their legislative power, judgment, and discretion. In the performance of such duties the questions of nonfeasance or misfeasance are not subjects of judicial inquiry. Having, however, determined these questions, the execution of the work and the management of its property is ministerial. In determining the locality, width, and grade of streets, and in establishing a system of sewers, and the kind and location of the pipes therefor, the corporation exercises its legislative authority—in the one instance as a governmental instrumentality, and in the other in its public capacity for the benefit of the inhabitants. In either case the city is liable to property owners for injury to their property occasioned by the negligent execution of the plan.

City of Toledo v. Cone, 41 Ohio St. 149, 163, was an action to recover damages for personal injuries sustained by the falling of an embankment supporting a vault in the city cemetery. The court said: "We think it evident from these statutory provisions that the trustees of the cemetery in question were elected by the people of Toledo to take charge, as their agents, of the cemetery property, and

acted in that behalf in subordination to, and subject to removal by, the council of the corporation. The improvement or repair of the city vault, through their agency and that of the superintendent, was not a legislative or governmental act on the part of the city, but was merely the discharge of a ministerial duty, such as the city performs in repairing or improving its streets, sewers, and wharves. It lay within the legislative capacity, judgment, and discretion of the city to provide a cemetery for the burial of the dead, and to build requisite vaults; but, having become the owner of such property, the city, in managing it, was held to the same degree of care in preventing damage to others as would be required of natural persons. By section 8 of the act of May, 1869, municipal corporations are made capable of acquiring, holding, and possessing property, real and personal. Having such power, there would seem to be no more valid reason for exempting them from liability for private injuries caused by the improper management of their property than for exempting private corporations and natural persons under like circumstances." In *Donahoe v. Kansas City*, 136 Mo. 657, 670, 38 S. W. 571, 574, which was an action to recover damages for injuries sustained by the plaintiff while engaged as a laborer in digging a trench for a sewer, the allegations were that the defendant and its duly appointed representatives in charge of the work negligently and carelessly failed to sufficiently brace, shore up, and protect the walls of said trench so as to make it reasonably safe for plaintiff to work in. The court said: "It was a duty which defendant owed to plaintiff to furnish him a reasonably safe place in which to work. The superintendent of streets, as well, also, as the foreman in charge of the work, knew, or might have known, had they discharged their duty, the unsafe condition of the bracing in this instance. 'This duty is personal to the master, and, if intrusted to a foreman, the negligence of the foreman is the negligence of the master.'" The court stated that the building of a system of sewers is for the private benefit of the corporation, and this may have had some influence upon the court in determining the question of the liability of the city. This question will be referred to later. Mr. Jones, in his work on *Negligence of Municipal Corporations*, § 141, says: "But as soon as the corporation has determined to construct a public work, it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then ministerial. There has been much discussion whether a municipal corporation will be liable for a defect in the plan of a public work, and many authorities have held broadly that it would not. The word 'plan,' however, in the cases, as is clearly shown in a recent case in the United States Supreme Court (*Johnston v. District of Columbia*, 118 U. S. 19 [6 Sup. Ct. 923, 30 L. Ed.

75]), where this question was presented, is ordinarily used to describe the general plan or system of work; and, where it is so used, nothing more would seem to be decided than that the general features of the system of drainage to be adopted are to be settled by the corporation, and cannot be reviewed by the courts. Some authorities have gone much further than this, but it is believed to be contrary to principle and the weight of authority to maintain that where, in the performance of a public work, there is any breach of the duty to exercise care, an action by one who is damaged will not lie." In *McClure v. City of Red Wing*, 28 Minn. 180, 9 N. W. 767: "The duty of providing drainage or sewerage is in its nature judicial or legislative, and consequently a municipal corporation is not liable for mere nonaction in failing to perform it. But that is not this case. It has also been held that, in adopting the general plan of an improvement, a municipality performs a legislative duty, whereas the manner of executing it is a ministerial one. In the case at bar, if it turned upon whether the duty was judicial or ministerial, we think the correct rule to apply would be that, in deciding upon the expediency of laying out this street, or upon the route thereof to be adopted, or the grade to be established, the city was exercising judicial duties, for errors of judgment in the performance of which they would not be responsible; but, having determined these matters, and having decided it expedient to obstruct the natural channel of these waters, and to divert them into another and artificial channel, then, in executing and carrying this out, including the construction of the sewer and fixing upon its size or capacity, they were exercising purely ministerial duties, in the performance of which they are held to the exercise of reasonable care." In *Johnston v. District of Columbia*, 118 U. S. 19, 21, 6 Sup. Ct. 923, 924, 30 L. Ed. 75, the court uses this language: "The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size, and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory, and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court. \* \* \* But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties, and, for any negligence in so constructing a sewer or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured." The same principle is announced in *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep.

463; *Judd et al. v. Hartford*, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 512; *McCombs v. Town Council of Akron*, 15 Ohio, 474; *Barton v. City of Syracuse*, 36 N. Y. 54; *Jenney et al. v. City of Brooklyn*, 120 N. Y. 164, 24 N. E. 274.

There is a line of authorities which hold that municipal corporations are only liable for the negligent performance of such ministerial public duties as are imposed upon them by law, but are not liable for the negligent performance of assumed duties which are permissive only. With this doctrine we do not agree. The performance of public duties which are imperative upon the corporation, as well as those which are merely optional, are for the same general purpose—the general welfare of the community. When a municipal corporation assumes the performance of a public duty which was permissive only, and enters upon the discharge of such duty, and, through the negligent performance thereof by its authorized agents, one is injured either in person or property, the corporation cannot escape liability by saying that the performance of this duty was not imperative. The principle here followed is well stated in *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, and the reasoning therefore we think sound.

Many authorities may be found among the adjudicated cases where the liability of municipal corporations is based upon, and would seem to be limited to, instances where the duty negligently performed was in the management of property from which the corporation derived an immediate income. Such distinction cannot be sustained by reason. The liability springs from the duty which is due from every person, whether natural or artificial, to exercise such reasonable care in the conduct and management of his property that it will not unnecessarily result in injury to another. A municipal corporation in control of public property, discharging a ministerial duty, is not exempt from this rule. Mr. Jones on Negligence of Municipal Corporations, in speaking on this question (section 150), says: "The obligation to exercise care does not arise between individuals because one pays money to another, and is therefore entitled to its exercise. It springs, as has been said, from the right of personal safety, and is wholly removed from the question of pecuniary profit. So, between corporations, whether public or private, and individuals, the duty is not dependent on the payment of money. It comes into existence from the same right of personal safety. And it is not consistent with principle to hold that a duty exists to exercise care in respect to remunerative public property, but that no such obligation arises in respect to public property from which no income is derived. Moreover, the weight of authority does not justify a distinction of this character. And an examination of the cases upon this question will sustain the conclusion that municipal corpo-

rations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it." In the care and management of the fire station, the city was performing a purely ministerial duty. It was incumbent upon it to furnish its employees in charge of this property a safe place in which to work, and, if the plaintiff was injured through the negligence of the city's agents in failing to perform this duty, it is liable for such injuries.

The judgment of the court below is reversed, with instructions to overrule the demurrer to the petition. All the Justices concurring.

#### MISSOURI PAC. RY. CO. v. JOHNSON.

(Supreme Court of Kansas. July 7, 1904.)

INJURY TO EMPLOYÉ — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

1. In an action by a widow to recover from a railway company damages for the death of her husband, an engineer on a switch engine, killed from the impact of cars kicked up a grade rolling back down and colliding with cars attached to the engine while he was engaged in looking under the engine for a hot box, where the negligence charged to the railway company was the failure of a co-employé by the use of brakes to have prevented the cars from rolling back down the grade, and the railway company charged negligence to deceased contributing to his death, *held*, whether deceased, by placing himself in a position of danger at the time and place and under the circumstances, was guilty of contributory negligence barring plaintiff's recovery, was a question for the jury.

2. Negligence is not imputable to a person for failing to look for a danger, when, under the surrounding circumstances, he had no reason to apprehend such danger.

(Syllabus by the Court.)

Error from District Court, Anderson County; C. A. Smart, Judge.

Action by Nellie Johnson against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Waggener, Doster & Orr, for plaintiff in error. C. W. Trickett and J. P. Trickett, for defendant in error.

ATKINSON, J. On the night of December 27, 1900, W. E. Johnson, an employé of the Missouri Pacific Railway Company, was killed in the switchyards at Coffeyville, Kan., while in the discharge of his duties as an engineer of a switch engine. Deceased left a widow and one child. His widow, Nellie Johnson, brought this action against the railway company to recover damages, charging that his death was the result of negligence for which the defendant railway company was liable. Verdict and judgment for plaintiff in the sum of \$7,000.

In the city of Coffeyville are two switchyards, one known as the "Missouri Pacific Yards," the other as the "Iron Mountain

Yards." These two yards are operated by the defendant railway company. They are connected at the west end by a Y. The portion of this Y leading from the main track southeast into the Iron Mountain yards forms a very perceptible grade dipping to the westward. Johnson was killed at about the hour of 10:30 p. m. The night was dark, cold, and windy. He was a new man in the yards, having operated the switch engine there the two preceding nights. The local freight from Osawatimie had just pulled into the yards. By direction of the foreman of the switch crew, the switch engine operated by Johnson moved forward, and was coupled to the rear end of the caboose of this train, consisting of 27 cars. This string of cars which had formed the local freight was then backed westward over the main line until it passed the switch opening onto the Y leading to the Iron Mountain yards. The switch having been lined, a signal was given to Johnson to move forward. The signal was given in a manner to indicate that cars would be cut off. The engine was caused by Johnson to move forward, pushing the string of cars onto the Y and up the grade. As the cars moved forward up the grade, the east 12 cars were cut off, and the signal was given to Johnson to stop and back up with the remaining 15 cars attached to the engine. It was left to McElrath, a member of the switch crew, to follow up and stop the cut of 12 cars, and prevent them rolling back down the grade. Johnson did not at once, when the signal was given, stop the engine and attached cars, and did not back up. He said to his fireman, Zubar, "I smell waste burning; I believe the right back driver box is on fire." He then lit a torch, and got down off the engine with the torch in his hand. After walking about the engine he stooped down, holding the torch in his left hand, resting his right hand upon the rail, and looked up under the engine. While in this position the 12 cars which had been cut off and left to move up the grade in charge of McElrath, rolled back down the grade, colliding with the cars attached to the engine, causing the engine to move backward, severing from the body the head of Johnson, and cutting off his right hand.

The second amended petition contained two causes of action; the first charging a liability for negligence under the common law, and the second charging a liability for negligence under the statute. When plaintiff rested her case, defendant interposed a demurrer to the evidence to each of the causes of action, and also moved that plaintiff be required to elect upon which cause of action she would rely for a recovery. The court overruled the demurrers to the evidence. The court also withdrew from the consideration of the jury all charges of negligence except the one charging negligence to McElrath on account of his failure to prevent the cut of 12 cars from rolling back

down the grade colliding with the standing cars and causing the death of Johnson.

Defendant denied negligence on the part of McElrath, and charged negligence to Johnson contributing to and causing his death. It was averred by defendant that the accident which resulted in the death of Johnson was caused by his negligence in not obeying the signals given him to stop and back up; in stopping the engine with 15 cars on the grade, he at the time knowing the danger of the cut off cars running back against them; in going under the engine at the time and under the circumstances then existing without giving notice or warning that he was about to do so; in voluntarily and unnecessarily selecting a dangerous and unsafe way to do what he did, when there was a better and safer way which might have been selected. It was further averred that Johnson had a full knowledge of all the conditions surrounding the business in which he was then engaged, and the means of acquiring information as to all the dangers and risks incident thereto, and assumed the risks and hazards as a part of his duties, and without objection or protest. The foregoing grounds by defendant pleaded as a defense to plaintiff's right to a recovery were also urged as grounds upon which the court should have sustained defendant's demurrers to plaintiff's evidence. The failure of the court to sustain defendant's demurrers to plaintiff's evidence is assigned as error.

With Johnson, and constituting the switch crew, was Wilson, the foreman of the crew, whose duty it was to lay out and direct the work; Murphy, one of the helpers, whose duty it was to cut off cars and throw switches; McElrath, also one of the helpers, the field man, whose duty it was to look out after, catch, and stop cuts of cars; and Zubar, the fireman. Wilson and Murphy testified that a signal to stop and to back up was given to Johnson by means of a lantern at or about the time the 12 cars were cut off; that the signals were not answered or acted upon by Johnson. There was no evidence to show that Johnson saw or understood the signals given. There was evidence tending to show that Johnson, from his position on the engine, could not have seen the signals. There was also evidence tending to show that the signals given were confusing; that it was the duty of an engineer, on receiving confusing signals, not to act on such signals, but await the giving of signals which could be by him understood. There was also competent evidence to the effect that when an engineer believed, as Johnson at the time expressed himself to his fireman, Zubar, as believing, that there was a hot box on his engine, it was his duty at once, and to the exclusion of every other duty, to make an examination of his engine. There was also testimony of engineers that Johnson, in making the examination of his engine at the time and place, pursued the customary meth-

od. Whether Johnson, before making an examination of his engine, applied the brakes, or whether he attempted to communicate by signals to the switchmen the fact that he was about to make such examination of his engine, is in doubt. He did not sound the whistle. If he signaled by the use of his torch, it was not seen. When the collision came, the fireman found the brakes not applied. He applied them, and soon stopped the moving engine and cars. He stated that he did not know whether or not Johnson had applied the brakes before leaving the engine. There was evidence offered tending to show that air brakes, such as this engine was equipped with, when the air had been applied, would automatically release themselves within the time intervening between the time Johnson left his engine and the collision caused by the cars rolling down the grade. There was evidence that one man could handle and control that number of cars on the grade of the Y if attentive to the task and the work of setting the brakes was taken in hand at the proper time; that one brake in good repair, set at the proper time, would have held this cut of cars. Johnson was a new man in the yards, and while it is fair to presume he knew of the existence of the grade, there was no evidence to show he had any knowledge that cars frequently rolled back down the grade when attended by a brakeman to control them. He had the right, under the circumstances, to assume that McElrath would discharge his duty, control the cars, and prevent their rolling back down the grade. Negligence is not imputable to a person for failing to look for a danger, when under the surrounding circumstances he had no reason to apprehend such danger. *Moulton v. Aldrich*, 28 Kan. 300. Again, there was evidence that Johnson, at the time and place, was discharging a necessary duty by the customary method. The facts shown were such that reasonable minds might differ with respect to whether he had acted as a reasonably prudent man under the circumstances should act. *Beaver v. Atchison, T. & S. F. R. Co.*, 56 Kan. 514, 43 Pac. 1136. We cannot say as a matter of law that Johnson was guilty of negligence contributing to his injury and death. The court committed no error in overruling defendant's demurrer to plaintiff's evidence. *Kansas City, Ft. S. & G. R. Co. v. Foster*, 39 Kan. 329, 18 Pac. 285; *Kansas City, Ft. S. & G. R. Co. v. Cravens*, 43 Kan. 650, 23 Pac. 1044; *Rogers v. Hodgson*, 46 Kan. 276, 26 Pac. 732.

Switchman McElrath, a witness for defendant, stated that when the cut of 12 cars was made he followed them up the grade, overtook them, climbed on top of the cars, had set the brakes on two of them, and was in the act of setting the brake on a third car, when they collided with the standing cars attached to the engine. He further stated that he had about succeeded in stopping the moving cars; that, had Johnson stopped the

cars attached to the engine at the time he was signaled to do so, and not have permitted them to move further up the grade, he (McElrath) could have stopped the 12 cars rolling down the grade before they would have traveled to a point where the standing cars would then have been, and the collision with the standing cars thus have been avoided. Willson and Murphy both stated that when they last saw McElrath before the collision he was following the cut of 12 cars, endeavoring to overtake them; that when they first saw him after the collision he was on the ground beside these cars. They did not see him on these cars at any time. Greenup, an engineer, who was on his engine close by where the cut of cars ran upon the grade, stated there was no person on the cars as they passed by. The cars were not subsequently found as McElrath stated they were at the time he left them. Nor were the cars found with the brakes set as he stated he had set them. Gallagher, a witness for defendant, one of its car repairers, stated that he examined the cars soon after the accident, found the brakes all in good repair, and the brake on the second car set. Defendant also produced as witnesses its master mechanic and several engineers to establish that Johnson, in making the examination of his engine, had not pursued the safest course, and had voluntarily placed himself in a place of great danger. The question of the negligence of McElrath in not preventing the cars from rolling down the grade, and the question of the negligence of Johnson in making the examination of his engine at the time and place and under the surrounding circumstances, were submitted to the jury upon conflicting evidence. The jury returned answers to 115 special questions submitted by defendant, covering all the material points in controversy. The answers returned are consistent with one another, are supported by the evidence, and uphold the general verdict. The jury specially found there was negligence on the part of McElrath, and that there was no negligence on the part of Johnson. The jury not only found negligence on the part of McElrath in not preventing the cars from rolling down the grade, but also found that he was never on the cut of 12 cars to set the brakes.

It is urged that the risk that cars might roll back down the grade was one of the risks assumed by Johnson in his employment. This court has frequently held the risks assumed by the servant by virtue of his employment are the ordinary risks and hazards incident to such employment. *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266. He does not assume unusual risks and hazards—those risks and hazards not ordinarily incident to his employment, and of which he has no knowledge. *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac.

935. Johnson being a new man in the yards, and not having knowledge that cars attended by switchmen frequently rolled back down the grade, it cannot be said as a matter of law that this was one of the risks and hazards assumed by him in his employment. The question was properly submitted to the jury. By the general verdict and by the special findings of the jury this proposition was determined against defendant.

The record in this case is voluminous. Much testimony was introduced upon the trial going to the question of the negligence of McElrath and the contributory negligence of Johnson. The brief of plaintiff in error contained numerous assignments of error. Most of these assignments were based on the refusal of the court to give the instructions requested and upon the instructions by the court given. The instructions given fairly stated the law of the case. There was no material error in refusing the instructions requested and not given. We have examined the entire record and the assignments of error.

Finding no substantial error in the record, the judgment of the district court will be affirmed. All the Justices concurring.

#### PUGSLEY v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas. July 7, 1904.)

##### DEMURRER TO EVIDENCE—DISMISSAL.

1. While a court is considering a demurrer to the plaintiff's evidence, and giving reasons why it will have to be sustained, but before announcement is made that it is sustained, it is error to overrule an application by the plaintiff to dismiss his case without prejudice.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by William F. Pugsley against the Chicago, Rock Island & Pacific Railway Company. From an order refusing to dismiss the action without prejudice, plaintiff brings error. Reversed.

David Overmyer, for plaintiff in error. M. A. Low, W. F. Evans, and Paul E. Walker, for defendant in error.

GREENE, J. This is a proceeding to reverse an order of the court below denying the plaintiff's application to dismiss his action without prejudice, and sustaining a demurrer to plaintiff's evidence. The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's agents and employes. After the plaintiff had introduced his evidence, the defendant demurred generally. After the argument of the demurrer, and while the court was considering the question, and giving his

reasons why he thought the demurrer would have to be sustained, but before a final decision was announced, the plaintiff announced to the court that he desired to dismiss his case without prejudice. The application was overruled, the demurrer sustained, and judgment rendered for defendant.

The refusal of the court to permit the plaintiff to thus dismiss his case without prejudice is the first error of which complaint is made. Subdivision 1, § 397, of the Code (section 4846, Gen. St. 1901), reads as follows: "An action may be dismissed without prejudice to a future action: First, by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court." If it could be said that the demurrer had been passed upon and sustained before the plaintiff made his application to dismiss, it would be clear, under the former decisions of this court, that the plaintiff could not, as matter of right, dismiss without prejudice. *St. Joseph & D. C. R. Co. v. Dryden*, 17 Kan. 278; *K. P. Ry. Co. v. Couse*, 17 Kan. 571; *Schafer v. Weaver*, 20 Kan. 296; *Bee Bldg. Co. v. Dalton* (Neb.) 93 N. W. 930; *Beaumont et al. v. Herrick*, 24 Ohio St. 457. When plaintiff made his application, the demurrer was still under consideration. It was pending. It had not been disposed of. The court was giving his reasons for the ruling he then expected to make, but which had not been made. If the defendant had changed its mind at the point where the plaintiff made his application to dismiss, it might have withdrawn the demurrer and gone on with the trial, or the court, after having used the language found in the record prior to the plaintiff's application, in further reasoning upon the question, might have changed its mind and determined that what first appeared sufficient reason for sustaining the demurrer upon further reflection appeared otherwise. These were possible contingencies, the happening of which in one instance would have rendered a final determination of the demurrer unnecessary, and in the other resulted in overruling it. They were only suggestions to show that, when the plaintiff made his application to dismiss, the demurrer had not been disposed of. While it was pending, and before a final determination against the plaintiff, he might, as matter of right, dismiss his case without prejudice. This court has not gone so far in any of the reported cases as to say that, while a demurrer to the evidence is pending, the plaintiff may not dismiss without prejudice. It is said by Justice Valentine in *Schafer v. Weaver*, 20 Kan. 294, 296, that, "where a demurrer to evidence is submitted to the court, the submission is only conditionally final. It is final upon the condition that the court shall sustain the demurrer, and shall not, in its discretion, choose to reopen the case for the admission of other evidence, or for the dismissal of the action without prejudice." When the appli-

¶ 1. See Dismissal and Nonsuit, vol. 17, Cent. Dig. § 29.

cation to dismiss was made in this case, the question being considered by the court was only conditionally final. While the case was in that status, it could have been dismissed without prejudice to a future action. We think the court erred in overruling the application to dismiss.

The second contention is that the court erred in sustaining the defendant's demurrer to the evidence. It can serve no public purpose for this court to go into an examination of the evidence in explanation of the reasons for its conclusion. Suffice it to say that, after a careful examination of the evidence, we are of the opinion that the demurrer was properly sustained.

For the reasons assigned, the judgment of the court below is reversed, and the cause remanded, with instructions to set aside the judgment of dismissal with prejudice, and sustain the plaintiff's application to dismiss without prejudice. All the Justices concurring.

#### STATE v. KNOLL.

(Supreme Court of Kansas. July 7, 1904.)

MURDER—INDICTMENT — SUFFICIENCY — DYING DECLARATIONS—INDETERMINATE SENTENCE LAW—VALIDITY.

1. Error cannot be predicated of the overruling of a motion to quash an information of doubtful sufficiency to charge murder in the first degree, where it was sufficient to charge manslaughter in the first degree, of which crime defendant was convicted.

2. A dying declaration is hearsay evidence, and is taken out of the rule excluding such evidence, because of reasons of necessity, and because it is supposed that a realization on the part of the declarant of the certain and speedy approach of death affords as powerful incentive to tell the truth as does the administration of an oath.

3. In order to render such declarations admissible, it must be first shown that the declarant was not only in articulo mortis, but under the sense of impending death, without hope of recovery, at the time such declarations were made.

4. The statements made by the deceased that he had to die of the whipping he had received from the defendant, and that any hour, any day, he might die, do not sufficiently show his sense of impending death to render his statements competent as dying declarations.

5. The title of chapter 375, p. 571, Laws 1903, the same being known as the "Indeterminate Sentence Law," recites that part of its purpose is to repeal section 5685, Gen. St. 1901. No mention of this section is made in the body of the act, but, instead, section 5686 is therein named as repealed. From the nature of chapter 375, and the matter therein treated, it is evident that it was section 5686 that was intended to be repealed. *Held*, that section 5685 is not repealed, it not being mentioned in the body of the act. *Held*, further, that section 5686 is repealed by implication, because chapter 375 covers the entire ground of that section, and is a substitute for it. *Held*, further, that chapter 375 is not rendered invalid by reason of such error.

(Syllabus by the Court.)

Appeal from District Court, Ellis County; J. H. Reeder, Judge.

John Knoll was convicted of manslaughter, and appeals. Reversed.

W. E. Saum and A. D. Gilkeson, for appellant. C. C. Coleman, Atty. Gen., and E. A. Rea, for the State.

GUNNINGHAM, J. Alois Denning and John Knoll were friends, or on friendly terms, and had been so for some time. They were both addicted to the excessive use of alcoholic liquors. A personal encounter occurred between them on the 19th of February, 1903, closing a convivial season of some five or six hours, during which time both had indulged to a considerable extent in the use of intoxicants. This had occurred at Denning's place of residence, which was in connection with a store which he kept. It seems that there was a matter of disagreement between the parties concerning a report which Knoll said he had heard relative to alleged improper relations between himself and Denning's wife. This, however, did not appear to be serious, and Denning had assured Knoll that he would take such measures as were necessary to contradict any unfavorable comment, and rectify any supposed wrong. However, an altercation, somewhat noisy and violent, at least on the part of Knoll, took place between them, during which Knoll broke some dishes on the table at which they were seated, partaking of their dinner together. Denning remonstrated, and told Knoll that he must cease these violent demonstrations, or leave the premises. With a view of enforcing this requirement, Denning procured a pistol, but there is little evidence that he had any purpose to use it against Knoll. With alternating periods of apparent friendliness and boisterousness, the matter finally culminated by Knoll throwing Denning to the floor, getting upon him with his knees, striking him with his fists, and in some way—how, the evidence does not indicate—breaking his leg. The whole evidence points strongly to the conclusion that the entire transaction was but a drinking bout indulged in by the two men, resulting in this altercation, in which Denning was sadly and unnecessarily worsted. Denning was suffering from chronic alcoholism and fatty degeneration of the heart. In consequence of his injury he was put to bed, and, by reason of the inactivity thus enjoined, together with his prior diseased condition, self-infection, resultant from the inability to properly throw off the natural secretions, ensued, from which complication he died on the 23d of March, 32 days after his injury. While his physical condition prior to his injury was such as would have eventually resulted in his death, the injury which he received hastened that result. From a prosecution which resulted in his conviction of and sentence

¶ 4. See Homicide, vol. 26, Cent. Dig. §§ 432, 433, 437.



for manslaughter in the first degree, Knoll prosecutes this appeal.

Complaint is made of the overruling of a motion to quash the information. While in terms this information charged murder in the first degree, we doubt the sufficiency of the facts as therein set out to support a conviction for that offense, but are of the opinion that sufficient facts are therein found to support the conviction of manslaughter in the first degree; and hence, following *State v. Triplett*, 52 Kan. 678, 35 Pac. 815, no prejudicial error resulted.

What purported to be the dying declaration of Denning was introduced in evidence. It is contended that this testimony was improperly received, because it was not sufficiently shown that Denning, at the time he made it, believed himself to be in extremis. The declaration was made on March 7th, 16 days prior to his death. His condition thereafter and up to the time of his death is not shown. The qualifying evidence comes from the lips of Denning's sister, and the strongest language attributed to Denning, as indicating his estimate of his then condition, is as follows: "He said that he had to die of the whipping of John Knoll; that he had to die; that any hour, any day, he might die, and he had to die of the whipping of John Knoll; that any hour and any day he might die; and that he had to die of the whipping he got from John Knoll. I asked him what made him say so—what made him say that he had to die; and he said that the pain from the whipping John Knoll gave him—from the whipping on his head and breast, where John Knoll jumped on him with his knees—that pain is what makes him know that he has to die." It is not disclosed from the record whether, at the time this statement was made, Denning was confined to his bed, or able to be around. We may presume, however, that he was unable to be up. Neither does it appear that he had received information from any one that his condition was in any way serious, not to say dangerous. There is absolutely nothing outside of these declarations to indicate the condition of Denning's mind as to the probabilities or imminence of his death. The reasons why dying declarations are taken out of the rule which excludes hearsay testimony are those of necessity, joined with the conclusion that a realization by the declarant of the certain and speedy approach of death would be as powerful an incentive on his part to tell the truth as would the administration of an oath. So that it is familiar law that, in order to authorize the introduction of such declarations, it must be shown that there was in the mind of the deceased at the time of the making of the statement a present belief of the close and certain approach of death. Indeed, this belief must be so present and grave as that the declarant must not be merely in articulo mortis, but under

the sense of impending death, without expectation or hope of recovery. *State v. Wellington*, 43 Kan. 124, 23 Pac. 156; *State v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State v. Medlicott*, 9 Kan. 257; *Am. & Eng. Cycl. of Law*, vol. 10, p. 366. It is quite true that, where this condition of mind exists at the time of the making of the statement, such statement is not rendered inadmissible by a subsequently entertained belief or hope on the part of the deceased that he may recover. Tested by the rule above stated, was the preliminary proof of the condition of Denning's mind such as to warrant the admission of the so-called dying declaration? We think not. It indicates little more than at the time the declaration was made he entertained the belief that some time in the future the injuries received would result in his death. When that result might occur was unknown to him. Its occurrence in the immediate future evidently was not anticipated. There is nothing indicating that he considered it imminent, or that he thought himself about to die. There is little more relative to expectation of death than what any person might truthfully say. It is sought to strengthen the showing of the decedent's knowledge of approaching death by introducing the evidence of a priest that the "last rites" were administered to Denning, but it was not shown when this was done, what its significance was, or that Denning knew it had any significance. This evidence added nothing to the preliminary showing.

The court instructed the jury that, if the defendant was not justified in his assault, he should be convicted of murder in the first or second degree, or of manslaughter in the first or second degree, or of assault and battery; thus excluding from the consideration of the jury the question of whether he might not be guilty of manslaughter in the fourth degree. In this we think the court erred. Section 28 of the act relative to crimes and punishments provides: "The involuntary killing of another by a weapon or by means neither cruel or unusual in the heat of passion in any case, other than justifiable homicide, shall be deemed manslaughter in the fourth degree." Gen. St. 1901, p. 437. Under the circumstances of this case, as shown in the evidence, we think the jury might well have found the defendant guilty under this section, had they been permitted so to do under proper instructions.

The appellant was sentenced under what is known as the "Indeterminate Sentence Law," the same being chapter 375, p. 571, Laws 1903. He now claims that such a sentence was void, because section 5686, Gen. St. 1901, which provides for a fixed sentence, was not repealed by chapter 375, p. 571, Laws 1903, and hence, being in force, he should have received his sentence thereunder. The

title to chapter 375 as follows: "An act to provide for the indeterminate sentence of persons convicted of certain felonies, for the termination of such sentence and the release of such persons, defining the duties of the directors and warden of the penitentiary in relation thereto, and repealing section 5685 of the General Statutes of 1901 and all other acts and parts of acts in conflict herewith." It will be noted from this recitation that section 5685 was the one therein named as the one to be repealed, whereas the section which was desired to be repealed, and which by section 10 of the act (page 575) was in terms repealed, was section 5686. Of course, there having been an error in the title of the act, in the recitation of the number of the section desired to be repealed, such section is not expressly repealed, even though correctly numbered in the body. We must, however, hold that it is repealed by clear implication. The whole scope and purpose of chapter 375 was to provide for an indeterminate sentence, and to substitute the fixed term of sentence as provided in section 5686 by this plan of indeterminate sentence as provided in chapter 375. Both schemes cannot stand together. Hence we hold that, although there was a failure to expressly repeal section 5686, it was repealed by implication. *Baker v. Agricultural Land Company*, 62 Kan. 79, 61 Pac. 412.

Other matters of error are urged, which have received our attention, but we find no prejudice therein to the appellant; but for the errors above noted the judgment will be reversed, and the case remanded for further proceedings. All the Justices concurring.

#### STATE v. STEPHENSON.

(Supreme Court of Kansas. July 7, 1904.)

#### APPEAL—OBJECTIONS TO TESTIMONY—GROUNDS—WAIVER.

1. Where the final objection to the admission of testimony was that it was not a book of original entries, and the objection that the book itself was not produced was not brought specifically to the attention of the trial court, the omission to produce the book itself could not be urged as a ground for reversal.

On petition for rehearing. Denied.  
For former opinion, see 76 Pac. 905.

**PER CURIAM.** On the application for a rehearing it is insisted that testimony as to the state of defendant's accounts was received in evidence without producing the book of accounts. The principal attack on the rulings on evidence was that the entries made from orders and other memoranda in a ledger were not original entries, and to that objection, so far as rulings on evidence were concerned, our attention was mainly directed. Nothing was said in the opinion about the objection to the testimony of Pettit that the

books themselves were not offered. It was mentioned in defendant's brief, and was therefore entitled to consideration.

Passing the question that the books were outside of the state and beyond the reach of the court's process, the absence of the books was not presented in a way to challenge the court's attention to that particular point, or to render the ruling erroneous. Pettit testified that he was the bookkeeper of his house, and made the entries in the ledger from temporary memoranda. He did not make or check the orders, did not take impressions of the orders on the bill book, and did not take cash, or note the receipts of the cashbooks. All of these were handled by others, and passed up to him to be entered on the ledger. The entries on that book are original entries, and were rightly held to be admissible. Whether entries so made should be treated as original entries was the main controversy when Pettit's testimony was offered. He testified that he knew the state of Stephenson's account, and was permitted to give it. An objection to the testimony was made, his counsel insisting that it must be proved by a book of original entries; and he proceeded to cross-examine the witness, and undertook to show that Pettit had no knowledge of the temporary memoranda, and that what he kept was not a book of original entries. Some of the general objections were broad enough to have covered the point that the books themselves were not in court, but that specific objection was not made. It was rather that the entries in the books were not original, and that the temporary notations from which the entries were made were not original entries, and that such memoranda were outside of the knowledge of the witness. At the end of an extended inquiry and colloquy, the final objection of counsel for defendant was that the testimony was not a book of original entries, and not that the book itself was not produced. The point now made was therefore not brought specifically to the attention of the trial court, and hence the omission cannot be treated as a ground of reversal.

#### WILSON et al. v. CITY OF PHILLIPS-BURG.

(Supreme Court of Kansas. July 7, 1904.)

#### APPEAL AND ERROR—BILL OF EXCEPTIONS—INSTRUCTIONS.

1. The evidence can be brought upon the record of the district court in no other way than by a bill of exceptions.

2. In the absence of a bill of exceptions, questions arising on the admission and exclusion of evidence are not reviewable.

3. In the absence of a bill of exceptions, instructions given and refused, which can be interpreted only by the evidence, cannot be considered by the Supreme Court.

Error from District Court, Phillips County;  
John R. Hamilton, Judge.

Action by the city of Phillipsburg against

David Wilson and another. From a judgment for plaintiff, defendants bring error. Affirmed.

T. M. Noble, C. W. Chase, Geo. Whitsett, and Guy Bissell, for plaintiffs in error. W. H. Pratt, C. A. Lewis, and R. F. Stinson, for defendant in error.

**PER CURIAM.** This proceeding in error was originally supported by a case-made attached to the petition in error. The case-made was settled and signed without jurisdiction, and, yielding to that fact, the plaintiffs in error substituted a transcript of the record in the district court for the case-made. The errors assigned involve a consideration of testimony and of instructions given and refused. The evidence could be brought up on the record of the district court in no other way than by a bill of exceptions, and no such document appears in the transcript. Therefore questions arising upon the admission and exclusion of evidence may not be examined. Most of the instructions given and refused can be interpreted only by the evidence. Hence they will not be considered.

One instruction is assailed as imposing a wrong interpretation upon a writing admitted by the pleadings. The instruction uses practically the language of the writing, and declares its true intent.

It is claimed that two instructions are contradictory of each other, but they are not so. One relates to the conduct of a work of construction and the other relates to the sufficiency of the completed work to fulfill the purpose for which it was intended, as a result of construction according to a given contract and plan.

The judgment of the district court is affirmed.

#### ENSIGN v. PARK et al.

(Supreme Court of Kansas. July 7, 1904.)

**LANDLORD AND TENANT—REMOVAL OF FENCES—DAMAGES—LANDLORD'S PROMISE TO INDEMNIFY LESSEE—CONSIDERATION.**

1. Where lands were leased for stock-raising purposes, and thereafter the fences were torn down, but the landlord refused to rebuild or allow the lessee to do so, the landlord's promise to pay the lessee all damages he might sustain from the absence of a fence was not without consideration.

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Dewey Ensign, as executor of Daniel Ensign, deceased, against D. B. Park and another. From a judgment for defendants, plaintiff appeals. Affirmed.

I. O. Pickering, for plaintiff in error. J. W. Parker and H. L. Burgess, for defendants in error.

**PER CURIAM.** On August 31, 1895, Daniel Ensign executed and delivered to D. B. and S. R. Park a written lease to three quarter sections of land. The tenancy was to

commence on March 1, 1896, and terminate on March 1, 1897. The lessees, to evidence the amount of rent to be paid, executed to Ensign two notes—one for \$300, due December 1, 1896, and another for \$600, due March 1, 1897—both drawing 8 per cent. interest from maturity. The first note was paid in full, and on March 1, 1897, defendants below paid \$367.90 on the \$600 note. This action was brought to recover the balance due on the last-mentioned note. By way of counterclaim, defendants below pleaded: That they rented the land for stock-raising purposes, which Ensign knew. That the landlord permitted the fences around the land to be torn down, depriving the tenants of the use of the land. That Ensign refused to rebuild the fences or permit defendants to do so, and promised and agreed that he would pay the lessees all damages they might sustain by reason of the removal of said fences; that the fences had been unlawfully and forcibly removed from the land by the township officers; that he was entitled to damages, and would sue the county therefor, and would pay and allow defendants all damages sustained by them. Defendants were given judgment against plaintiff for \$167.

The jury found that Ensign made the promise to defendants to pay the damages suffered by them. Many points were raised and discussed in the brief of counsel for plaintiff in error, but the pivotal question in the case was whether Ensign made the promise alleged, and, relying thereon, defendants did not repair the fences, and suffered damages thereby. The question was submitted directly to the jury, who found against the plaintiff below. The agreement was founded on a sufficient consideration. *Spencer v. Taylor*, 68 Kan. —, 77 Pac. 276; *Clark on Contracts*, § 76, p. 171. The claim of defendants below was based on a new contract outside of and beyond the terms of the lease. Mr. Burgess was not disqualified as a witness for defendants. He testified that, at the time of his conversation with Ensign, he was not employed by him as an attorney, but had always been against him. We have given consideration to the rulings of the court in admitting testimony offered by defendants, and find no error in such rulings.

The judgment of the court below will be affirmed.

#### CITY OF GARNETT v. HAMILTON.

(Supreme Court of Kansas. July 7, 1904.)

**MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—NOTICE TO CITY.**

1. Where, while a sidewalk was being repaired, loose planks were insecurely laid over an excavation, the city knew or could have known of the dangerous condition.

2. Where a pedestrian saw that a sidewalk was a temporary one, placed in position for

¶ 2. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1677.

travel, but had no reason to think it insecure, he was not guilty of contributory negligence in going upon it.

3. The fact that a verified written claim or demand for damages for injuries caused by defects in a sidewalk was not presented to a city council, was not a bar to the maintenance of an action for damages; the penalty for failure to present an unliquidated claim being that no costs can be recovered against the city.

Error from District Court, Anderson County; Saml. A. Riggs, Judge.

Action by W. G. Hamilton against the city of Garnett. From a judgment for plaintiff, defendant brings error. Affirmed.

W. O. Knight, Manford Schoonover, and J. G. Johnson, for plaintiff in error. N. L. Bowman, for defendant in error.

**PER CURIAM.** W. G. Hamilton recovered a judgment against the city of Garnett for an injury suffered from a defective sidewalk over which he was passing. While a sidewalk in the city was under repairs, loose planks were insecurely laid over an excavation. The city knew, or should have known, of the dangerous condition of the walk. It could readily be seen that the walk was a temporary one, but it had been placed there for travel, and the plaintiff had no reason to think that it was insecure, and it cannot be held that he was guilty of contributory negligence.

The objections to the rulings on the admission of testimony are not material, and it cannot be said that there is not enough testimony to sustain the material findings of the jury.

The fact that a verified, written claim or demand for damages was not presented to the city council is not a bar to the maintenance of an action for damages. The penalty for failure to present an unliquidated claim is that no costs can be recovered against the city. The trial court did not award judgment for costs against the city, and hence it has no reason to complain.

We find nothing substantial in any of the objections, and therefore the judgment of the district court will be affirmed.

(69 Kan. 733)

**FABRIQUE et al. v. CHEROKEE & P. COAL & MINING CO. et al.**

(Supreme Court of Kansas. July 7, 1904.)

**CONDITIONAL SALE—MORTGAGE.**

1. A mortgage is a defeasible conveyance to secure the payment of a debt. Where there is no continuing debt, the execution of a deed with a simultaneous contract to reconvey upon the payment of certain sums of money by the grantor to the grantee within a specified time, the payment of which is optional with the grantor, is a conditional sale, and not a mortgage.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. § 72.

Action by A. H. Fabrique and others against the Cherokee & Pittsburg Coal & Mining Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

O. V. Ferguson, for plaintiffs in error. A. A. Hurd and O. J. Wood, for defendants in error.

**GREENE, J.** This was an action to have a certain deed and contract declared to be a mortgage, and to ascertain the amount due the defendant thereon, and to have the premises sold to satisfy the amount so found due in case it should not be paid within a time to be specified by the court. The defendant filed a general demurrer to the petition, which was overruled. On the trial it objected to the introduction of any evidence under the petition. This objection was sustained, and judgment rendered for defendant for costs.

The petition shows the following material facts: In 1892 L. G. Scheetz was the owner of lots 113 and 115, on Douglas avenue, in Griffenstein's Addition to the city of Wichita. While such owner he undertook to construct a three-story brick and stone building according to the plans and specifications referred to in the agreement. After performing some portion of the work, he became greatly involved for material and labor. Among his creditors was L. C. Jackson, to whom he executed a mortgage on this property for \$4,800. This mortgage was assigned to defendant, and at the time of the agreement hereinafter set out had been foreclosed, and the premises ordered sold. The property had also been deeded for taxes, the amount of which was about \$1,200. By reason of his indebtedness Scheetz was compelled to suspend the construction of this building. On September 28, 1897, Scheetz executed a warranty deed of the property to defendant. On September 21, 1897, the parties entered into the following agreement:

"This contract made and entered into on this 21st day of September, 1897, by and between the Cherokee & Pittsburg Coal & Mining Company, a corporation, party of the first part, and L. G. Scheetz, party of the second part:

"Witnesseth, that whereas, the party of the first part is the owner in fee simple of the following described real estate, situated in the County of Sedgwick and State of Kansas, to-wit: Lots No. 113 and 115 on Douglas Avenue, in Griffenstein's Addition to the City of Wichita, Kansas.

"And whereas, there is situated upon said real estate a stone foundation and partly constructed brick walls for a three story building thereon, the construction of which building has heretofore been undertaken and commenced by the party of the second part for and on behalf of Jacob Scheetz.

"And whereas, the party of the first part desires, at as early date as it can profitably

do so, to sell the above described real estate, and the party of the second part desires as soon as he can arrange to do so, to purchase said real estate.

"And whereas, in the meantime it is desired by both parties to this agreement, that the said building, the construction of which has heretofore been commenced upon said property, be completed according to the original plans and specifications prepared by E. Dumont, an architect, and in pursuance of which the construction of said building has heretofore been commenced.

"Now therefore, the party of the first part agrees to proceed with the construction of said building, according to said original plans and specifications without unnecessary delay.

"Said specifications and plans may be altered by the agreement of the parties hereto; and to keep a correct account of all monies expended and paid out in construction and completion of said building. The party of the first part further agrees to sell and convey said real estate to the party of the second part or to his assigns at any time within two years from this date, upon the payment to the party of the first part by the party of the second part or his assigns the following named sums with interest from the time hereinafter stated, to-wit:

"1st. The sum of Four Thousand Eight Hundred and Ninety-seven and  $\frac{44}{100}$  (\$4897.48) Dollars, with interest from the 10th day of January, 1897, at the rate of nine per cent (9%) per annum, until the date of such payment.

"2nd. The sum of Five Hundred Twenty (\$520) Dollars with interest thereon at the rate of nine per cent (9%) per annum from the 29th day of May, 1897, until the time of such payment.

"3rd. The sum of Twelve Hundred and Forty (1240) Dollars with interest thereon at the rate of nine per cent (9%) per annum from the 17th of August, 1897, until paid.

"4th. The sum of Three Hundred and Seventy-two and  $\frac{32}{100}$  (\$372.32) Dollars with interest thereon at the rate of nine (9%) per cent per annum from the 30th day of August, 1897; and also such other and further sums of money which the party of the first part may hereafter pay out or expend in the construction and completion of the said building upon said real estate, with interest thereon at the rate of nine per cent (9%) per annum from the time when such sum or sums shall be paid out until the date of the payment of such sum or sums from the party of the second part to the party of the first part; and such further sums also as the party of the first part may hereafter expend or pay out for taxes, insurance and repairs upon said property, together with nine per cent (9%) interest on said sum or sums from the date when the same shall be paid out or expended until the date when paid to the party of the first part by the party of the second part. That if the party of the second part or his assigns at

any time within the above named period shall purchase said property from the party of the first part upon the terms hereinbefore mentioned, then the party of the second part or his assigns shall receive credit on the amount which is to be paid according to the terms hereinbefore set forth for all income, without commissions for renting or otherwise caring for or handling the property or constructing said building, which the party of the first part shall receive from said property between now and the date when the party of the second part shall purchase said property and make the payments therefor as hereinbefore mentioned, which credits shall be made of dates when said income is received.

"It is expressly understood and agreed that time is of the essence of this contract and that unless the party of the second part shall fully comply with the terms of this agreement on or before two years from this date, then all the rights of the party of the second part, under this contract shall cease and be determined and the same shall thereafter have no binding effect."

It is alleged that said deed was executed to the grantees in pursuance of the agreement above quoted to secure the amount then owing by Scheetz for the improvements upon said lots, and for money to be advanced for the completion of the building; that the company agreed to reconvey said property to Scheetz whenever these sums should be paid, and that the deed was intended only as a mortgage. In October, 1900, Scheetz assigned to these plaintiffs all his right, title, and interest in and to said agreement and to the lots described, and it is also alleged that they were the owners of the property, and that defendant company has refused to account to them for any of the money received for rents and profits. The only question to be determined is, does the deed, together with the contract, constitute a mortgage, or only a conveyance with a contract to reconvey? The court concluded that it was a conveyance with a contract to reconvey, and not a mortgage.

The test in determining whether an absolute conveyance with a separate agreement to reconvey, executed simultaneously, constitute a mortgage, is whether the relation of debtor and creditor continues to exist. In 4 Kent's Commentaries (14th Ed.) p. 163 (note "d"), the rule is stated as follows: "The test of the distinction is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties \* \* \* and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale." This is the test adopted by this court in McDonald & Co. v. Kellogg, Trustee, 30 Kan. 170, 2 Pac. 507; Elston v. Chamberlain, 41 Kan. 354, 21 Pac. 259; McNamara v. Culver, 22 Kan. 661; Martin et al. v. Allen et al., 67 Kan.

758, 74 Pac. 249. Applying this test, the transaction cannot be construed into a mortgage. Scheetz was not liable to the coal company for any of the debts assumed and paid by it. He did not agree to pay such debts, nor did he agree to pay any of the expense of completing the building. An action could not have been maintained by the coal company against Scheetz to recover any of such amounts. The contract amounted to nothing more than an option by which defendants agreed to sell to Scheetz within a certain time upon his compliance with the specified conditions. There was no room for oral evidence in the interpretation of the agreement, or in arriving at the intention of the parties. Such intention is plainly expressed in the contract.

The judgment of the court below is affirmed. All the Justices concurring.

(69 Kan. 872)

**DAUGHERTY et al. v. HEDRICK et al.**

(Supreme Court of Kansas. July 7, 1904.)

**APPEAL—SETTLEMENT OF CASE—TIME—EXPIRATION OF JUDGE'S TERM.**

1. A final order was made September 24, 1902, and another order, entered on the same day, allowed plaintiff 90 days to serve a case, 10 days to suggest amendments, and required 5 days' notice of settlement, but made no provision as to the time of settlement. The term of the trial judge expired January 12, 1903. Held that, though the trial judge became his own successor, he had no jurisdiction to sign and settle the case later than January 12th.

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Thomas Daugherty and others against Thomas D. Hedrick and others. There was judgment for defendants, and plaintiffs bring error. Dismissed.

Bird & Pope, T. J. Madden, and Lewis G. Ferril, for plaintiffs in error. Ogg & Scott and John T. Little, for defendants in error.

**PER CURIAM.** This was an action in ejectment, the plaintiffs basing their claim upon an old Indian title. It seems probable that the judgment of the district court should be affirmed upon the theory that they are precluded from recovery by reason of laches, under the authority of *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243. It appears, however, that the final order sought to be reviewed was made on September 24, 1902, when an order was made giving plaintiffs 90 days in which to serve a case, allowing 10 days to suggest amendments, and requiring five days notice of settlement to be given, but otherwise making no provision as to the time of settlement. The term of office of the trial judge expired January 12, 1903, and, although he was his own successor, within the rule stated in *Mowery v. Bank* (Kan.) 72 Pac. 539, he had no jurisdiction to settle and sign the case later than January 12th.

The proceeding in error is therefore dismissed.

(69 Kan. 738)

**BRINKMEIER v. MISSOURI PAC. RY. CO.**

(Supreme Court of Kansas. July 7, 1904.)

**INJURY TO SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.**

1. In an action against a railroad company for damages resulting from an injury caused by a patent defect in the original construction of the coupling apparatus of one of its own cars, notice to the company of the defect will be inferred.

2. A railroad brakeman whose duty requires him to couple cars does not assume the risk of injury from a defective coupling apparatus, unless he knows, or from all the circumstances should know, the danger arising from its use.

3. Contributory negligence in the use of a defective coupling apparatus cannot be imputed to a railroad brakeman merely because he knows it to be defective. In order to bar recovery, the danger of using the imperfect appliance must be so great and so apparent that a person of ordinary prudence would not encounter it.

4. If a workman have the choice of several ways in which to do his work, he will be negligent if he reject those which are safe for one which is dangerous; but he may adopt any one which a reasonably prudent man would adopt, and not be negligent, although others may be absolutely safe.

5. Under all the circumstances of this case, the propriety of the conduct of a brakeman in using his foot to control a refractory drawbar while attempting to make a coupling should have been left to the jury to determine.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by Henry Brinkmeier against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. V. Ferguson, for plaintiff in error. J. H. Richards and C. E. Benton (David Smyth, of counsel), for defendant in error.

**BURCH, J.** While serving the defendant in the capacity of brakeman, the plaintiff was injured in an attempt to couple freight cars. In an action for the recovery of damages a demurrer to his evidence was sustained, and the railroad company justifies the conduct of the trial court upon three grounds, viz.: That it had no notice of the defect in the appliance causing the injury; that the hazard was one incident to plaintiff's employment, and therefore assumed; and that the plaintiff was guilty of contributory negligence.

The defective appliance was a part of the equipment of one of the defendant's own cars, and the defect itself was alleged to be one originating in faulty construction. If this be true, proof of notice was unnecessary. It was the duty of the defendant to furnish a properly constructed coupling apparatus. Whether the defendant built the car itself, or employed others to do so, or purchased it of reliable car dealers, it was bound to know the condition of the coupling contrivance when the car was put into serv-

¶ 4. See *Master and Servant*, vol. 34. Cent. Dig. § 745

ice, and it will not now be heard to say that it had no knowledge of patent original structural defects. In 20 A. & E. Encycl. of L. (2d Ed.) 93, occurs the following accurate summation of the authorities: "Where the defect through which the injury occurs is in the original construction of the appliance or instrumentality, notice thereof to the master is unnecessary. In case of structural defects, knowledge thereof by the master will be inferred. This doctrine is no more than an application of the general rule that it is the master's duty to exercise ordinary care in providing tools, machinery, and appliances that are reasonably safe." The language of Chief Justice Breese regarding the duty of a municipality to know the character of a structure it supplies for the use of its inhabitants is pertinent to the attitude of a private corporation toward its employes. He said: "For the proper construction of this sidewalk, it is not denied the town authorities were responsible. They should see to it that such structures are properly made and reasonably safe, and they must be kept so. They, being the projectors of them and the builders of them, are in law held to a knowledge of their original condition. It would be absurd to say they must have notice of the original defect, when they themselves are the authors of the defect. Why notice to a party of original defects in a work he is bound to make safe and reasonably free from defects? The town being in fault at the outset, no notice was necessary." *Alexander v. Town of Mt. Sterling*, 71 Ill. 366. In the case of *Finnerty v. Burnham*, 205 Pa. 305, 54 Atl. 996, decided in 1903, an injury occurred from the use of a defective chain in the equipment of a crane. The master supplying the crane attempted to justify on the ground that the chain had been purchased of one of the most reputable manufacturers, and placed in stock; that others of a similar kind had been furnished, so that the employe could select any one he desired; and that general instructions had been given to report and have repaired any defects. But the court adopted in full the statement of the law already quoted from the *American & English Encyclopedia of Law*, and further said: "Where a chain is used as an attachment to a crane for the purpose of lifting very heavy weights, the same rule that imposes upon the employer the duty of supplying a reasonably safe and suitable crane requires him to furnish a chain of like character." The defendant cites certain decisions of this court supposed to favor a different doctrine, but their real purport is misapprehended. Only the general formulas of the law relating to notice of defects are referred to in those cases, and the particular rule under consideration was not discriminative.

The plaintiff was injured while attempting to adjust a drawbar with his foot, in order to effect a coupling. His evidence tended

to prove that when properly constructed the drawbar is in the center of the car, and is held in place by heavy timbers on each side of it called "draft timbers." Above the neck of the drawbar is a piece of timber, and below it a strap or plate of iron, both held fast by bolts running through the ends of the draft timbers. The draft timbers should be near enough together to prevent the drawbar from becoming out of line, and, in order to secure a snug fit, a large bolt is passed down from the timber above on each side of the drawbar, between it and the draft timber, and through the plate beneath. The car in question had been constructed without the bolts necessary to prevent the lateral play of the drawbar, and the draft timbers were so far apart that when pushed to one side the head of the drawbar failed to meet squarely the head of the drawbar on the car to be coupled, but passed by it and crushed the plaintiff's foot. A spectator of the accident described the draft timbers as worn and splintered up, but the evidence of that witness, as well as that of the plaintiff, clearly showed the primary defect to be one of construction, and the case should have been submitted to the jury so far as the question of notice to the defendant was concerned.

The contention of the defendant that the plaintiff assumed the risk of injury is based upon his testimony that it was not unusual for drawbars to be out of line, and that it was necessary almost every day for him to put them in place in order to make couplings. But the plaintiff further testified that, so far as he knew, the only result attending the meeting of cars with a drawbar out of line was that they would fail to couple. The drawbar in question was not movable to such an extent that it was obvious it would slip by. There is no evidence that any circumstance of that character had ever been brought to the plaintiff's attention. He was a brakeman, and not a skilled mechanic or scientific car builder. He was not chargeable with greater knowledge of the effect of the relation of pieces and the operation of forces than his daily experience furnished. If the knuckles of the drawbars would still meet and the cars simply recoil, as the plaintiff believed would be the case if the drawbar were not in position, there was no danger, and, without evidence indicating that the erratic action of the drawbar in this case might or should have been anticipated, or that the defendant knew or should have known the danger attending its unforseen conduct, it cannot be said as a matter of law that he contracted to take the risk of such a result. *Railway Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253.

On the general question of contributory negligence, the case of *C. & P. Ry. Co. v. Eversole* (Kan.) 69 Pac. 1126, is controlling. The casualty under consideration is a duplication in all essential respects of the one

there described. The defendant attempts to make a distinction between them by claiming that the couplers did not pass by in this as they did in the Eversole Case. The record, however, is otherwise. On direct examination the plaintiff testified: "Q. Where was your foot, between the lip of the moving car and the knuckle of the other car? A. Yes, sir. Q. Where did the drawbar and the knuckle that was closed on it of the moving car finally stop against the drawbar on the car standing still? A. Right in this position in here. Q. Did it slip by? A. Yes, sir; it threw this drawbar away over. Q. Which way—from you, or towards you? A. From me. It went away over from me." It is true that, before the accident occurred, the plaintiff attempted to adjust the drawbar by hand, and found it would not stay in position. But mere knowledge of a defect does not bar recovery. To establish negligence per se, the danger of using the imperfect appliance must be so great and so apparent that a person of ordinary prudence would not encounter it. Only after the plaintiff's foot had been caught and held did he discover the possibility of the drawbar being thrown so far to one side by the impact of the car that it would pass by the knuckle of the drawbar on the other car instead of meeting it face to face.

The propriety of the plaintiff's use of his foot to push the drawbar into place was a question of fact for the triers of fact, and not a question of law for the court. The defective car was moving so slowly that the plaintiff had ample time to adjust himself to meet its approach in safety. The engine was disconnected, and he had nothing to fear from any sudden or unexpected impulse which might be given to the car. With respect to the method of assisting couplings, the plaintiff testified: "Q. How did you assist? A. Assisted in adjusting the drawbars to the center of the car so that they may make. Q. Well, how did you do that? How did you proceed about it? A. Used my hand or my foot, whichever came handiest to do that work, to shove them over." There was no rule of the company governing the conduct of its brakemen with respect to coupling cars whose drawbars might be out of line. The plaintiff did not know, and was not bound to anticipate, that the drawheads would pass each other, and it is only on the assumption that no man of ordinary prudence would have used his foot to control the refractory bar that plaintiff could be declared to be negligent as a matter of law. This assumption the district court was not warranted in making.

There was evidence that drawbars were sometimes wedged into place by pieces of wood, or stones or cinders, if any were at hand. The law is plain that a plaintiff may not recover for injuries resulting from his voluntary choice of an unsafe method of doing his work when a safe one is open to him.

*Carrier v. Railway Co.*, 61 Kan. 447, 59 Pac. 1075. But to be unsafe a method must be such that a reasonably prudent man would not, under all the circumstances, adopt it. The question must always finally be resolved with reference to that standard. If several ways be open, and one of them be such that a reasonably prudent man would choose it, no negligence can be imputed to the choice, even if all the others be absolutely safe. In this case the plaintiff might have allowed the cars to meet and rebound, and, after they had come to rest, might have blocked the drawbar and waited for the engine to return to make the coupling. Then he would not have been injured. Or he might have refused to couple the car until it had been repaired, or he might have left the service of the company. Then he would not have been injured. But if a reasonably prudent man would have attempted to make the coupling, and if, in doing so, such a man would have used his foot in a particular way, the plaintiff could follow the same course and not be negligent; and, unless he be guilty of negligence, he may recover—the elements of a cause of action in his favor being proved.

The district court having undertaken to determine as matters of law questions of fact which should have been submitted to the jury, its judgment is reversed, and the cause is remanded with direction to grant the plaintiff a new trial. All the Justices concurring.

#### STATE v. FRANKLIN.

(Supreme Court of Kansas. July 7, 1904.)

CRIMINAL LAW—EVIDENCE—OTHER CRIMES—ROBBERY—CONVICTION OF ATTEMPT.

1. In a criminal case, facts relevant to the issue may be given in evidence for the purpose of establishing guilt, although they tend to prove the commission by the defendant of another independent crime.

2. Under an information charging robbery in the first degree, the defendant may be convicted of an attempt to rob.

3. In a criminal prosecution under an information charging an offense consisting of different degrees, it is the duty of the court, if the evidence warrant, to instruct upon the law of an attempt to commit the crime charged.

(Syllabus by the Court.)

Appeal from District Court, Rush County; Chas. E. Lobdell, Judge.

Henry Franklin was convicted of robbery, and appeals. Affirmed.

G. R. McKee, for the State. C. C. Coleman, Atty. Gen., and J. W. McCormick, for appellee.

BURCH, J. The appellant was charged with robbery, and convicted of an attempt to rob. The property alleged to have been taken was money. The crime was committed at night. On the preceding afternoon and evening, the appellant was observed to be gambling, and upon quitting play he declar-

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 823.



ed he was "broke." The next day he had money. These facts were proved, and the claim is made that it was error to establish the crime of gambling against him.

The appellant was transient in the locality, and his depleted financial condition furnished a motive for the crime. The circumstances narrated were strongly indicative of guilt, and could not be excluded merely because they tended to prove another independent crime. *State v. Folwell*, 14 Kan. 105; *State v. Adams*, 20 Kan. 311, 319; *State v. Stevens*, 56 Kan. 720, 722, 44 Pac. 992. "The testimony was competent, not to prove another offense, but as circumstances to show the prisoner's guilt." *Lewis v. State*, 4 Kan. 296, 309. The authorities upon this subject are classified and reviewed in an elaborate note found in 62 L. R. A. 193.

The information alleged that the assault was made with a pistol. When arrested on the day following the crime, the defendant had a pistol. The weapon was taken by the officer, who produced it at the trial. It corresponded, as far as the verbal description in the record extends, with the pistol held by the appellant while conducting the felonious enterprise, and hence was properly admitted in evidence. Besides this, the record shows that the pistol had been passed into the hands of the jury, without objection, before it was finally offered in evidence. Therefore the offer was in fact a formal matter, and the appellant cannot complain of it.

The information charged the robbery of one W. E. Cronkrite, who was not a witness at the trial. On the afternoon preceding the offense, Cronkrite had drawn from the bank some \$30, which he placed in a tobacco pouch, covered with tobacco, and then put into his pocket. This pouch was taken from Cronkrite's pocket while he stood covered by appellant's revolver. The appellant moved for a discharge upon the state's evidence because it failed to show that the property described in the information was taken, and the same defect in the evidence is urged upon this appeal. The court denied the motion, and, after instructing upon the crime for robbery, submitted to the jury the law relating to an attempt to rob. The appellant assails this instruction on the ground that a complete offense of robbery was proved, if any crime were proved. The two positions are inconsistent, but the fact that a fair argument may be made for each one shows the wisdom of the trial court's action. There was no direct evidence that Cronkrite's money was taken, but it would not be unreasonable to infer that it was. Probably it remained in the pouch where he placed it, but he appeared to be anxious for its security, and may have changed its place of concealment, or left it with some one for safe-keeping. The question of fact was pre-eminently one for the jury.

The crime of robbery is divided by the statute into three degrees. Section 121 of the

Code of Criminal Procedure provides that, "upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offence." True, there may be a separate substantive offense of an attempt to rob, but in the case of *State v. Decker*, 36 Kan. 717, 721, 14 Pac. 283, 286, it is said: "Even where an indictment or information charges the full commission of an offense, without the slightest intimation that there was any failure on the part of the defendant in the perpetration thereof, or any prevention or interception in executing the same, still he may be convicted, under section 121 of the Criminal Code, of attempting to commit the offense." In the case of *State v. Frazier*, 53 Kan. 87, 90, 36 Pac. 53, 59, 42 Am. St. Rep. 274, the same doctrine is declared. Whenever the evidence warrants, it is the duty of the court to instruct upon inferior degrees of the crime charged. So, if the evidence warrant, the law of an attempt to commit the crime charged should be given. The appellant's challenge of the evidence directed the court's attention specially to the possible failure to prove a completed crime. Therefore the instruction was necessary, if the court were to obey the mandate of the statute, and state to the jury all matters of law necessary for their information in giving their verdict. That the jury gave the appellant the benefit of the doubt, and found him guilty of an attempt only, is greatly to his advantage, and not at all to his detriment.

The record is free from error, and the judgment is affirmed. All the Justices concurring.

(60 Kan. 632)

#### BOWMAN et al. v. HAZEN.

(Supreme Court of Kansas. July 7, 1904.)

#### RECEIVERS — APPOINTMENT — VALIDITY — COLLATERAL ATTACK — PERSONAL LIABILITY.

1. An order of court appointing a receiver to take custody of property involved in litigation which was unwarranted and erroneous, but not absolutely void, is not open to collateral attack.

2. The orders of a court, purporting to vest a receiver with the authority and control of property and funds not involved in the litigation in which the receiver was appointed, are absolutely void, and can be collaterally attacked at any time by any one in any proceeding where their validity is in issue.

3. The receiver who takes such property and funds under the void orders without the consent and contrary to the wishes of the owner, and those who procure the orders to be made and co-operate with him in the wrongful seizure and appropriation, are all trespassers, and are liable for the property and funds so wrongfully taken, with interest.

4. Those who wrongfully seize property and funds cannot excuse themselves by showing that the use which they made of it was, to some extent, beneficial to the wronged party. Such

¶ 2. See *Receivers*, vol. 43, Cent. Dig. § 102.

trespassers cannot compulsorily constitute themselves the disbursing agents of the owner, nor can they make themselves his debtor by paying his obligations without his request or consent.

(Syllabus by the Court.)

Error from District Court, Douglas County; C. A. Smart, Judge.

Action by W. R. Hazen against Homer O. Bowman and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

See 63 Pac. 274; 68 Pac. 1133.

Action by W. R. Hazen to recover rents alleged to have been wrongfully and unlawfully collected through a void receivership by Homer C. Bowman, M. W. Van Valkenburg, Josie Webb, and Millie Nichols. At the trial the court made the following findings of fact and conclusions of law:

#### "Findings of Fact.

"(1) This action is prosecuted by the plaintiff against the defendants to recover the rents collected by the defendants from October 13, 1900, to June 1, 1902, on the following described real estate: The undivided one-half of lot No. 149, the south ten feet of lot No. 147, and the north ten and one-half inches of lot No. 151, the undivided half of lot No. 165, the whole of lot No. 167, and the north twenty feet of lot No. 169, all on Kansas avenue, in the city of Topeka, Shawnee county, Kansas.

"(2) For many years prior to the commencement of any action against John S. Branner by either Josie Webb or Millie Nichols, said John S. Branner had been in the actual and peaceable possession of the whole of lot No. 165, lot No. 167, the north twenty feet of lot No. 169, the undivided half of lot No. 149, the south ten feet of lot No. 147, and the north ten and one-half inches of lot No. 151, and collecting the rents and profits from said real estate; claiming to be the owner of the same, and, at the time of the appointment of M. W. Van Valkenburg as receiver, said Branner was in the peaceable possession of all said real estate, and collecting the rents and profits of the same, except the undivided half of lot No. 165, which had been turned over to said Josie Webb and Millie Nichols in pursuance of a written agreement hereinafter referred to; all of the property at the time being occupied by tenants of said John S. Branner.

"(3) On October 13, 1900, and for some time prior thereto, and since said date, up to and including June 1, 1902, the plaintiff was the owner of the real estate described in finding No. 1, which property he purchased from John S. Branner on May 8, 1900.

"(4) On April 24, 1894, Josie Webb, one of the defendants herein, commenced an action in the district court of Shawnee county, Kansas, against John S. Branner, to recover a one-fourth interest in lot No. 165 on Kansas avenue, in the city of Topeka, and for rents and profits, which action, by proper orders

and proceedings, was transferred to Jackson county, Kansas, and became cause No. 3,622 on the records of the district court of said Jackson county, Kansas, and which cause was duly tried in said court on July 2, 1898, and verdict rendered and judgment entered finding and adjudging Josie Webb to be the owner and entitled to the possession of an undivided one-fourth of said lot No. 165, and for \$4,500 rents and profits.

"(5) On March 29, 1899, upon application of Josie Webb, plaintiff in said cause No. 3,622, at chambers, and without notice, the judge of that court appointed the defendant M. W. Van Valkenburg receiver, and he at once qualified and entered upon the discharge of his duties. By the order appointing said M. W. Van Valkenburg as such receiver, he was directed to immediately take charge of the undivided one-half of lot No. 149, the south ten feet of lot No. 147, and the north ten and one-half inches of lot No. 151, the undivided one-half of lot No. 165, all of lot No. 167, and the north twenty feet of lot No. 169, on said Kansas avenue, Topeka; to collect the rents due from the tenants of said property; to sue for and recover any of such rents in any court of competent jurisdiction; to make all contracts for the leasing and letting of the said premises; out of the rents collected to pay taxes due or to become due, and interest on all valid liens against said property; and to pay insurance and all necessary and proper repairs. It was further ordered that the defendant in that action, John S. Branner, his agents and attorneys, and all persons acting for him or in his behalf, be strictly enjoined and restrained from in any wise interfering with the discharge by the receiver of the duties imposed upon him by said order.

"(6) Prior to March 29, 1899, there had been begun an action in the district court of Shawnee county, Kansas, which by proper order had been transferred to the district court of Jackson county, Kansas, for trial, wherein Millie Nichols, a sister of Josie Webb, was the plaintiff, and said John S. Branner was the defendant, which action became cause No. 3,623 upon the record of said district court of Jackson county, Kansas, and which action was tried on November 26, 1898, and a judgment duly rendered in favor of said Millie Nichols and against John S. Branner, adjudging said Millie Nichols to be the owner and entitled to the possession of an undivided one-fourth of lot No. 165 on Kansas avenue, in the city of Topeka, Kansas, and for \$4,742.20 rents and profits.

"(7) On March 31, 1898, the said Josie Webb and Millie Nichols commenced an action in the district court of Shawnee county, Kansas, against said John S. Branner, to recover possession of an undivided one-half of lot No. 167, and an undivided one-half of the north twenty feet of lot No. 169, and for rents and profits. By proper order said cause was transferred to the district court of

Jackson county, Kansas, for trial, and became cause No. 3,624 upon the records of said court. On September 5, 1900, the plaintiff in this action, William R. Hazen, upon his own application, became a party defendant in said cause, and asserted a claim of title to lot No. 167 and the north twenty feet of lot No. 169 under deed from John S. Branner. The said cause was tried on January 30, 1901, and a judgment duly rendered in favor of Josie Webb and Millie Nichols, plaintiffs, and against John S. Branner and William R. Hazen, defendants, for the possession of an undivided one-half of said lot No. 167, and an undivided one-half of the north twenty feet of lot No. 169, on Kansas avenue, Topeka, and other land, and for costs amounting to \$843, and a further judgment against John S. Branner for \$12,196.94.

"(8) Said causes Nos. 3,622, 3,623, and 3,624 were each actions in ejectment, and for rents and profits.

"(9) On August 15, 1898, while said causes Nos. 3,622, 3,623, and 3,624 were either being reviewed, or being prepared for review, by the Supreme Court of Kansas, the plaintiffs in said action No. 3,624 applied to the judge of the district court of Jackson county, Kansas, for the appointment of a receiver to take charge of the real estate involved in said action, and on said day said application was by said judge denied upon the condition that the defendant would within fifteen days therefrom execute a good and sufficient bond in the sum of \$10,000, conditioned that said defendant John S. Branner should not during the pendency of that action commit waste, or suffer waste to be committed, on the premises described in plaintiffs' petition in said cause No. 3,624, and would keep the building on said premises insured in a reasonable amount in some good and responsible insurance company or companies, and would properly and diligently look after and care for said property, and the rental of the same, and use due diligence in the collection of the rents therefrom, and keep a correct account of all rents received from said real estate, and further conditioned that said defendant would not sell or dispose of any of said real estate, or incumber the same, or any part thereof, and that he would apply the rents received from said property to the payment of reasonable insurance on the same, taxes when the same became due and payable, and in keeping the property in repair, and in the payment of interest on the mortgage incumbrance on said real estate, and interest on a certain judgment which was then a lien upon said real estate, and the surplus of said rent, if any there should be, said defendant would apply the same toward the payment of the principal of said judgment, or upon the mortgage indebtedness upon said real estate, and that said defendant would not permit any further liens to accrue upon said real estate, and would not permit said real estate to be sold for the payment of any of

the mortgages or judgments against the same. Within the time above specified, said John S. Branner caused to be executed the bond required by said order, which bond was on the 27th day of August, 1898, approved by the clerk of said court, and the judge thereof, and which said bond was still outstanding and in full force and effect on the 29th day of March, 1899.

"(10) On December 21, 1898, the said John S. Branner and the said Josie Webb and Millie Nichols entered into a contract in writing, which contract is in words and figures as follows:

" 'This agreement made and entered into this 21st day of December, 1898, by and between John S. Branner, party of the first part, and Josie Webb and Millie Nichols, parties of the second part:

" 'Witnesseth, that whereas, said party of the first part claims to be the owner of the whole of lot No. one hundred and sixty-five (165) on Kansas Avenue, in the City of Topeka, in Shawnee county, Kansas,

" 'And whereas, said parties of the second part claim to be the owners of the undivided one-half of said real estate,

" 'And, whereas, in the district court of Jackson county, Kansas, said Josie Webb recovered by the consideration of said court a judgment for the undivided one-fourth ( $\frac{1}{4}$ ) of said real estate, in an action pending in said court, in which Josie Webb was plaintiff and said John S. Branner was defendant,

" 'And, whereas, said Millie Nichols, in said court, by the consideration of said court recovered a judgment against said John S. Branner for an undivided one-fourth ( $\frac{1}{4}$ ) of said real estate,

" 'And, whereas, said John S. Branner is now having prepared a case-made for the supreme court of the State of Kansas, to review the decision of said district court of Jackson county, in the case of Josie Webb v. said Branner, as well as in the case of Millie Nichols v. said Branner,

" 'And, whereas, said Josie Webb and Millie Nichols are claiming the right to the undivided one-half of the rents and profits of said real estate, which rights to said rents and profits said party of the first part denies,

" 'Now, therefore, to avoid litigation in reference to the future rents and profits, and to avoid annoyance or any inconvenience to the tenants occupying said premises,

" 'It is hereby agreed between the parties hereto that each party shall pay one-half of the taxes for subsequent years during the continuance of this contract.

" 'It is further agreed, that, whereas, there is now a plumbing bill for work done upon said premises, which is unpaid, in the sum of one hundred and twenty dollars (\$120.00), of which sum John S. Branner is to pay Ninety dollars (\$90.00) and Josie Webb and Millie Nichols thirty dollars (\$30.00).

" 'The party of the first part shall have the

right to collect one half of the rents from said premises, and the parties of the second part the other half, from the 1st day of January, 1899, and during the continuance of this contract, it being distinctly understood that this agreement is to continue only until said cases shall be reviewed by the supreme court, and decided in said court.

"It is further agreed that any necessary repairs or expenses pertaining to said real estate accruing after January 1, 1899, shall be paid, one-half by each party hereto.

"It is hereby distinctly understood and agreed between the parties hereto that this agreement is made as a matter of convenience, and to avoid litigation, and shall in no way in the future prejudice either party, or in any manner affect their rights in said litigation.

"And if it shall be hereafter determined that the parties of the second part were not entitled to the rents and profits of said premises that said parties of the second part will repay to the party of the first part all rent by them received over and above the amount expended for taxes and expenses pertaining to said building after January 1, 1899, together with interest upon the same computed annually.

"In witness whereof the parties have hereunto set their hands by their duly appointed agents this 21st day of December, A. D. 1898. Josie Webb, Millie Nichols, by Keeler & Hite, their agents and attorneys. John S. Branner, by John S. Branner, Jr., his agent."

"That immediately upon the execution of said contract said Josie Webb took possession of an undivided one-fourth of said lot No. 165, and said Millie Nichols took possession of an undivided one-fourth of said lot No. 165, on Kansas avenue, Topeka, and from that time hitherto they each held possession of said undivided one-fourth, and collected the rents accruing therefrom, agreeably to the terms of said contract, and said John S. Branner thereafter made no claim to said undivided half, or to the rents and profits thereof.

"(11) On January 5, 1900, in cause No. 3,622, and upon application of Josie Webb and Millie Nichols, the receiver was ordered and directed by the district court of Jackson county, Kansas, to deliver to said Josie Webb and Millie Nichols the possession of the undivided one-half of lot No. 167, and the north twenty feet of lot No. 169, which real estate had theretofore been adjudged to belong to said Josie Webb and Millie Nichols in said cause No. 3,624, which order was by said receiver obeyed, and said Josie Webb and Millie Nichols at once took possession of said real estate, and held the possession thereof continuously down to and including June 1, 1902, and afterwards.

"(12) On April 4th, 1899, the defendant John S. Branner, in cause No. 3,622, filed his motion in said district court of Jackson coun-

ty, Kansas, to vacate the order appointing M. W. Van Valkenburg as receiver, for the following among other reasons, 'That the court at the time of appointing said receiver had no jurisdiction of the subject-matter or property included in said order,' which motion was by the court overruled.

"(13) On September 15, 1899, the defendant John S. Branner served written notice upon Josie Webb, Millie Nichols, and M. W. Van Valkenburg to the effect that he objected and protested against the making of any improvements on lot No. 147 and lot No. 149, for the reason that said receiver had no power or authority to make such improvements, and that the court or judge of the district court of Jackson county, Kansas, had no power, authority, or jurisdiction to order or direct any such improvements to be made.

"(14) On February 23, 1900, in said cause No. 3,622, the defendant John S. Branner moved said court for an order discharging all of the property from the custody of the receiver, and for an order directing said receiver to turn the same over to the said defendant, and pay to him all of the money which had been received by said receiver as rents and profits of said real estate, for the reason, among others, that said receivership was being continued and said property held by said receiver without authority of law. On the same day, February 23, 1900, in said cause No. 3,622, said John S. Branner moved said court to vacate and set aside and hold for naught the order theretofore made appointing M. W. Van Valkenburg as said receiver, or, in the event that the court should refuse to make such order, then that said receiver be ordered and directed to release from his charge and custody all the real estate then held by him and in his possession, except said lot No. 165, the same being the only real estate involved in said cause No. 3,622, which motions were by the court overruled and denied; that on March 3, 1900, in said cause No. 3,622, the said defendant John S. Branner moved said court to turn over to him the undivided one-half of lots Nos. 147, 149, the north ten and one-half inches of 151; also all of lot No. 167 and the north twenty feet of lot No. 169, all on Kansas avenue, Topeka, for the reason, among others, that the order appointing said receiver and directing him to take charge of said property was without authority of law, and that said court had theretofore by an order directed said receiver to deliver to Josie Webb and Millie Nichols such portions of said real estate as had theretofore been adjudged to belong to them, which order had been by the said receiver carried out; that on the same day, March 3, 1900, in said cause No. 3,622, the said John S. Branner moved the said court for an order discharging said receiver for the reason that 'said receiver was appointed without authority of law, that the appointment was illegal, and that said receivership had been conducted under the

orders and directions of said court, to the great injury and damage of the defendant, and without authority of law,' which motions were by the said court overruled.

"(15) That neither said John S. Branner nor the plaintiff, W. R. Hazen, at any time acquiesced in the order or orders appointing and continuing said receivership, but from April 4, 1899, to the time of the discharge of said M. W. Van Valkenburg and H. C. Bowman as receivers, continually attacked said receivership and the order appointing said receivers by many written motions and protests, and always upon the ground, among others, that the district court of Jackson county, or the judge thereof, had no jurisdiction to appoint said receivers, and that such appointment was null and void.

"(16) On March 31, 1899, the defendant M. W. Van Valkenburg, acting under the appointment of March 29, 1899, served written notice on the tenants occupying said premises to pay no rent to said Branner, and immediately took possession and control of Branner's undivided half of lot No. 149, the south ten feet of lot No. 147, and the north ten and one-half inches of lot No. 151, and Branner's half of lot No. 165, and the whole of lot No. 167, and the north twenty feet of lot No. 169, and thereafter collected the rents and profits from all of said real estate until the 5th day of January, 1900, at which time said M. W. Van Valkenburg, under the orders and directions of the district court of Jackson county, delivered and turned over to Josie Webb and Millie Nichols the undivided half of said lots 167 and the north twenty feet of 169, and thereafter, until November 1, 1900, was in possession and control, and collected the rents and profits, of the undivided half of lot No. 149, and the south ten feet of lot No. 147, and north ten and one-half inches of lot No. 151, and the undivided half of lots No. 167, and of the north twenty feet of 169, all on Kansas avenue. Said Josie Webb and Millie Nichols received the rents and profits of the undivided half of all said property from and after the 5th day of January, 1900. That said Van Valkenburg continued in the active control and collection of the rents and profits of said real estate until the defendant H. C. Bowman was appointed as a joint receiver with said Van Valkenburg, as hereinafter found.

"(17) From the order of said court refusing to discharge the said receiver, and release from his custody the real estate, the defendant John S. Branner, in said cause No. 3,622, prosecuted a proceeding in error to the Kansas Court of Appeals, which court reversed the decision of the district court of Jackson county. 10 Kan. App. 217, 63 Pac. 274. By proper proceedings said cause was certified to the Supreme Court of Kansas, which court, upon argument, in all things affirmed the decision of the Kansas Court of Appeals. 65 Kan. 830, 68 Pac. 1133.

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"(18) On October 18, 1900, the defendant Homer C. Bowman was by the judge of the district court of Jackson county, Kansas, at chambers, appointed a receiver in said cause of Josie Webb v. John S. Branner (No. 3,622), and was directed 'to act as such receiver jointly with M. W. Van Valkenburg'; that said Homer C. Bowman at once qualified and entered upon the discharge of his duty under such appointment.

"(19) That at the time of said appointment said M. W. Van Valkenburg was in the possession and control and collecting the rents and profits of the undivided half of lot 149, and of the south ten feet of lot 147, and north ten and one-half inches of 151, and of the undivided half of lots 165 and 167, and the north twenty feet of lot 160, on said Kansas avenue, and the defendants Josie Webb and Millie Nichols were collecting and receiving rents and profits of the other undivided half of all said real estate, being the part they claimed to be the owners of.

"(20) Shortly after the appointment of H. C. Bowman to act jointly with M. W. Van Valkenburg, he was notified by plaintiff, W. R. Hazen, that he, the said Hazen, claimed to be the owner of said real estate, and that he would hold said Bowman and all persons connected with said receivership responsible for all rents collected, on the ground that said receivership was void, and the court had no jurisdiction to appoint a receiver, and on January 1, 1901, the plaintiff, W. R. Hazen, notified the defendants H. C. Bowman and M. W. Van Valkenburg, in writing, of the decision of the Kansas Court of Appeals in reference to said receivership, and notified said parties that he was the owner of said real estate, and would hold them responsible for any rents that they might collect as receivers having charge of said property, and rents that they had theretofore collected, and notifying said parties not to collect any further rent of said premises, and that if they did he would hold them responsible for any such rent so collected.

"(21) On July —, 1901, the defendant Homer C. Bowman made a written application to the judge of the district court of Jackson county, Kansas, for advice regarding such receivership. He entitled such application as follows, 'Josie Webb and Millie Nichols, Plaintiffs, v. John S. Branner and W. R. Hazen, Defendants (No. 3,624)', as also the notice of such application served upon said parties, on which application the said judge on October 14, 1901, made an order giving certain directions to said receiver, which order was made in cause No. 3,622 (Josie Webb v. John S. Branner).

"(22) On October 19, 1900, when the said Homer C. Bowman was appointed receiver in said cause No. 3,622, Josie Webb and Millie Nichols were in the undisputed possession of all the real estate that had theretofore been adjudged to be their property, or the property of either of them, and were

then collecting the rents thereof, and all of the real estate at that time held by M. W. Van Valkenburg as receiver, and taken possession of by Homer C. Bowman after his appointment, was real estate belonging to W. R. Hazen, purchased by him from said John S. Branner as aforesaid.

"(23) On July 17, 1899, the said district court of Jackson county made an order in said cause No. 3,622 directing M. W. Van Valkenburg, the receiver, to pay to John S. Branner, the defendant in that cause, out of the rents in his hands, \$172, and to thereafter pay to him out of such rents \$65 per month. The said court made a further order directing said receiver to pay to said John S. Branner \$200. The said payments of \$65 per month continued until October 10, 1900. All of said payments were made by said Van Valkenburg to said John S. Branner out of the rents accruing from the real estate belonging to said Branner.

"(24) That within the time covered by this action neither the plaintiff, W. R. Hazen, nor John S. Branner, nor any one for them, received any part of the rents and profits of any of the real estate described in plaintiff's petition herein.

"(25) Neither the said John S. Branner nor the said W. R. Hazen ever consented to the appointment of said receivers, or either of them, or acquiesced in or ratified said appointment.

"(26) That, in procuring the appointment of said receivers and the continuance of said receivership in the case of Josie Webb v. John S. Branner, the defendant Millie Nichols co-operated with her sister Josie Webb, and, by agreement between said Josie Webb and Millie Nichols, each was to participate equally in all the benefits accruing to either in all of the litigation between either said defendants and John S. Branner or either of said defendants and plaintiff, W. R. Hazen, and each were to bear an equal proportion of all the expenses, whether said profits or expenses accrued in either of said actions or proceedings against said John S. Branner or plaintiff, W. R. Hazen.

"(27) The defendant M. W. Van Valkenburg collected no rents from any of said real estate after October 18, 1900.

"(28) On September 25, 1902, the district court of Jackson county, Kansas, made an order in cause No. 3,624 of the records of said court purporting to discharge said Bowman as receiver, and finding that he had fully and faithfully performed all his duties as such receiver, and had fully accounted for and disposed of all receivership funds pursuant to the order of said court. No order has ever been made in cause No. 3,622 discharging said Bowman or adjusting his accounts.

"(29) In cause No. 3,950 on the records of the district court of Jackson county, Kansas, wherein W. R. Hazen was plaintiff, and the defendants in this cause and others were

defendants, the same being an action to partition the real estate described in the plaintiff's petition herein, the court found as one of its findings of fact that said W. R. Hazen, in procuring the conveyance of the real estate described in plaintiff's petition herein, on May 8, 1900, from John S. Branner, fraudulently attempted and intended thereby to hinder and delay or defeat Josie Webb and Millie Nichols in the collection of their judgments against John S. Branner. But in the judgment rendered in said cause it was by said court adjudged and decreed that said W. R. Hazen was the owner of an undivided one-half of the south ten feet of lot No. 147, and the undivided half of lot No. 149, and the undivided half of the north ten and one-half inches of lot No. 151, and of the undivided half of lot No. 165, and of the undivided half of lot No. 167, and of the undivided half of the north twenty feet of lot No. 169, and other lands subject to certain mortgage liens and the judgment liens of Josie Webb and Millie Nichols.

"(30) No part of the rents collected within the time covered by this suit was paid out by reason of any consent, acquiescence, or approval on the part of the plaintiff herein, and was disbursed with full knowledge that the plaintiff was denying the right of the defendants to collect or disburse said rents, and that said plaintiff was prosecuting proceedings in court to set aside said receivership on the ground that the court had no jurisdiction over the subject-matter, and that the order appointing said receiver was void.

"(31) From October 18, 1900, to June 1, 1902, the defendant Homer C. Bowman, acting under the said order appointing him a receiver in said cause No. 3,622, collected from the real estate so belonging to the plaintiff, W. R. Hazen, rents amounting to \$5,383, of which sum he collected for rents accruing from the undivided one-half of lot No. 165 so belonging to W. R. Hazen \$1,375.63, and the balance from the other property described in the petition, a statement of which is as follows: [Statement omitted.]

"(32) From the time of the appointment of Homer C. Bowman up to June 1, 1902, he expended under the orders of the court that appointed him, upon lot No. 165, in paying taxes, insurance, repairs, interest on incumbrances, janitor's services, and other necessary expenses in and about said building, \$791.84, and upon the other property \$3,055.80, a statement whereof is as follows: (Statement omitted.)

"(33) The reasonable value of the services of said Homer C. Bowman in caring for and managing said lot No. 165 was \$200.

"(34) By an order made in cause No. 3,624 by the district court of Jackson county, Homer C. Bowman was directed to pay \$700 of the judgment rendered therein against W. R. Hazen and John S. Branner, which sum he paid.

**"Conclusions of Law.**

"(1) The appointment of M. W. Van Valkenburg as receiver in cause No. 3,622 was void as to all real estate described in the order of appointment, except lot No. 165, as the court had 'no power to appoint a receiver for other lands of the defendant not involved in the suit.'

"(2) Such appointment as to lot No. 165 was erroneous, but not void.

"(3) The appointment of Homer C. Bowman as receiver was auxiliary to the appointment of M. W. Van Valkenburg, and was void as to all real estate except lot No. 165, and as to that it was erroneous, but not void.

"(4) The defendants herein, Homer C. Bowman, Josie Webb, and Millie Nichols, should be charged with the receipt of \$5,383, with interest, and should be credited as follows:

Expenses on lot No. 165.....	\$ 791 84
Services .....	200 00
Amount paid on judgment of \$700 against Hazen .....	383 79

Total ..... \$1,375 63

"(5) Interest should be computed upon the money received for rents for all property except lot No. 165, from the date of receipt.

"(6) Plaintiff should have judgment against all the defendants, except M. W. Van Valkenburg, principal and interest to date, for \$4,127.49, and for costs.

"(7) M. W. Van Valkenburg should have judgment for costs."

Exceptions were taken to the findings of fact and conclusions of law by the defendants, and the plaintiff excepted to the third conclusion of law so far as it pertained to lot No. 165, and to the fourth conclusion of law so far as the same allowed any credits to the defendants. Judgment was rendered in favor of the plaintiff, Hazen, against Josie Webb, Millie Nichols, and H. C. Bowman, in the sum of \$4,127.59. Each of the parties alleges error.

Henry Keeler, Clifford Histed, and Rossington, Smith & West, for plaintiffs in error. A. W. Benson and W. R. Hazen, for defendant in error.

JOHNSTON, C. J. (after stating the facts). This is a collateral attack on the appointment and action of receivers, and, to recover from them and those at whose instance they were appointed and acted, it must appear that they collected the rent money without authority, and that their action, to that extent, was absolutely void. The history of the case, and the facts upon which the trial court based its judgment, are included in the foregoing statement, and they are so elaborately and clearly stated as to render a restatement and discussion of them unnecessary. Although some complaint is made, it may fairly be said that the testimony in the record substantially supports all the material findings. The findings disclose that, in the action in which the receiver was appointed, nothing was involved

but the title of lot No. 165, on Kansas avenue, in the city of Topeka. The title of Branner, who was Hazen's grantor, to one-half of the lot, was not disputed, and the only controversy was whether Josie Webb and Millie Nichols owned the remaining half, and that part they ultimately recovered. In that case the decision in the trial court had been given in their favor, and they had acquired possession of their shares in the lot when the receiver was appointed. The trial court undertook to vest the receiver with the custody of other valuable property which was in no way involved in the action wherein the appointment was made. Just why the receiver was given possession of Branner's half of lot No. 165, when his right to it was conceded, is not easily understood; but, when the court undertook to reach out and take custody and control of property which was not the subject-matter of the controversy, it went outside of its appointed sphere, and its orders in respect to such property were nullities. The court had no more authority over that property than it would have had over the square on which the statehouse stands. The fact that the other real estate, which may be termed the outside property, was or had been in litigation between the same parties, did not enlarge the court's jurisdiction in the case in which the receiver was appointed. The outside property was entirely distinct from that involved in the action wherein the receiver was appointed, and the orders of the court as to the former were in excess of its jurisdiction, and to that extent, at least, absolutely void. This question was directly adjudicated, first in the Court of Appeals, and later when the decision of that tribunal was affirmed in this court. *Branner v. Webb*, 10 Kan. App. 217, 63 Pac. 274; *Webb v. Branner* (Kan. Sup.) 68 Pac. 1133. Since that determination there has been no excuse for contention as to the invalidity of the receivership, so far as the outside property was concerned. The orders appointing and directing the receivers were incurably void, and afforded no protection to the receivers, or those at whose instigation they were acting. Some of the money wrongfully taken from Branner through the medium of the receivership was returned to him by order of court, and because of this it is contended that Branner and his grantee cannot raise the question of invalidity, and that Hazen is precluded from recovering in this action. The money returned to Branner was his own, and at no time did he or Hazen acknowledge the authority of the receiver, or acquiesce in his action. They protested persistently and at every stage of the proceedings that there was no jurisdiction to appoint the receivers, and that their acts were utterly void. As the orders were nullities, they may be attacked collaterally, as well as directly, at any time, by anybody, and in any proceeding where their validity is in issue. In *re Dill*, 32 Kan. 691, 5 Pac. 39, 49 Am. Rep. 505; *Gille v. Emmons*,

58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609; *Whitmore v. Stewart*, 61 Kan. 254, 59 Pac. 261; *Johnson v. Powers*, 21 Neb. 202, 32 N. W. 62; *State v. District Court*, 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300; *Smith v. Los Angeles & P. R. R. Co.*, 98 Cal. 210, 33 Pac. 53; *Staples v. May*, 87 Cal. 178, 25 Pac. 346; *Krelling v. Krelling*, 118 Cal. 421, 50 Pac. 549; *People ex rel. Railway Co. v. Judge*, 31 Mich. 456; *People ex rel. Railway Co. v. Jones*, 33 Mich. 303; *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132; *Thurber v. Miller*, 11 S. D. 124, 75 N. W. 900; *Vila v. Grand Island Electric, etc., Co. (Neb.)* 94 N. W. 136, 63 L. R. A. 791; *Van Fleet's Collateral Attack*, § 16; 17 *Encyc. of Pl. & Pr.* 752.

The orders did not give the receivers even color of authority as to the property not in litigation, and they were therefore trespassers, and are liable for all the moneys unlawfully collected. The plaintiffs in that action, who procured their appointment and aided and co-operated with them in wrongfully taking and appropriating the rents from the outside property, are equally liable, as trespassers, for the wrong done.

It is contended that they should be credited with the disbursements made—especially as much of it was used for the benefit of the owners. Trespassers are not in a position to make such a claim. Those who wrongfully seize and hold the property of another cannot excuse themselves by showing that it was subsequently used for some good purpose, or that the use made of it was, to some extent, beneficial to the wronged party. Such trespassers cannot compulsorily constitute themselves disbursing agents of the one whose funds or property they have wrongfully seized, nor can they make themselves his debtor by paying his debts without his request or consent. It cannot be said that the measure and extent of recovery adjudged by the trial court was erroneous. As tending to sustain the ruling, the following cases are cited: *Shaw v. Rowland*, 32 Kan. 154, 4 Pac. 146; *Hagar v. Haas*, 66 Kan. 333, 71 Pac. 822; *Otis v. Jones*, 21 Wend. 394; *Higgins v. Whitney*, 24 Wend. 379; *Kerr v. Mount*, 28 N. Y. 659; *Wehle v. Butler*, 61 N. Y. 245; *Roff v. Duane*, 27 Cal. 565; *Olsen v. Upsahl*, 69 Ill. 273; *Garrigan v. Knight*, 47 Iowa, 525; *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440.

In his cross-petition in error, Hazen complains of the rulings which denied to him the recovery of \$1,375.63, being the rents collected from lot No. 165. This was done upon the theory that the order appointing receivers as to that property, although erroneous, was not void. The ruling must be sustained. While the application to take possession of Branner's half of the lot, to which the opposing parties made no claim, was without merit, it cannot be said that the court was wholly without jurisdiction in making the appointment. There was joint ownership of the lot

in litigation. The possession given under the agreement was conditional upon the decision to be made in the case by the reviewing court. Aside from the question of paying taxes, repairs might be necessary, and the parties in interest might not be able to agree with respect to the necessity and extent of such repairs. Circumstances can be imagined which afford reason for a receiver in a case of joint ownership of property, the title of which was in litigation, and hence it cannot be said that the court was without jurisdiction, nor that the orders were absolutely void. As to this lot, Hazen can only recover upon the theory of a lack of power in the court to appoint a receiver, and, as that cannot be held, the trial court rightly refused him the rents on that lot.

The judgment of the district court will be affirmed. All the Justices concurring.

#### ROBINS MIN. CO. v. MURDOCK.

(Supreme Court of Kansas. July 7, 1904.)

CORPORATIONS—AUTHORITY OF PRESIDENT—EVIDENCE.

1. The president of a corporation has no authority, by virtue of his office, to bind the corporation by his admission of the indebtedness of such corporation, such admission not being shown to have been made by him while in the business of the corporation out of which the indebtedness grew, or as a part of the res gestæ. Such admission is merely hearsay, and its admission erroneous.

(Syllabus by the Court.)

Error from District Court, Cherokee County; A. H. Skidmore, Judge.

Action by J. C. Murdock against the Robins Mining Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. R. Cowley and E. E. Chesney, for plaintiff in error. S. C. Westcott and Tracewell & Moore, for defendant in error.

CUNNINGHAM, J. The defendant in error was plaintiff below. His petition contained 10 causes of action. The first was for goods sold and delivered by the plaintiff to the defendant corporation. The second, third, fourth, and fifth were for goods sold to the defendant corporation by others, which accounts were alleged to have been assigned to the plaintiff. The sixth, seventh, eighth, ninth, and tenth causes of action were for goods sold by various parties to the Robins Mining Company, a copartnership, the payment for which the petition charged had been assumed by the defendant; it being alleged that the defendant, a corporation created under and by virtue of the statutes of Missouri, had succeeded to all the property of the Robins Mining Company, a copartnership theretofore existing, and verbally agreed to pay all the debts of such copartnership. A witness was called and permit-

¶ 1. See *Corporations*, vol. 12, Cent. Dig. § 1688.



ted to testify what the president of the corporation, more than 18 months after the alleged assumption, said with regard to the action of the corporation in the matter. Judgment was rendered for the plaintiff in the full amount claimed, a motion for a new trial being overruled. The defendant is now here as plaintiff in error to obtain its reversal upon several alleged grounds of error.

There is substantial error in the admission of the evidence as to what the president of the corporation said with regard to the assumption of these debts by the corporation; it was mere hearsay evidence. The officers of a corporation are its agents; their acts and admissions, within the scope of their authority, bind the corporation like the acts and admissions of any other agent. The conditions which would warrant us in holding that the admission of a president bound a corporation are not here shown to exist. His conversation purported to narrate transactions which had occurred some 18 months prior to the time of such conversation, and while engaged in a business not shown to be that of the corporation which he represented; neither was such admission in any way shown to have been authorized by the corporation. The correct rule seems to be well stated in *Clark & Marshall on Private Corporations*, vol. 3, § 728: "The president of a corporation has no authority to act for or bind it by contracts, or otherwise, by virtue of his office, and therefore his admissions or declarations, although made on behalf of the corporation, are not binding upon it or admissible in evidence against it, unless they are expressly authorized by the corporation, or are made in the course of transactions which are within the scope of the authority conferred upon him, and are a part of the *res gestæ*. If the president, however, is intrusted with the general management of the corporation, or the management of a particular transaction, any admission or declaration by him within the scope of his authority is the admission or declaration of the corporation." Many authorities are cited in support of this proposition. The case of *Central Electric Company v. Sprague Electric Company*, 120 Fed. 925, 57 C. C. A. 197, was one in its facts much like the case at bar. It was there said: "Statements of officers of a corporation that the company had agreed to pay the obligations of another corporation whose assets it had acquired were incompetent to show such agreement." Other cases to the same effect are: *Hardwick Savings Bank & Trust Company v. Drenan*, 72 Vt. 438, 48 Atl. 645; *Rumbough v. Southern Imp. Co.*, 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528; *Henry & Co. v. Bank*, 63 Ala. 527; *Johnston v. Loan Ass'n*, 104 Pa. 394; *Hawey v. Railway Co.*, 20 N. Y. 392; *Thompson*, *Law of Corporations*, vol. 4, § 4656. The same principle has been decided by this court in *Dodge v. Childs*, 38 Kan. 526, 16 Pac. 815; *A., T. & S. F. R. R. Co. v. Wilkinson*, 55

Kan. 83, 39 Pac. 1043; *Tennis v. Rapid Transit Co.*, 45 Kan. 503, 25 Pac. 876; *Mo. Pac. Ry. Co. v. Johnson*, 55 Kan. 344, 40 Pac. 641; *A., T. & S. F. R. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286; *Walker et al. v. O'Connell*, 59 Kan. 306, 52 Pac. 894. There was no evidence whatever that the president had had authority conferred upon him in regard to this matter. The burden in this respect rested upon the plaintiff. The management of the affairs of a corporation are in the hands of the directors; there is no presumption that the president has had delegated to him the power to bind his corporation for the payment of the debt of another; neither was the admission testified to connected with the transactions as a part of the *res gestæ*. The court was clearly in error in admitting this evidence.

It is suggested that such portion of the judgment as rests upon the first five counts should be affirmed. It is quite a serious question whether there was any evidence in support of these counts; but, admitting that there was, it would not be proper to carve out of the total amount found due so much as we might suppose was found to exist by reason of the first five counts. The judgment is an entirety. It is all rendered bad because we cannot state how much, if any, of it is good.

Some other errors are counted upon, which we have carefully examined, but find no reason to reverse because of.

For the error above pointed out, the judgment will be reversed, and the cause remanded for farther proceedings. All the Justices concurring.

#### KENNEDY v. KENNEDY. (No. 1,640.)

(Supreme Court of Nevada. July 11, 1904.)

##### NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. In a divorce suit, in which the evidence on which plaintiff had judgment was mainly his own testimony, defendant is entitled to a new trial on the ground of newly discovered evidence; her motion being supported by plaintiff's affidavit, stating he was mistaken in the testimony he gave, specifying the particulars, which embrace the essential facts in the case.

Appeal from District Court, Washoe County; B. F. Curler, Judge.

Action by Thomas Kennedy against Minnie F. Kennedy. New trial was denied to defendant, and she appeals. Reversed.

See 74 Pac. 7.

Norcross & Orr, for appellant. Benj. Curler, for respondent.

FITZGERALD, J. Plaintiff recovered judgment against defendant, dissolving the bonds of matrimony between them. Defendant moved for a new trial on the grounds of newly discovered evidence. The question for determination is, is the newly discovered evidence sufficient to entitle defendant to a new trial? I think it is. The evidence on which

the judgment of divorce was granted was mainly that of the plaintiff. In support of her motion for a new trial, defendant filed an affidavit of the plaintiff, in which he says he was mistaken in the testimony that he gave at the trial; specifying the particulars in which he was mistaken. The particulars specified embrace all the essential facts of the case on which a judgment of divorce could have been granted. Since the plaintiff, under oath, admits that he was mistaken in these facts, it should be taken as true that the newly discovered evidence completely overthrows and nullifies the evidence given at the trial, and on which the judgment of divorce was granted.

The judgment of the trial court denying the motion of defendant for a new trial is reversed, and a new trial of the case is ordered.

TALBOT, J., concurs.

STATE v. ROBERTS et al. (No. 1,656.)

(Supreme Court of Nevada. July 2, 1904.)

JURY—CHALLENGES—GROUNDS—IMPLIED BIAS—FORMATION OF OPINION.

1. Under Criminal Practice Act, § 340 (Cutting's Compilation, § 4305), making the formation or expression of an unqualified opinion of guilt, when not based upon the reading of newspaper accounts of the transaction, ground for challenge for implied bias, the formation or expression of an unqualified opinion, when shown not to have been based on newspaper accounts alone, renders the juror incompetent, though, in response to a question of the court, he says that he can put aside what he has heard and read, and give defendant an impartial trial.

Appeal from District Court, Humboldt County; S. J. Bonnefield, Jr., Judge.

Fred Roberts and others were convicted of murder in the first degree, and appeal. Reversed.

M. S. Bonnefield, F. X. Murphy, and William Woodburn, for appellants. James G. Sweeney, Atty. Gen., and H. Warren, for the State.

BELKNAP, C. J. The prisoners were convicted of murder in the first degree. A motion for a new trial was denied. They have appealed from the order and judgment.

In impaneling the trial jury, Richard Barry was examined. He stated, in substance, that he thought he had conversed with some of the witnesses, and with persons who pretended to know the facts; that he had read newspaper accounts of the crime; that he had heard and read that deceased had been killed on a freight train east of Lovelock about August 20th, last, and prior to his death had identified the prisoners, or some of them, as the guilty parties; that he had formed and expressed an opinion with reference to the guilt or innocence of the prisoners; that his opinion became fixed and definite at the time he read

and heard of the offense, and he then had such opinion, based upon what he had heard; and that he had expressed that opinion. He was then challenged on the ground that he had formed and expressed an unqualified opinion as to the guilt or innocence of the accused. In cross-examination by the prosecution, he testified that his mind was not then in condition to render a verdict against the prisoners from what he had heard; that his opinion was formed upon general rumors, and from what he had read in the newspapers; that he would not refuse to give any one a fair trial and rest his verdict upon the law and evidence; that, if what he had heard and read was true, the prisoners were guilty, and, if untrue, were not guilty, of the offense charged, and, if sworn as a juror, he would lay aside anything he had heard, and try the case upon the evidence and law, and render a true verdict accordingly. The court then asked him the following question: "I understand you to say you are conscious that, if you are sworn and accepted as a juror, you could put aside everything you have heard and read, and try the case according to the evidence and the law, and give the defendants a fair and impartial trial?" To which he answered, "I could." The court overruled the challenge. Defendants, whose peremptory challenges were exhausted before the completion of the jury, excepted.

Giving full consideration to all of the testimony contained in the above statement of the juror, it shows that he had expressed an unqualified opinion that the prisoners were guilty or not guilty of the offense charged. Section 340 of the criminal practice act (section 4305, Cutting's Compilation) enumerates nine separate cases for a challenge for implied bias, as follows (section 4305; section 340): "A challenge for implied bias may be taken for all or any of the following causes: \* \* \* Eighth, having formed or expressed an unqualified opinion or belief that the prisoner is guilty of the offense charged: provided, that such unqualified opinion or belief shall not have been formed or expressed or based upon the reading of newspaper accounts of the transaction." That the juror's opinion was not based upon newspaper accounts alone is satisfactorily shown by his testimony in response to questions asked by the court at the conclusion of his examination. The answer made by the juror in cross-examination could not affect the question of his competency, under the statute. As was said by the Supreme Court of California in a similar case: "It was of no sort of import whether he in fact had any prejudice against the prisoner, or not, or whether he supposed, as a juror, he would be governed by the evidence, or not. The admitted fact being that he had unqualifiedly expressed his opinion upon the question of the guilt or innocence of the prisoner, he thereby became, in judgment of law, incompetent to serve as a juror, just as if it had appeared

that he was related by consanguinity to the prisoner (also a ground of challenge for implied bias), in which case it would be idle to inquire of the proposed juror whether or not, in his opinion, he could give his accused kinsman an impartial trial." *People v. Edwards*, 41 Cal. 640; *People v. Brotherton*, 43 Cal. 530; *People v. Cottle*, 6 Cal. 227.

The court erred in overruling the challenge. Judgment reversed, and cause remanded for a new trial.

TALBOT and FITZGERALD, JJ., concur.

(45 Or. 224)

WRIGHT-BLODGETT CO., Limited, v. ASTORIA CO.

(Supreme Court of Oregon. July 18, 1904.)

VENDOR AND PURCHASER—PAYMENT—TIME—ESSENCE OF CONTRACT—SPECIFIC PERFORMANCE—DEEDS—ESCROW—DELIVERY—SUBSEQUENT SALE.

1. Time of payment is not of the essence of a contract for the sale of real estate in equity, unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.

2. Specific performance of a sale of real estate will ordinarily be granted, though the purchase price was not paid or tendered at the exact time fixed, when the party seeking performance has acted in good faith, and with reasonable diligence, unless there has been a change of circumstances affecting the equities of the parties.

3. Where, under a contract for the sale of real estate, the deed was deposited in escrow, to be delivered on payment of the price after examination of the title by the purchaser's attorneys, and there was no understanding or stipulation that the deed should not be delivered unless the price was paid on a particular day, and no attempt was made to withdraw the deed before the conditions of the deposit had been complied with by the grantee, title passed to such grantee on delivery of the deed as against a purchaser from the grantor on the day the deed was delivered.

Appeal from Circuit Court, Linn County; R. P. Boise, Judge.

Action by the Wright-Blodgett Company, Limited, against the Astoria Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Weatherford & Wyatt, for appellant. L. M. Curl and Percy R. Kelly, for respondent.

BEAN, J. This is a suit to remove a cloud from title. The material facts are practically undisputed. In the latter part of October, 1901, J. J. Collins contracted with John Holland to purchase from him for the plaintiff 160 acres of unimproved timber land in Linn county for \$2,000. On November 5th Holland and wife executed a deed to the plaintiff for the property, and delivered it to Collins under an agreement that he should deposit it with the banking firm of J. W. Cusick & Co., at Albany, to be held by the bank until an

abstract could be procured, the title approved, and plaintiff make payment of the purchase price, when the bank should deliver the deed to it. Collins deposited the deed with the bank, as agreed upon, where it remained until the 22d of November, when the purchase price was paid to the bank between 2 and 3 o'clock in the afternoon, and the deed delivered to the plaintiff's agent, without any notice or knowledge of an adverse claim to the property. About 11 o'clock on the same day, however, the defendant company contracted orally with Holland to purchase the property for \$2,250, and at 6 o'clock in the afternoon, after the delivery of the deed by the bank to the plaintiff, Holland made a deed purporting to convey the property to the defendant. At the time of the purchase the defendant was advised of the previous deed, and obtained from Holland an order on the bank for its possession. The only substantial conflict is as to the time the purchase price was to be paid by the plaintiff to the bank and the deed taken up. The contention for the defendant is that the money should be paid by the 12th of November, and its testimony tends to show that the agreement was to this effect. Collins, on the other hand, says that the understanding was that the deed, together with a large number of deeds from other parties for land in the same vicinity, should be deposited with the bank by that date, and the purchase price should be paid thereafter as soon as abstracts of title could be secured and the title examined. We do not regard this point as at all material, however. It is agreed by all that the deed was made and deposited by Holland with the bank to be delivered to the purchaser upon the payment of the purchase price, and that there was no withdrawal, or attempted withdrawal, of the deed before the conditions of the deposit were complied with by the grantee. Even if the purchase price was to be paid, as defendant contends, on or before the 12th of November, time was not a material or an essential part of the contract, nor was it made the essence thereof by agreement of the parties. There was no understanding or stipulation that the deed should not be delivered unless plaintiff paid the purchase price by a day certain. In equity the time of payment is not of the essence of a contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed. Specific performance of a contract for the sale of real estate will ordinarily be decreed, even though the purchase money was not paid or tendered at the exact time fixed by the contract, when the party seeking the performance has acted in good faith, and with reasonable diligence, unless there has been such a change of circumstances affecting the equities of the parties or the justice of the contract as to make it inequitable that it should be enforced. *Knott v. Stephens*, 5

¶ 1. See *Vendor and Purchaser*, vol. 43, Cent. Dig. § 121.

Or. 235; Frink v. Thomas, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; Bank of Columbia v. Hagner, 1 Pet. 454, 7 L. Ed. 219; Barnard v. Lee, 97 Mass. 92; Hall & Rawson v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57. The plaintiff in this case was guilty of no laches. It paid the money to the bank as soon as the abstract had been prepared and the title approved by its attorney, and there is nothing in the character of the property or the nature of the transaction to indicate that the time of payment was intended to be essential. The property in controversy was unimproved timber land. The evidence indicates that at the time the plaintiff contracted for its purchase it was increasing in value, but there is nothing to show that it was of such an uncertain or fluctuating value as to make time the essence of the contract when not so provided therein. If, as defendant contends, the agreement was that the purchase price should be paid by the plaintiff on or before the 12th of November, Holland perhaps had a right, upon a failure to make such payment, to revoke the deposit and recall the deed; but he did nothing of the kind. On the contrary, he allowed the deed to remain on deposit with the bank, and when the conditions of the deposit were subsequently complied with by the grantee, and the deed delivered to it by the bank, the title passed, and Holland could not thereafter convey the property to another.

It follows that the decree of the court below must be affirmed, and it is so ordered.

(44 Or. 557)

#### FERGUSON v. RAY.\*

(Supreme Court of Oregon. July 18, 1904.)

PERSONAL PROPERTY—POSSESSION—"TREASURE TROVE"—LOST OR ABANDONED PROPERTY—TITLE.

1. Gold-bearing quartz rock found buried in the ground, where it had evidently been placed several years before, did not constitute "treasure trove" belonging to the state or the finder.

2. Plaintiff, while in possession of defendant's premises under a lease, discovered rich specimens of gold-bearing quartz lying on top of the ground. By investigation he dug up a large quantity of such quartz found lying in the soil unconnected with any ledge, pocket, placer, or other natural deposit, the quartz being imbedded in the loose surface soil, there being also evidences of a sack or duck cloth in which the quartz might have been buried. Held, that such quartz was not lost or abandoned property, and therefore belonged to the owner of the soil, and not to the finder.

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Action by Robert A. Ferguson against Charles R. Ray. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The plaintiff, being in possession of defendant's premises under a lease, while cutting wood thereon in the afternoon of November 14, 1901, discovered a rich specimen of gold-bearing quartz lying on top of the ground. He at once secured a pick and

\*Rehearing denied October 17, 1904.

shovel, and on scraping the leaves away he found one or two other small pieces "on top," as he testified, "or almost on top of the ground, sticking through the ground." On digging through the surface he found others, extending to the depth of 10 or 12 inches, in all weighing, approximately, 17½ pounds. There were no indications present of any natural ledge or lode of gold-bearing or other quartz in place, or of any pocket or placer or other natural deposit, the formation in which the specimens were imbedded being described as "a loose surface soil." Plaintiff disposed of a part of the quartz, estimated as being half of it in value, and delivered the remainder, 8¾ pounds in weight, to defendant, Ray. He now brings trover for the quartz thus delivered to the defendant, alleging that it was obtained from him through duress and threats of arrest and imprisonment and false and fraudulent representations. The defendant answers (1) that the specimens were his property by reason of having been extracted from his land, and (2) by virtue of an agreement entered into between him and the plaintiff, whereby, upon an ascertainment of values and an accounting, defendant was to pay plaintiff one-half of the excess value, if any should appear, between the rock delivered to defendant and that disposed of by plaintiff. The evidence shows that two trees standing nearest the place of discovery bear some old marks, consisting of one or more blazes, as if made with an ax, and indentations having the appearance of being struck with a hammer or some blunt instrument; that another has been partially peeled, apparently at a more recent date; that many trees and shrubs in the vicinity contain the marks of an ax, and that many more have been cut away and made into wood. The plaintiff testified touching the ore that "it had the appearance of having been placed there at some time long ago." Another witness testified that the quartz had at one time been connected with a vein, and had been broken out; that there were indications of the marks of a pick or a hammer upon portions of it, as it had the appearance of having been bruised, and that the break was evidently very old; and still another (using his language): "I found evidence of some kind of old cloth there—duck cloth. The ground was stained around a small place there, of a dark brown stain. I even found a few old duck ravelings—their impression—on the dirt I dug up. They were decayed through until they would not hold together, and the ground about it for a space of four or five feet was stained with this dark brown stain, or about the color of it, and parts of it showed prints of old cloth of some kind, and a few old ravelings that were perfectly rotten. I tried to pick them up, and they would not hold together." No evidence was adduced of a different trend or tendency relative to the finding or the place thereof, or of the circumstances and conditions attending

either. Upon this condition of the record defendant moved for a nonsuit, which being denied, and judgment having been rendered adverse to him, he brings this appeal.

W. D. Fenton and A. S. Hammond, for appellant. E. B. Dufur and H. H. Riddell, for respondent.

WOLVERTON, J. (after stating the facts). The theory upon which the cause is sought to be maintained is that the quartz, the subject of the dispute, was either lost or abandoned property, and that in either event plaintiff is entitled to its possession or value as against the defendant and all others except the true owner. As the property was found beneath the surface of the earth, not upon it, the question has been presented whether or not it is treasure trove. We are firmly impressed that it cannot be so considered. Treasure trove, and its legal status, according to Blackstone, "is where any money, or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king. But if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. Also if it be found in the sea, or upon the earth, it doth not belong to the king, but to the finder, if no owner appears. \* \* \* Formerly all treasure trove belonged to the finder, as was also the rule of the civil law. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king, which was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder." 1 Bl. Com. (Lewis' Ed.) c. 8. \*295, 296. Bouvier gives the same definition, except that he adds that it includes not only gold and silver, but whatever may constitute riches, as vases, urns, statues, etc. Bouvier, Dict. Mr. Chief Justice Appleton declares that "nothing is treasure trove except gold or silver." *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600. So, according to an article found in the *Law Times* (vol. 81, p. 21), the prerogative of treasure trove is strictly limited, and touches only gold and silver plate and bullion, discarding the baser metals; and in *Elwes v. Brigg Gas Co.*, 33 Law Rep. [Ch. Div.] 562, it is said that Roman coins, not being gold or silver coins, did not fall within the royal prerogative of treasure trove. A case has come to our notice where it seems to have been conceded that certain cups, a chalice, pyxes, and a paten, all of silver, were treasure trove (*Attorney General v. Moore*, Law Rep. [1 Ch. Div.] 676), and another where solid gold rings and ornaments were so classed (*Queen v. Thomas*, 33 Law Jour. [N. S.] p. 22). In a case from Pennsylvania (*Huthmacher v. Harris' Adm'rs*, 38 Pa. 491, 80 Am. Dec. 502) the

court say, however, of treasure trove: "Though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals." This is manifestly an enlargement of the common-law idea of the term, and we have been unable to find any cases that go beyond it. We find expressions by Chancellors Walworth and Kent, however, that would seem to give it further scope, even to the extent of comprising all chattels or goods hidden. We quote from the former in *McLaughlin v. Waite*, 5 Wend. 406, 21 Am. Dec. 232: "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth, or in the sea, if no owner appears to claim them, it is presumed they have been intentionally abandoned by the former proprietor; and as such they are returned into the common mass of things, as in a state of nature." And from the latter in his *Commentaries* (2 Kent, Com. \*357): "Nor does this right of acquisition [by finding] extend to goods found hidden in the earth, and which go under the denomination of treasure trove. Such goods, in England, belonged to the king." It is at once apparent, however, that neither of these distinguished jurists was attempting to define treasure trove, but was distinguishing it as it respects the rights of the finder from goods found upon the surface of the earth; hence that they intended no innovation upon the common-law idea of the term. Indeed, Chancellor Walworth cites as his sole authority from volumes 1 and 2 of Blackstone's *Commentaries*, the substance of which, as it relates to the subject in hand, we have quoted above; and it is only upon the principle indicated that the citation supports him at all. But, without further reference to the authorities, or attempting to define more precisely the scope and meaning of the term "treasure trove," we may very safely conclude that, in view of the nature of the property in controversy, it does not fall within the classification. It is neither gold nor bullion. It is simply what may be correctly denominated gold-bearing quartz. The testimony varies touching the relative weight of the gold as compared with the rock in which it is carried, the estimates ranging from one-fourth to three-fourths, but it is manifest that in either extreme it cannot be fitly or properly styled bullion, and there is clearly nothing else that will give it the stamp of treasure trove.

This brings us back to the real controversy: Was it lost or abandoned property,

or, rather, does the evidence suffice to carry the case to the jury upon that contention? The novelty of the affair is such as to induce hesitation, and to involve us in some doubt; but a careful survey of the authorities impresses us that it cannot be characterized as either lost or abandoned in the sense that the finder is entitled to its possession or ownership as against the owner of the soil. Nor do we think that any reasonable inference that such is its nature and character can be deduced from the evidence, and the case therefore is not one proper for the jury to pass upon. It has been very well understood in this jurisdiction, since the case of *Sovern v. Yoran*, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 298, and the more recent one of *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913, what is meant by lost or abandoned property. To lose is casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event; and, if the property is found on the surface of the earth, the conditions suggest that it has been intentionally abandoned, and as such has returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing (1 Bl. Com. [Lewis' Ed.] c. 8, \*295, 296; 2 Bl. Com. [Lewis' Ed.] c. 26, \*402; 2 Kent, Com. \*356; *McLaughlin v. Waite*, supra), the distinction between losing and abandonment being that one is involuntary, while the other is by intent or design. But the result, as it relates to the property, is practically the same, the owner not appearing to lay claim to it. In the one case the finder has the right to the possession against all except the true owner. In the other he acquires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier, the presumption being disputable by the rightful owner. Such presumption or inference does not obtain as to property intentionally left or deposited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory or want of memory of the owner as to the locality at any given moment. "In such case," says Baron Parke, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." The principle is amply illustrated in the cases. In *Lawrence v. State*, 1 Humph. 228, 34 Am. Dec. 644, a customer placed his pocketbook on a table in a barber shop, and, his attention being attracted to the outside, went out, forgetting it. The barber discovered the pocketbook, and attempted to appropriate it, and it was held that it was not lost property. In *McAvoy*

*v. Medina*, 11 Allen, 548, 87 Am. Dec. 733, the plaintiff picked up a pocketbook in a barber shop, and handed it to the barber, but, the owner not appearing to claim it, sued to recover it. In disposing of the case Mr. Justice Dewey says: "This property is not, under the circumstances, to be treated as lost property in that sense in which the finder has a valid claim to hold the same until called for by the true owner. The property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there, and has never called for it. The plaintiff also came there as a customer, and first saw the same, and took it from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant \* \* \* to use reasonable care for the safe-keeping of the same until the owner should call for it." See, also, *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. 460. The circumstances must be such, considering the place and the conditions under which the property was found, as to lead to the inference that the property was casually or involuntarily left where found, or there can be no losing. This is well illustrated by the case of *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528. Plaintiff bought an old safe, and left it with his agent to sell, who in turn left it with defendant for a like purpose. The defendant, in looking through it, found a roll of bills, amounting to \$165, between the wooden lining and the sheet-iron exterior, which could only have gotten or been placed there through a large crack in the lining. The court said: "We think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped or was accidentally shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit." The circumstances and conditions of the place where found afforded the indicia from which the inference of a losing was deduced. Now, in the case at bar, the quartz was not found on the surface of the earth. True, a small piece or so was picked up from the surface, but, if this were all, there would have been no controversy. The remainder was found imbedded in the earth, and the presumption that it was lost which attends property found on the surface of the earth is wanting, so that there was no inference for the jury, deducible from the place of finding and the conditions of the property, that it was lost property. Indeed, the evidence, it would seem, refutes any such presumption or inference. The property was

valuable. It had certainly at some time previous been detached by human agency from a ledge, its natural place of deposit; and the evidence that it was once contained in a bag of some kind of cloth, and that trees nearest the place of finding bore some old marks, apparently made by design to aid in locating the property, would indicate that it was voluntarily deposited where found. What effect the elements have had upon the conditions and position in which it was left could only be the merest conjecture. In any event, there could be no inference of a losing or abandonment from the conditions present at the finding, and this is all the knowledge we have respecting the matter; so that the case was not such as was proper to be left to the jury for their determination upon the theory that the property was lost or abandoned. The case, to our mind, falls within the principle of a class of cases which we will now notice, and which counsel for defendant rely upon as controlling. The one most nearly illustrative is *South Staffordshire Waterworks v. Sharman*, 65 L. J. (N. S.) 460. The subject of the controversy there was two gold rings found by a laborer in a pool upon the premises of his employers. He was engaged in cleaning out the pool, and, after throwing out large quantities of mud, came across the rings and some other articles of interest. Lord Russell, in announcing his opinion, quotes from Pollock and Wright on Possession in the Common Law, pp. 40, 41, as follows: "The possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence." "It is free to any one who requires a specific intention as part of de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession, constituted by the occupier's general power and intent to exclude unauthorized interference." And then says: "It is upon the principle expressed in this [the latter] passage that I base my judgment, for it shows the broad distinction between the present case and the case contemplated in the passage cited to us in course of the argument from Blackstone's Commentaries, showing that a jewel cast into the sea or on the public highway could not be said to be in the possession of any one, because no one had a right to exclude another from the public place;" and concludes as follows: "The general principle is that where any one is in possession of house or land which he occupies, and over which he manifests an intention of exercising a control and preventing unauthorized interference, and something is found in that house or on that land by a stranger or a servant, the presumption is that the possession of the article found

is in the owner of the locus in quo." Another case is noted in Law Notes (vol. 7, No. 8, p. 160), decided by Supreme Court Justice Forbes of New York; not so authoritative as the preceding one, as it does not come from a Court of Appeals, but the principle is recognized. Some ancient dishes, supposed to have been buried by Col. Edmeston, an officer in the French-Indian war, 150 years ago, at a time when he was obliged to flee from the Indians, were recently plowed up, and it was held as to them to be well established that where a thing is imbedded in the soil the right to it is in the owner of the land, unless it is of such a character as to constitute treasure trove. Other cases announcing the same principle are *Elwes v. Brigg Gas Co.*, supra; *Regina v. Rowe*, *Bell's Crown Cas.* 93. Now, we have here property not treasure trove, found imbedded in the soil under circumstances repelling the idea that it has been lost. How long a time it had been in the place where found is conjectural, of course, but it had probably been there many years—long enough, at least, that only a trace of the cloth bag that once contained it was left; and the ownership of the land where found is in the defendant. Being in the possession of the land, and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, as was announced by Lord Russell in *South Staffordshire Waterworks v. Sharman*, supra, that "the presumption is that the possession of the article found is in the owner of the locus in quo."

There was error, therefore, in denying the nonsuit, and the judgment appealed from will be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

#### HARRINGTON v. DEMARIS.

(Supreme Court of Oregon. July 18, 1904.)

WATER COURSE—ARTIFICIAL CHANGE—RIPARIAN RIGHTS—ADVERSE USER—LIMITATION—QUANTITY AWARDED—EVIDENCE—SUFFICIENCY—MEASUREMENT—DAMAGES—WAIVER—APPEAL.

1. A lower riparian owner of land cannot show an adverse use of the water against an upper riparian owner, in the absence of proof of recognition of his right by the upper owner.

2. The use by an upper riparian owner of water from a spring which was never tributary to the stream in which a lower owner claimed rights is not adverse to the lower owner.

3. Where it appeared in a suit instituted in 1900 to enjoin interference with the flow of water in the channel of a stream to plaintiff's premises that the volume of water flowing in the stream to plaintiff's premises was annually diminishing, but that plaintiff's use was undisturbed by defendant until about 1898, the defendant's interference with the flow not having been sufficient to enable him to invoke the statute of limitations, his use of the water could not toll the plaintiff's right thereto.

4. Where the respective owners of different tracts of land, by a concert of action, removed a dam, and permitted water from the springs

of a swamp to run into a stream which the water from the springs had never run into before, they thereby made the springs tributary to the branch, and subject to the rules of law applicable to riparian ownership; the change having been acquiesced in for more than 15 years.

5. In an action to enjoin interference with the flow of water in a stream subject to riparian rights of plaintiff, evidence examined, and held sufficient to sustain an award of 48 inches of water to plaintiff for the purpose of irrigation.

6. Where, in a suit to enjoin interference with the flow of water in a stream subject to riparian rights of the plaintiff, the decree awarded an apportionment of 48 inches of the water of the stream to plaintiff for the purpose of irrigation, and 12 inches more in the bed of the stream, plaintiff is entitled to 48 square inches of the vertical cross-section of the stream as it ordinarily flows, without pressure, to be measured in a box 12 inches wide, placed in his dam on a grade, as near as possible, with the fall of his irrigation ditch, and the 12 inches decreed him in the bed of the stream to be measured in the same manner at his dam, in a box of the same dimensions, set as near as possible on the same grade as the average fall of the stream as it flows through his land; the evidence showing that the stream was about 3 feet wide and from 7 to 8 inches deep, of which, by the decree, plaintiff was to have not to exceed one-half of the entire flow, and the testimony implying that square inches of the vertical cross-section of the stream were meant, in estimating the volume of water.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Suit by S. F. Harrington against A. L. Demaris. From the decree, defendant appeals. Affirmed.

This is a suit by S. F. Harrington against A. L. Demaris to enjoin interference with the flow of water in the channel of a creek to plaintiff's premises. It is alleged in the amended complaint, in substance, that until August, 1900, a natural stream of water, consisting of about 480 inches, had its source from time immemorial in certain springs arising in and issuing from the land of one R. M. Dorothy, in Umatilla county, and flowed westward through defendant's land, thence across plaintiff's premises, and through the lands of "other persons," whereby plaintiff's premises were subirrigated, and he and his predecessors in interest had used such water for a beneficial purpose; that more than 35 years prior to the bringing of this suit his grantor dug a ditch from the channel of the stream, diverting therefrom 120 inches of water, which was conducted to the land now owned by him, and there continuously used adversely to the defendant and to all other persons for more than 10 years prior to August, 1900, in irrigating crops and an orchard; that after such diversion and appropriation there remained in the channel of the stream 360 inches of water, which continued to flow across plaintiff's premises, "and on and to the lands of other persons," and which plaintiff used for stock and domestic purposes, and claims the right to have such quantity continually to flow across his land; and that in August, 1900, the defendant unlawfully placed a dam in the bed of the stream, and prevented the water from flowing to plaintiff's premises,

thereby injuring the grass, crops, and fruit trees growing thereon, to his damage in the sum of \$2,000. The answer denies the material allegations of the complaint, and, for a separate defense, avers, in effect, that water originally collecting in a swamp on Dorothy's land never reached plaintiff's premises by any channel having a bed or banks, but that during the rainy season, when the accumulation was greatest, the overflow found its way westward on the surface to defendant's land, where it sunk in the ground and was lost, and another part found its way northward, emptying into an old channel of the Walla Walla river; that about 15 years ago Dorothy caused the swamp to be drained by digging one ditch northward to such old channel, and another westward to the boundary of his land, where defendant appropriated the water flowing therein, and also extended the latter ditch northward to the old channel, in which he placed a dam, and, by means of another ditch, conducted all the water flowing from the swamp, in the irrigating season, to his premises, where it was appropriated to a beneficial purpose, and ever since has been used adversely to the plaintiff and to all other persons. For a further defense, it is alleged that from time immemorial the stream mentioned in the complaint has had its only source in a spring of water issuing from defendant's land, which, augmented by the flow of water from other springs on his premises, originally consisted of a volume 12 inches wide and of the same depth, two-thirds of which for more than 25 years has been adversely used by him and his predecessors in interest in irrigating crops, the remainder being permitted to flow to plaintiff's premises; that from natural causes the volume of water originally flowing in this stream has gradually diminished, and the surplus, after supplying the defendant's use, sinks into the porous soil before reaching plaintiff's land; that in April, 1900, defendant built a new dam in the stream to take the place of an old one therein, but diverts no more water thereby than formerly, "and that defendant's diversion and use of the water of said stream has at all times been, and now is, a right which belongs to him absolutely, as appurtenant to the land by him owned." It is also alleged that, in the fall of 1875 or 1876, defendant's predecessor in interest diverted and appropriated to a beneficial purpose two-thirds of all the water flowing from springs on defendant's land, and ever since that time such water has been used adversely to plaintiff and to all other persons, and that during the last five years, owing to the diminution by natural causes of water flowing from these springs, the quantity now used by defendant is less than that originally appropriated by his predecessors. The reply having put in issue the allegations of new matter in the answer, a trial was had before the court, which found the facts, in substance, as alleged in the complaint, and, as conclusions of law de-



ducible therefrom, that plaintiff was entitled to have all obstructions placed in the stream removed, so as to permit one-half the water arising from the springs on Dorothy's lands, not exceeding 60 inches, to flow in the channel to his premises, where he could divert 48 inches into his ditch, and permit 12 inches to flow in the bed of the stream through his land, but in no event to take more than one-half the entire flow, and that the defendant was entitled to use the remaining quantity after supplying that given to plaintiff, who was awarded damages in the sum of \$700 by reason of his deprivation of the use of the water; and, having given a decree in accordance therewith, the defendant appeals.

Stephen A. Lowell and Henry J. Bean, for appellant. J. H. Raley, for respondent.

MOORE, C. J. (after stating the facts). An examination of the pleadings, the substance of which is hereinbefore set out, shows that the controversy involved in this suit relates to the use of water from a stream by riparian proprietors; and, though appropriations of water are mentioned in the complaint and answer, no priority of possession of public land is alleged by either party as a foundation for a vested and accrued right to the use of such water (Rev. St. U. S. § 2339 [U. S. Comp. St. 1901, p. 1457]), nor is it averred by either party that, after the necessary demands of a prior appropriator had been supplied, there remained a quantity which he appropriated. *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; *Carson v. Gentner*, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; *Browning v. Lewis*, 39 Or. 11, 64 Pac. 304; *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976. It will be remembered that the complaint states that plaintiff and his grantor had used the water in question more than 10 years adversely to the defendant, but, as his land is situated on the stream below that of the defendant, and the testimony fails to show any recognition by the latter of his alleged right, his use has not been adverse to the defendant. *North Powder Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546. So, too, the answer alleges that the water issuing from the springs on Dorothy's land was used by defendant adversely to plaintiff more than 10 years prior to bringing this suit. If the water from these springs was never tributary to the stream in question, defendant's use thereof could not have been adverse to plaintiff, who, as a riparian proprietor, was never entitled thereto. The testimony shows that, though the volume of water flowing in the stream to plaintiff's premises was annually diminishing, his use thereof was undisturbed until about 1898, and, if it be conceded that the water from the springs on Dorothy's land originally formed a part of this stream, the defendant's interference therewith, not having been sufficient to enable him to invoke the statute of

limitations, his use of the water could not toll the plaintiff's right thereto. This eliminates the question of adverse use by the respective parties, and confines the inquiry as follows: (1) What constitutes the waters of the stream flowing through the lands of the parties; (2) has the defendant, as a riparian proprietor, taken more than his share of the water of the stream; and, if so (3) what damage has the plaintiff suffered in consequence thereof?

Considering these questions in their order, the testimony shows that one R. M. Dorothy owns the east half of section 21 in township 5 north, of range 36 east of the Willamette meridian, the defendant the west half of that section, and the plaintiff, the southeast quarter and the east half of the northeast quarter of section 20 in that township and range, except, however, 29 acres from the north end of the latter land, and also 1 acre therefrom on which a schoolhouse has been erected; that the Walla Walla river now flows westerly through the northern part of these sections near a bluff, but prior to 1870 it ran in an old channel, about 200 yards south of its present bed; that a small stream, known as "Spring Branch," is found on defendant's land, and flows southwesterly to and through plaintiff's premises, emptying into the river at a point below. This branch was probably an older channel of the river, for during freshets in the latter stream, before the channel was changed to its present bed, the water overflowed the banks on the south and passed down Spring branch, and, to prevent the stream from permanently following such course, plaintiff's grantor, George De Haven, and others, constructed a dam on the south bank of the river on the line of the overflow. About 15 acres of Dorothy's land was originally a swamp, in which brush and tules grew, and where the water during the entire year stood about three feet deep; but about 1884 he drained this marsh, and discovered that it was caused by three large springs therein. It is alleged in the complaint, and the court found, that the source of Spring branch was the springs on Dorothy's land, though defendant maintains that the fountain head of this stream is a spring on his premises, and that the water from the springs on Dorothy's land never reached Spring branch in any channel, and, this being so, the court erred in making its finding to that effect, and in rendering the decree based thereon. Each party introduced in evidence a map on which is severally delineated the land owned by the plaintiff, by the defendant, and by Dorothy; but no survey of the stream, river, old channel, or dams ever having been made, the charts do not coincide in important particulars, and hence neither can be adopted as correct, except in so far as the representations thereon are corroborated. The plaintiff contends that the dam placed in the stream, constituting an obstruction to the flow of water from the springs on

Dorothy's land to his premises, is built in the old channel. The defendant maintains, however, that the dam complained of is placed in Spring branch, and permits as much water to flow to plaintiff's land as passed an old dam which was supplanted by the new structure, and that Spring branch is separate from the old channel. Whether or not Spring branch is a part of the old channel of the Walla Walla river is of no consequence, but the identity of the dam that produced the injury of which plaintiff complains is important.

Considering whether the water from the swamp on Dorothy's land ever found its way originally into Spring branch, we think the preponderance of the testimony shows that it flowed westward therefrom on the surface into this stream, and also northward in the same manner into the old channel. When Dorothy drained this swamp, he dug a ditch therefrom northward, and conducted water into the old channel, and also made another ditch westward from the swamp to the boundary of his land, where defendant continued the conduit north, causing the water flowing therein to be discharged into the old channel. The marsh having been reclaimed, it was ascertained that the swamp was caused by three large springs, known as No. 1, which discharges its water westward, and Nos. 2 and 3, which emit their waters northward, and all now emptying into the old channel. This change in the flow of water from spring No. 1 probably causing a scarcity, George De Haven, plaintiff's grantor, Enoch Demaris, defendant's father and predecessor in interest, and one Highbly Harris, who then owned land through which Spring branch flowed, about 1885, removed a part of the old dam, built on the bank of the old channel to prevent an overflow, and let the water issuing from these springs flow down such branch, in which, as we understand the testimony, the greater part thereof has continued to glide for more than 15 years, until the summer of 1900, when the dam was replaced, and the water from the springs conducted in the old channel to a dam built therein, where by means of a ditch it is diverted and used in irrigating crops and an orchard growing on defendant's land.

Mr. Gould, in his work on Waters (3d Ed.) § 263, in elucidating the principle that water which does not flow in a channel is not subject to the rules regulating the rights of riparian proprietors, says: "But if a well-defined, natural stream empties into a swamp or lake, where all definite channel is lost, and emerges again into a well-defined channel below, it is a question of fact, dependent upon the extent of the swamp or lake, whether it is the same stream; and, if it is, the owners of land upon the lower stream have riparian rights, and an owner of land upon the stream above the swamp or lake is not entitled to divert water therefrom to their in-

jury." In the next section the learned author, discussing this question further, says: "A stream does not cease to be a water course, and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." In *Case v. Hoffman* (Wis.) 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937, it was held that the flowing of water upon and beneath the surface of lands between a natural lake of about 60 acres in extent, and a creek into which they discharge, constitutes a water course, where the flow is all in the same direction, and a part of the way along a distinct and plainly marked channel, although for some of the distance it spreads over wide reaches of marsh and swamp lands, and percolates the soil in many and most places between the lake and creek. To the same effect, see *Cox v. Bernard*, 39 Or. 53, 64 Pac. 800, and *Mace v. Mace*, 40 Or. 586, 67 Pac. 660, 68 Pac. 737. Though there is a conflict in the testimony respecting the character of the original outlet from the swamp westward—some of the witnesses insisting that it was well-defined and others that the water flowed on the surface—we think it was in fact a water course emanating from the springs into a swamp of sufficient extent to render it and spring No. 1 tributary to Spring branch. The water flowing in the outlet from the swamp northward into the old channel never originally reached Spring branch, but when De Haven, Demaris, and Harris, by a concert of action, took out the dam, and let such water, together with that from spring No. 1, into the branch, they thereby made these springs tributary to such stream, and subject to the rules of law applicable to riparian ownership. *Cottel v. Berry*, 42 Or. 593, 72 Pac. 584. In that case Mr. Justice Wolverton, in discussing this subject, said: "It seems to be a rule of law that where owners of different parcels of land conduct water across the same in an artificial channel, and do not define their respective interests in the water, their reciprocal rights thereto are to be measured and determined as if they were riparian owners upon a natural stream." In *Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304, it was held that where a change is made in the flow of a natural water course, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition. In the case at bar, we think the testimony warrants the conclusion that after defendant continued the west ditch north on his premises, so as to conduct the water from spring No. 1 into the old channel, the riparian proprietors removed a part of the old dam, per-

mitting the water issuing from Dorothy's land to flow down Spring branch, thereby making it tributary thereto and entitling them to a reasonable use thereof.

The parties being riparian proprietors, and entitled to the reasonable use of the water flowing in Spring branch, including that issuing from the springs on Dorothy's land, the next question to be considered is whether the defendant has taken more than his share. In *Jones v. Conn*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, Mr. Chief Justice Bean, after reviewing numerous decisions involving the right of a riparian proprietor to use the water flowing through his land for irrigation, deduces the following conclusion as applicable to the arid region of the United States: "It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigation purposes." In enforcing this rule, it is further said in the opinion: "For the protection of the rights of the several proprietors, it has even been held that a court of equity may, in a proper case, apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances." In *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325, it was held that the inquiry as to what constituted a reasonable use of the water of a stream for irrigating the land of a riparian proprietor was a question of fact, depending upon the circumstances appearing in each particular case; the court saying: "The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor." In the case at bar it is impossible to determine from the testimony any of these elements, though it will be remembered that the complaint states that, after this stream crosses plaintiff's premises, it flows "on and to the lands of other persons." If others have any rights in or claims to the use of the water flowing in Spring branch, it is needless to say that, not having been made parties, the decree herein cannot possibly affect them. If they are entitled to a reasonable use of water, defendant's rights as a riparian proprietor must necessarily be abridged just in proportion as theirs are judicially

determined. The plaintiff having been decreed 60 inches of water, providing that does not exceed one-half the volume flowing in the branch, the defendant has no cause to complain, because under no circumstances would he be entitled to more, assuming that the demands of the parties are equal. The testimony shows that in 1875 plaintiff's grantor dug a ditch so as to tap Spring branch on the east boundary of his land, and conducted water therein, which since that time, and until August, 1900, has been used in irrigating about 15 acres, which has been cultivated as an orchard, garden, lawn, and meadow. The plaintiff, as a witness in his own behalf, says that, if all the water from the springs on Dorothy's land flowed into Spring branch, the volume therein would be about 3 feet wide and from 7 to 8 inches deep, and, in speaking of the capacity of his ditch, said it was about 2 feet wide and from 2 to 3 inches deep; and, the court having awarded him 48 inches of water for the purpose of irrigation, we conclude the quantity so decreed is the measure of his right. The decree, however, does not prescribe how such quantity shall be ascertained, but, as plaintiff's testimony seems to imply that he estimates it to be square inches of the vertical cross-section of the stream as it ordinarily flows, he is entitled to that quantity, without pressure, to be measured in a box 12 inches wide, placed in his dam on a grade as near as possible with the fall of his ditch, and the 12 inches decreed him in the bed of the creek will be measured in the same manner at his dam in a box of the same dimensions, set as near as possible on the same grade as the average fall of the stream as it flows through his land.

We think the weight of the testimony shows that the dam which confines in the old channel the water issuing from the several springs on Dorothy's land is the primary cause of the injury complained of. Such dam, and also the new one built on defendant's land, will be removed sufficiently to permit the quantity of water awarded plaintiff to flow to his premises, provided, however, it does not exceed at any time one-half the volume flowing in Spring branch.

This brings us to a consideration of the damages sustained by plaintiff. The trial court having visited his premises, with the parties and their attorneys, allowed him \$700, but the considerations which led the court to award this sum are not contained in the transcript, although that comprises the entire testimony. The lowest estimate placed by any witness on the damage done was \$1,000, and it would seem that such sum ought to have been awarded; but the defendant, not having insisted thereon at the trial in this court, is evidently satisfied therewith.

From these considerations, it follows that the decree is affirmed.

(46 Or. 233)

## IN re MORGAN'S ESTATE.

(Supreme Court of Oregon. July 18, 1904.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—ALLOWANCE—LIMITATIONS—SUSPENSION OF STATUTE—COUNTY COURT—JURISDICTION—FINDINGS—EVIDENCE.

1. The pecuniary limitation imposed on the jurisdiction of county courts by Const. art. 7, § 12, providing that such courts shall have jurisdiction pertaining to probate courts, and civil jurisdiction not exceeding the amount of \$500, does not apply to the examination and allowance of claims against a decedent's estate as authorized by B. & C. Comp. § 1161.

2. In proceedings for the establishment of a claim against a decedent's estate, evidence reviewed, and held to sustain a finding that the claim arose from a debt of a firm of which deceased was a partner.

3. B. & C. Comp. § 387, provides that an action cannot be maintained against an executor or administrator until the expiration of six months after the granting of letters testamentary or of administration, and section 388 declares that such an action cannot be commenced until the claim of the plaintiff has been duly presented to the executor or administrator and disallowed by him. Section 20 provides that when the commencement of an action is stayed by statutory prohibition the time of the commencement of such prohibition shall not be a part of the time limited for the commencement of the action. *Held*, that where a claim against a decedent's estate was duly filed with the executrix before it was barred, and no indorsement of her rejection of the claim officially signed was made thereon as required by B. & C. Comp. § 1161, the statute of limitations was suspended during the time which elapsed between the filing of the claim with the executrix and the date the claimant acquired notice that the claim had been rejected.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

In the matter of the estate of Amos H. Morgan, deceased. Wells, Fargo & Co., a corporation, presented its claim against said estate to Melinda E. Morgan, as executrix, by whom it was rejected; and said Wells, Fargo & Co. appeals. Reversed.

This proceeding was instituted in the county court, sitting for the transaction of probate business, to establish a claim against the estate of A. H. Morgan, deceased. Morgan and A. W. Stowell formed a partnership in 1882, engaging in the retail grocery and feed business in the city of Portland, from time to time borrowing sundry moneys from the Commercial National Bank, the assignor of Wells, Fargo & Co. On or about October 1, 1888, they sold out their business, but did not dissolve their partnership, nor did the purchaser assume any of the liabilities of the firm, or the sale include its outstanding accounts or bills receivable. At the time of the sale Morgan & Stowell were indebted to the bank in the sum of \$2,500, evidenced by a promissory note for that amount, signed by the firm name. This note was renewed from time to time, Morgan signing the firm name to the renewal in some instances and Stowell in others, until December 24, 1891, when the last renewal note was given, the firm name being signed by

Stowell. The interest on this note was paid to March 24, 1894. On May 1, 1889, Morgan & Stowell borrowed or became indebted to the bank in the sum of \$1,000, giving their promissory note therefor, which was likewise renewed from time to time until April 25, 1894, when the other note now in controversy was executed, the firm name being signed by Stowell. No payments have been made upon it. Morgan died March 3, 1897, and a few days thereafter his wife was appointed executrix of his estate. On April 22, 1897, the bank duly presented to the executrix for allowance a claim against the estate based on the two notes mentioned. The receipt of the claim was acknowledged by the attorney for the executrix, and the bank was assured that the claim would be "examined into and allowed or rejected in due course, of which you will be advised." Mr. Morgan's estate consisted almost entirely of real property. The condition of the market was such at the time of his death that it was difficult to convert this real property into money, and the bank was indulgent, and did not press payment of its claim. Its officers, however, several times inquired of the attorney for the executrix about the matter, and were assured by him that the estate would ultimately pay all the claims against it, and leave something over, but were not advised that there was any doubt as to the validity of the claim or its allowance by the executrix. Meanwhile the Commercial National Bank sold and transferred its claim to Wells, Fargo & Co., which, in July, 1901, put it in the hands of its attorney for adjustment. Upon examining the records of the Morgan estate, the attorney found that the executrix had filed no list of claims presented as required by law, and had made no reports whatever of any of her transactions. He therefore inquired of her attorney concerning the condition of the estate, and was informed that the bank's claim had been rejected. This was the first knowledge either the bank or its assignee had of that fact. The notation of rejection on the claim bears no date, nor does the time thereof otherwise appear. Immediately on learning that the claim had been rejected, Wells, Fargo & Co. applied to the county court for its allowance under section 1161, B. & C. Comp. The county court allowed the claim, but upon appeal to the circuit court a nonsuit was entered, and hence this appeal.

Robert T. Platt, for appellant. Ellis G. Hughes, for respondent.

BEAN, J. (after stating the facts). There are three questions presented for our consideration: (1) Whether, under section 1161, B. & C. Comp., the county court, sitting in the transaction of probate business, has jurisdiction to adjudicate and allow a claim for more than \$500 against an estate; (2) whether the notes upon which the claim of the bank is bas-

ed were in fact the obligations of the partnership of Morgan & Stowell; and (3) whether they are barred by the statute of limitations.

The Constitution provides: "The county court shall have the jurisdiction pertaining to probate courts, \* \* \* and such civil jurisdiction, not exceeding the amount of value of five hundred dollars, \* \* \* as may be prescribed by law." Const. Or. art. 7, § 12. It is argued that the examination and allowance of a claim against an estate under section 1161 is the exercise by the county court of civil, as distinguished from probate, jurisdiction, being, therefore, limited to claims which do not exceed \$500. In our opinion, this view is erroneous. By the Constitution county courts are vested with the jurisdiction pertaining to courts of probate, and the Legislature is authorized to confer upon them limited civil and criminal jurisdiction. The two jurisdictions are, however, as separate and distinct as if conferred upon separate tribunals. While sitting in the transaction of probate business, the nature and jurisdiction of a county court must be sought in the general nature and jurisdiction of probate courts as they are known in the history of the English law and the jurisprudence of this country. The allowance or ordering the payment of claims against estates which are in process of administration has always been considered an appropriate subject for the jurisdiction of probate courts. 2 Woerner, Administration (2d Ed.) § 391 et seq. In this country courts exercising such jurisdiction are often invested by statute with the power to hear and determine claims against the estates of deceased persons in a summary manner, without the formality of technical pleadings. *Id.* § 391. Such is our statute. The subject-matter of section 1161 pertains exclusively to the administration of estates, and is clearly within the functions of a probate court. The remedy there provided is not exclusive, but is intended to afford a speedy, efficient, and summary remedy to one who has a claim against an estate which has been rejected by the executor or administrator, without the necessity of technical pleadings or the observance of the formal proceedings required in an ordinary action. *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 185; *Johnston v. Schofner*, 23 Or. 111, 31 Pac. 254; *Pruitt v. Muldrick*, 39 Or. 353, 65 Pac. 20. That the proceedings are to be regarded, for the purpose of trial, as an action at law, rather than a suit in equity (*Wilkes v. Cornelius*, 21 Or. 341, 28 Pac. 135), does not affect the question. From the nature of the case, the method of procedure usually provided for probate courts is more nearly conformable to proceedings in equity than in law. Such courts, however, do not have either original equitable or common-law jurisdiction, and in the disposition of the business before them they observe and apply legal and equitable rules, as the case may require and the statute provide.

The second question is one of fact. There is sufficient evidence tending to show that the notes in question were the obligations of the firm of Morgan & Stowell to carry that question to the jury. Stowell testified that the consideration of the notes was money borrowed by the firm for the purpose of conducting its business and discharging its debts, and that the notes in question were given in renewal of previous obligations incurred with the knowledge, consent, and acquiescence of Morgan. Dooley, the assistant cashier of the bank, testified that he presented the particular notes in question to Morgan for payment, and Morgan said that he was unable to pay them at the time, but would take them up at some later date. The cash book of the firm of Morgan & Stowell, which was kept by Morgan, its entries being chiefly in his handwriting, shows the receipt of the consideration for the \$1,000 note, and also the firm's payment from time to time of interest on that sum and on the \$2,500 note. There was other evidence tending in the same direction, but this is sufficient for the present purpose.

The important and difficult question is whether this proceeding is barred by the statute of limitations. The \$1,000 note is dated April 25, 1894, and the last payment on the \$2,500 note was made March 24th of the same year. The proceeding was instituted in the county court on July 20, 1901, more than seven years thereafter, and is therefore barred unless the running of the statute of limitations was suspended from the time the plaintiff's claim was presented to the executrix until the bank was notified that it had been rejected. By section 387, B. & C. Comp., an action cannot be maintained against an executor or administrator until the expiration of six months after the granting of letters testamentary or of administration, and by section 388 such an action cannot be commenced until the claim of the plaintiff has been duly presented to the executor or administrator, and by him disallowed. Section 20 provides that, when the commencement of an action is stayed by statutory prohibition, the time of the continuance of such prohibition shall not be a part of the time limited for the commencement of the action. It seems, therefore, that the time a claimant is prohibited from commencing an action on his claim, either because the six months after the granting of letters testamentary or of administration have not expired or because the question of the allowance of the claim is pending before the executor and undecided, will not be deemed a part of the time limited for the commencement of the action thereon. During the first six months after the granting of letters one holding a claim against an estate, except possibly when it comes within the provisions of section 18, is prohibited from suing thereon in any event; nor can he commence his action after the expiration

of such time until the claim has been disallowed. He must, of course, present his claim before it is barred by the statute of limitations, otherwise the executor or administrator is not authorized to allow it. B. & C. Comp. § 1161. The statute cannot be tolled by a mere failure to present the claim. After it has been presented, however, the claimant is prohibited from suing thereon until it is disallowed, and the operation of the statute will be suspended during the time of such prohibition. *Blaskower v. Steel*, 23 Or. 106, 31 Pac. 253; *Nally v. McDonald*, 66 Cal. 530, 6 Pac. 390, 19 Am. & Eng. Enc. Law (2d Ed.) 216. The claim in this case was presented for allowance in April, 1897. It was not then barred by the statute of limitations. Until it was disallowed by the executrix, or until she had retained it a reasonable time without acting on it, no action could have been commenced by the claimant to recover thereon. During the time it was properly pending before the executrix, the cause of action was stayed by the statute, and therefore is not a part of the time limited by the general statute of limitations for the commencement of an action on the claim. An executor or administrator is entitled to a reasonable time after the presentation of a claim in which to examine it to ascertain whether he will allow or disallow it, but, unless he takes some action thereon within such time, the claimant, at his option, may treat the claim as disallowed, and act accordingly. *Goltra v. Penland* (decided June 27, 1904) 77 Pac. 120. This right, however, is believed to be personal to the claimant, who may waive it, and permit the claim to remain in the hands of the executor for further consideration. If he does so, and it is afterwards rejected, the right to commence an action will date from the time of rejection, and not from the time the claimant might have elected to treat the claim as disallowed and commenced an action if he had so desired. The claim in suit was indorsed "Disallowed," but the time when such indorsement was made is not stated. The notation is not dated, and there is no proof whatever on the subject. The statute provides that whenever a claim is disallowed by an executor or administrator he shall indorse thereon the words "Examined and rejected," with the date thereof, and sign the same officially (B. & C. Comp. § 1161), but whether, in such case, the claimant should be notified thereof, either personally or constructively, by the executor or administrator filing a proper report with the county court, as required by the statute, is not clear. But, however that may be, and whatever may be the rule in this regard in ordinary cases, we are of the opinion that under the facts of this particular case the executrix cannot be permitted to insist that the claim was rejected by her prior to the time the bank or its assignee was advised of her action. When the claim was presented, the bank was ad-

vised in writing that it would be notified of the action of the executrix thereon as soon as had. Some seven or eight months later it was assured that the estate "would undoubtedly pay every dollar it owes," but it would be necessary to sell some of the real estate, which the executrix was endeavoring to do, but could not rush the matter without such a sacrifice as would be injurious not alone to the estate but to the creditors, and they were therefore requested, "in their own interests, to be patient." By these statements and promises and the conversations with the attorney of the estate the bank was lulled into security, and did not press the payment of its claim. Relying upon such promises and statements, and in view of the general condition of the estate, and its desire that the largest amount possible should be realized from the assets, it was indulgent, and the executrix ought not now be permitted to insist that its rights have been injuriously affected by some secret action of hers in rejecting the claim. If it was to be rejected because not an obligation of the estate, the proper indorsement should have been made thereon, the bank advised by the return of the claim, or in some other manner, of the action of the executrix, so that it could have taken such steps as it might deem proper to protect its interests. This was not done, nor did the executrix file with the county court, as required by law, a report of the claims presented against the estate. On the contrary, the claim remained either in her possession or her attorney's, and it was not until the statute of limitations had run that the bank's assignee was advised that the claim had been rejected. We are of the opinion, therefore, that the time during which the claim was in the hands of the executrix for examination, without notifying the bank that it had been rejected, should not be taken as a part of the time limited by the statute for the commencement of the action thereon.

It follows that the judgment of the court below should be reversed, and it is so ordered.

#### MOYES v. OGDEN SEWER PIPE & CLAY CO.

(Supreme Court of Utah. June 30, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT  
—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE  
—ASSUMPTION OF RISK—QUESTION FOR JURY.

1. Plaintiff, a boy 14 years of age, the day after he started to work in a sewer pipe factory, was placed at work at a clay hopper. He was required to notify another servant to start the machinery when desired, which was done by pulling a bell cord. The bell was located directly under the hopper, and was accidentally rung on some occasions by pieces of clay falling through an open space in the floor. There was a conflict in the evidence as to

¶ 1. *Young v. Clark*, 16 Utah, 42, 50 Pac. 832; *Anderson v. Daly Min. Co.*, 15 Utah, 22, 49 Pac. 126.

whether plaintiff had received instructions as to the manner of doing the work. While he was cleaning clay from the plunger, the bell rang by accident, when the plunger was caused to descend, and amputated plaintiff's arm. Held, that defendant's negligence in permitting the bell to be exposed and in failing to warn plaintiff and plaintiff's contributory negligence were for the jury.

2. Plaintiff did not assume the risk of injury under such circumstances as a matter of law; but whether he was justified in assuming that his employer expected him to use his hands to clean the plunger, no other tools having been furnished for that purpose, was for the jury.

Appeal from District Court, Weber County; H. H. Rolapp, Judge.

Action by Byron R. Moyes, a minor, by Stewart H. Moyes, his guardian, against the Ogden Sewer Pipe & Clay Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. S. Varian, for appellant. Henderson & Macmillan, for respondent.

MCCARTY, J. Byron R. Moyes, the plaintiff, was injured while in the service of the defendant company on the 13th day of March, 1903, by losing his left arm at the elbow. In his action for damages for said injury a verdict of \$4,000 was rendered, and judgment thereon entered. From said judgment this appeal is taken.

The allegations of negligence in plaintiff's complaint upon which he relies for a recovery are as follows: "Plaintiff further alleges that the bell that he was supposed to ring in order to give the signal to let the plunger descend was worn out, old, cracked, and that said bell was placed immediately under and below the hopper that he was attending to, and that said bell was wholly unprotected, so that clay could and would fall from the table of the hopper upon said bell, and would cause said bell to make a sound as though the cord of bell had been pulled; all of which was, or by the use of reasonable diligence could have been, known to defendant, and was unknown to plaintiff. Plaintiff further alleges that the defendant was guilty of negligence and carelessness in this, to wit: That defendant failed to give plaintiff any or proper instructions how to operate said sewer pipe machine, or how to clean and keep said hopper free from dry clay or any hard substances, and failed to warn said plaintiff of the danger of said machine and to keep his hands and arms out of said hopper and from under said plunger, and in keeping the said bell properly or at all protected, and in causing said plunger to descend without giving any warning to plaintiff, and that by reason of said negligence and carelessness of defendant as aforesaid, and without any fault or carelessness on the part of plaintiff, he has lost his left arm as aforesaid, and will be injured, maimed, and crippled throughout his life; and that by reason thereof said plaintiff has been made sick and sore and dis-

tressed in mind and body, and will ever be so—all to his damage in the sum of \$20,000." Defendant, by its answer, denies that it was guilty of any negligence that caused, or in any way contributed to, the injury upon which the action is based; and alleges contributory negligence on the part of plaintiff, and that he assumed the risk and hazards of the employment.

It appears from the record that the plaintiff was employed by the defendant company to work in its factory, a building of three stories, in which sewer pipe was being manufactured. Plaintiff, who at the time was 14 years of age, bright and intelligent, commenced work at noon on March 11, 1903, and worked until noon the following day (March 12th) sifting sand and doing odd jobs about the factory, on the ground floor thereof. A few minutes before it was time to start the factory running at the noon hour on the date last mentioned, Helmle, a boy who was in the employ of the defendant attending the feeder of the tile press on the third floor of the factory, came to plaintiff, and asked him if he would change jobs. Plaintiff answered that he would provided Hutto, the foreman, would consent. Hutto gave his consent, and the boys changed work. Plaintiff testified that Hutto then went with him to the third floor, where the feeder and tile press were, and said to him, "You must keep all the clay away from the machinery." Hutto, however, testified that he did not go with plaintiff on the occasion referred to. Neither did he give him any instructions respecting his (plaintiff's) work. The clay used for making tile was brought by "cup" elevator from the ground floor to where plaintiff last went to work, and was discharged on a belt, termed the "slow feeder belt," thence onto a fast feeder belt, which delivered the clay into a steel pot or cylinder (called "hopper" in the complaint), and there molded into sewer pipe. When the "pot" or "hopper" was filled with clay, the discharge of clay from the fast feeder belt was shut off, and a signal given by plaintiff to the pressman, who stood at the lever on the floor below, to let the steam on and start the plunger down to press the clay for the purpose of fashioning or molding it into sewer pipe. The feeder belts ran in wooden boxes elevated about four feet from the floor. These boxes ran east and west, and there was a platform for the operator's (plaintiff's) use along the south from the west end 14 feet to the tile press. At the west end (14 feet from the tile press) was a seat for the operator, with levers at his hand to regulate the action of the feeder belts. There were also signal cords communicating with the ground floor to regulate the clay coming up and with the pressman to set the plunger in motion when signaled so to do by plaintiff. Immediately in front of the tile press there was an open space in the floor from 18 inches to 3 feet in width,

and it was shown by tests made by certain of the witnesses that pieces of partially dried clay falling through this open space would occasionally strike the bell which was used to signal the pressman to set the plunger in motion, causing a ring similar to that created by pulling the bell cord. William McGregor, a witness called by the defense, testified that he worked in the immediate vicinity of the bell, and had on several occasions observed pieces of clay, which had fallen through the open space mentioned, strike the bell. The feeder belts would sometimes get clogged with clay, and the plaintiff would clean them off, which was a part of his duties. As stated by one of defendant's witnesses in his testimony, "If the clay accumulated on top of the plunger so that it went up high enough, he would have to push it off." On the afternoon of the second day that plaintiff was at work in the factory, while he was in the act of cleaning the partially dry clay from the tile press, the plunger, without any warning, came down, and cut his arm off at the elbow. On this point the plaintiff testified in part as follows: "When hurt I had left the chair, and was standing on the floor cleaning in back of this sheet iron. The seat is elevated about three feet from the floor. I went over to clean the clay, and put my hand in as far back as I could reach. I was pushing the clay down into the press. I put my hand in to clean it out so that it wouldn't get dry and fall down and spoil the tile. The plunger came down, and cut my arm off at the elbow joint, leaving my hand in the place where the plunger goes." And again: "Before the accident I had cleaned out from under the plunger about six or seven times. \* \* \* The plunger never came down before I rang the bell. I did not expect it to come down until I rang the bell. I did not ring the bell. I was 12 or 14 feet away from the place where I used to ring the bell." The clear preponderance of the evidence shows that neither Hutto, the foreman, nor any other person gave plaintiff instructions respecting the manner in which he was to clean the clay from the tile press. Nor was he warned of the danger of cleaning away the clay referred to with his hands, there being no tools at his disposal except a hoe, which was not suitable for that purpose. Plaintiff testified on this point as follows: "I had never worked around machinery before, and had worked on this machine but one day. I had seen the machine operated once or twice before I was hurt, but had never seen it cleaned out. When I saw the machine working, it was for a minute or two. No one warned me about the danger of putting my hand in there. I did not know it was dangerous." Hutto, the foreman, was called as a witness by defendant, and testified: "Well, I never considered there was any danger to it [the tile press]. I didn't warn

him [referring to plaintiff]. I never paid any particular attention to him." When the evidence was all in, and both parties had rested their case, the defendant requested the court to peremptorily instruct the jury to return a verdict for defendant. The refusal of the court to so instruct is now assigned as error.

Appellant contends that the dangers and hazards incident to the employment in which plaintiff was engaged were so open, plain, and obvious that a person of the age and intelligence which the evidence shows plaintiff to be would, by the exercise of ordinary care, have understood and appreciated them; and, further, that plaintiff's means of knowing and understanding the hazards of the employment were equal to those of his employer, and that he assumed the risks and dangers to which he was exposed. It appears from the record that plaintiff was the only person authorized and whose duty it was to give signals for the plunger to descend, and it is evident that, if the bell had not been rung by accident—which the evidence tends to show was caused by pieces of clay falling through an open space in the floor immediately in front of the tile press and striking the bell, which was in an exposed condition almost directly under the opening in the floor—the injury to plaintiff would not have occurred. In determining the question of negligence on the part of defendant and that of contributory negligence on the part of plaintiff, the exposed position of the signal bell with reference to the falling clay, the youth of plaintiff, and his inexperience in the handling and running of machinery, and the question as to whether or not, under the circumstances, it was the duty of defendant to warn him of the dangers and hazards of the employment, were proper matters for the consideration of the jury, under proper instructions from the court. *Young v. Clark*, 16 Utah, 42, 50 Pac. 832; *Anderson v. Daly Min. Co.*, 15 Utah, 22, 49 Pac. 126; *Bailey, Mast. Liabil.* 116, 117; *Chopin v. Badger Paper Co.*, 83 Wis. 192, 53 N. W. 452; *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183; *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200. The contention of appellant that the opportunities of plaintiff for knowing and understanding the risks and dangers of the employment were equal to those of the defendant, and that plaintiff thereby assumed the risks, and that the court, as a matter of law, should have so found, is not supported by the record, which shows that plaintiff was young and inexperienced, and there is a conflict in the evidence as to whether he received instructions from any source respecting the manner or way in which he should perform the work. The preponderance of the evidence, however, is that he received no instructions. There is evidence in the record tending to show that he received general instructions to keep the excess or accumulations of clay away from the tile press, but that no specific



structions were given him as to how he should do this, and that there were no tools at his disposal suitable for that purpose. Under these circumstances, and in view of his youth and inexperience, it was a question for the jury to determine as to whether or not he was not justified in assuming that his employer expected him to use his hands for that purpose.

Appellant assigns as error the giving of certain instructions and the refusal of the court to give certain instructions asked for by appellant. The instructions cover nearly 20 pages of the abstract, and are therefore too voluminous to set forth in this opinion. We have, however, made a careful examination of them, and find that the court carefully and elaborately covered all the issues, and that the instructions, as a whole, are as favorable to the defendant as the facts in the case warrant. We find no reversible error in the record.

The judgment is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

### McINTYRE v. AJAX MIN. CO.

(Supreme Court of Utah. July 15, 1904.)

#### CONTRACTS—PROVISION AS TO PAYMENT—CLAIM AGAINST CORPORATION—PURCHASE BY DIRECTOR.

1. A contract providing that two sums advanced in the formation of a mining company shall be repaid pro rata out of the proceeds of "ore sales, compromises or otherwise," and that no other money shall be paid out, except for necessary operations, till after the payment of such sums, is to be construed as meaning that, if the net proceeds of ore sales and compromises does not, within a reasonable time, amount to enough to liquidate such claims, the obligation to pay them shall become absolute, and not dependent on the proceeds of ore sales or compromises.

2. One may rightfully purchase a bona fide existing claim against a corporation of which he is a director, if the rights of other creditors are not involved, and he is under no present duty to act in the transaction for the corporation.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Samuel McIntyre against the Ajax Mining Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

While there is some apparent conflict in the testimony on some of the material issues, the following facts are supported by a clear preponderance of the evidence: In 1894 Peter C. Burke and Frank Salisbury were the owners of  $\frac{19}{24}$  of the Champlain No. 2 mining claim, and all of the Fraction mining claim, situate in Tintic mining district, Utah. Burke and Salisbury conveyed their title to the foregoing mining property to John T. Sullivan, who held the same in trust for them. Certain parties, namely, Henry M. Ryan, W. I. Snyder, and Henry Shields, desired to form a corporation, and purchase

the property and take the title thereto to the corporation, and in pursuance of this plan negotiated with Burke and Salisbury for the purchase of their interest in these mining claims. An agreement in writing was accordingly entered into between John T. Sullivan, Peter C. Burke, Frank Salisbury, and Henry M. Ryan, parties of the first part, and A. R. Holcomb, V. F. Clays, and W. I. Snyder, parties of the second part. This agreement, so far as material here, provided as follows:

"And whereas, certain litigations are pending between the American Eagle Mining Company, et al., plaintiffs, against said Clays, Holcomb and Sullivan, defendants, and said Snyder has by proper instrument in writing agreed to maintain and pay the expenses of said litigation on the part of said defendants.

"Now, therefore, in consideration of the premises and of the circumstances, and also of the matters herein recited, the said parties do hereby covenant and agree to form a corporation under the laws of the Territory of Utah, with a capital of \$500,000, divided into one hundred thousand shares of the par value of \$5 each, for the purpose of owning, acquiring and working the mining claims aforesaid, including the other five twenty-fourths of said Champlain No. 2, if the same shall be acquired, and to divide said stock as follows: 70 per cent thereof to said parties of the first part, to be divided among them in such manner as they shall agree, and 30 per cent thereof to said parties of the second part, to be divided among them in such manner as they shall agree upon.

"The said Snyder is to pay the expenses of said litigation to final judgment, that is to say, the retainer to W. H. Dickson of \$2,000 and to Expert Brunton, of Colorado, not exceeding \$1,000. Also the expense of witnesses, court reporters, experts, and other necessary expenses and costs upon the trial of said cause.

"It is further mutually agreed that the present interests of said parties of the first part is of a value of \$34,000, and that the interests of the said parties of the second part for the purposes mentioned in this paragraph, shall be the actual sum paid out by Snyder for and on account of said litigation, as aforesaid, and that said two sums shall be paid back to said parties pro rata out of the proceeds of ore sales, compromises or otherwise, together with the payment of the matters recited in the previous paragraph, but the sum of \$5,000 shall be paid to Salisbury, or his assigns, first of all. All of which are to be paid out and made good before any general dividend shall be paid out, or any other money except for necessary operations."

In accordance with the terms of the foregoing agreement, a corporation known as the Ajax Mining Company was organized, and after the litigation mentioned in the agreement was concluded it entered upon the de-

velopment of the mining properties mentioned. Other mining properties, including the remaining  $\frac{5}{24}$  of the Champlain No. 2, were subsequently acquired by the corporation at a cost of \$46,000, which amount was paid by installments to the parties, or their assignees, from whom the purchases were made. At a meeting of the board of trustees of the company held October 23, 1894, a motion was made and carried "that a mortgage be given to secure the payment of the amounts due Burke and Salisbury, and also the attorney fees, also money due Snyder, as per contract" (referring to the contract of June 7, 1894, portions of which are hereinbefore set out). At a meeting of the board of trustees held July 20, 1895, the following motion was made and carried unanimously: "It was moved and seconded that the action of the board of directors of this company, as reported by the president in adopting the contract of June 7, 1894, made between Salisbury, Burke, Ryan, Snyder, Clays and Holcomb, also in recognizing and agreeing to pay same, as also the amount due Ryan and Knox and McIntyre, and authorizing the trust deed and other suitable obligations and contracts to be issued therefor, be ratified, and in all respects adopted, which motion, being put, was carried." At a meeting of the board of trustees held February 9, 1895, as shown by the records of the company, "it was resolved and carried that the secretary be and he is hereby instructed to prepare an evidence of indebtedness in the form of a trust deed showing the indebtedness due to Salisbury, Burke, Snyder, Ryan, Knox and McIntyre, and providing for the payment of the same, and report at next meeting, or an adjourned meeting to be held February 16, 1895, at 7:30 p. m. Said indebtedness consisting of the following items: \$5,500 advanced by Snyder on purchase money; \$5,000 due Salisbury or assigns, to be a first lien; \$29,000 due Burke and Salisbury or assigns, as per contract of June 9, and \$19,634 due Snyder for expenses of suit, as per same contract, and \$6,030 due Ryan and Knox; \$4,000 due McIntyre, and \$10,000 to McIntyre for water." On January 1, 1895, Samuel McIntyre, plaintiff herein, became a stockholder and officer of defendant company. On September 6, 1895, Henry M. Ryan, and Marian Ryan, his wife, by an instrument in writing, assigned to Frank Knox, president of the company, and Samuel McIntyre, a director, a block of stock of defendant corporation. The writing, so far as material in this case, provides, as follows: "Know all men by these presents, that we, Henry M. Ryan and Marian Ryan, of Chicago, Illinois, for and in consideration of the sum of \$18,679.56 to us in hand paid by Frank Knox and Samuel McIntyre of Salt Lake City, Utah, do hereby sell, assign, transfer, set over and deliver unto said Frank Knox and Samuel McIntyre, 49,812 shares of the capital stock of the Ajax mining company, a corporation, of

Utah Territory, standing in our names and upon the books of said company, as follows, to-wit: 5,000 shares of said stock standing in the name of Marian Ryan and 44,812 shares thereof standing in the name of said Henry M. Ryan. \* \* \* And the said Henry M. Ryan in consideration of the purchase of said stock by said Knox and McIntyre hereby assigns, transfers and sets over unto the said Knox and McIntyre all claims of said Ryan against the said Ajax mining company, aggregating \$9,015.00, and all securities held by said Ryan to secure the payment of said sum." McIntyre received and paid for two-thirds of the stock and account mentioned in the assignment, and Knox received and paid for one-third. The \$9,015 mentioned in the assignment was a part of the \$34,000 purchase price of the Champlain No. 2 and the Fraction mining claims. \$3,005 of the amount was credited to Knox on the books of the company, and McIntyre was given credit for \$6,010 of the account, and the respective amounts charged against Ryan's account. The amount for which Knox received credit (\$3,005) was subsequently paid by the company without objection, but it failed and neglected to pay McIntyre the \$6,010 due him. On January 15, 1897, McIntyre commenced an action against the company to recover the \$6,010. The defendant answered, and a trial was had, and when plaintiff rested his case a judgment of nonsuit was entered, and the case dismissed. An appeal was taken to this court, and the judgment of the trial court affirmed, without prejudice to the bringing of another suit by plaintiff. McIntyre v. Ajax Min. Co., 20 Utah, 323, 60 Pac. 532. For a more detailed statement of the facts reference is hereby made to the opinion of this court rendered on that appeal. On January 24, 1901, McIntyre commenced the present action, alleging substantially the same facts as were set out in the complaint in the former suit, namely, that on or about the 1st day of February, 1895, at Salt Lake City, Utah, one Frank Salisbury sold and conveyed to defendant an undivided one-half interest in the mining claims hereinbefore mentioned for the sum of \$17,000; that thereafter, on or about May 1, 1895, for a valuable consideration, the said Salisbury sold and transferred his said claim to Henry M. Ryan, and that on the 6th day of May, 1895, the said Henry M. Ryan, for a valuable consideration, sold, assigned, and transferred to the plaintiff \$6,010 of said claim of \$17,000; that defendant was immediately informed of said assignment and transfer, and accepted the same, and then and there promised and agreed to pay the said amount to the said plaintiff. The defendant denied the allegations of the complaint relied upon for a recovery, and alleged that Burke and Salisbury claimed and represented to W. I. Snyder and H. M. Ryan, two of the promoters of this mining enterprise, before the agreement

hereinbefore referred to was entered into, that they had a perfect and absolute title to the mining property mentioned therein, subject only to the paramount title of the United States; and that said mining claims contained large quantities of valuable and paying ore. Defendant further alleged that said representations were untrue, in this: that there was no ore in said property, nor was the title to said property clear, perfect, and absolute, but, on the contrary, a large portion of said mining claims was then and there the property of others. Defendant further alleged that at the time plaintiff procured the assignment from Henry M. Ryan of the \$6,010 sued for said plaintiff was a director and vice president of defendant company, and acting in a confidential and fiduciary capacity with respect to defendant and its stockholders, and that he paid nothing whatever for said claim, and that under such circumstances it became and was the duty of plaintiff to obtain said assignment for this defendant and its stockholders, and not for his personal profit and gain. The issues were tried by a jury, who returned a verdict for plaintiff, and from the judgment entered thereon this appeal is taken.

King, Burton & King, for appellant. Sutherland, Van Cott & Allison, for respondent.

McCARTY, J., after making the foregoing statement, delivered the opinion of the court.

The first contention made on this appeal is that the trial court erred in overruling defendant's motion for a nonsuit. Appellant insists that, as the contract of June 7, 1894, between Burke and Salisbury and Snyder and others, provided the \$34,000 was to be paid out of the proceeds of ore sales, compromises, or otherwise, it was incumbent upon respondent to prove by a preponderance of the evidence that the profits of the mines were sufficient to pay plaintiff's claim after liquidating other claims which took precedence of, and were, under the terms of the contract, superior in point of time to, the claim sued on. This same question was raised and squarely presented to this court in the case of McIntyre v. Ajax Min. Co., supra, and Mr. Justice Baskin, now Chief Justice, speaking for the court, said: "To understand the full bearing of the testimony, it is necessary to construe the terms 'that said two sums shall be paid pro rata out of the proceeds of ore sales, compromises, or otherwise,' as used in the contract of June 7, 1894. Following these terms it is provided that no other money shall be paid out, except for necessary operations, until after the payment of the sums mentioned in said contract. From this provision it is clear that the term 'proceeds of ore sales' was intended to include only the proceeds left after paying the expenses of necessary operations, or, in other words, the net proceeds. It is clear that the parties did not intend that payment was to be immediately made, or should depend ex-

clusively on the proceeds of ore sales and compromises, or that said claims should become due and payable only when sufficient funds to pay said claims should be received from the proceeds of ore sales or compromises, because, if such had been the intention, the term 'or otherwise' would not have been used. The proper construction of these terms is that, if the net proceeds of ore sales and that derived from compromises did not, within a reasonable time, amount to a sum sufficient to liquidate said claims, then payment was to be made otherwise; which means that after a lapse of a reasonable time the obligation to pay was to become absolute, and not dependent upon either the proceeds of ore sales or compromises. (Bearing upon this question, see cases cited in *Johnson v. Schenck*, 15 Utah, 490 [50 Pac. 921].)" This same general doctrine was reaffirmed by this court in the case of *Busby v. Century Gold Min. Co.*, 27 Utah, 231, 75 Pac. 725. Therefore, under the law as declared in those cases, which we again reaffirm, the court did not err in denying defendant's motion for a nonsuit.

The claim made by appellant that McIntyre paid nothing for the account is not supported by the record. The written assignment by which it was transferred to him reads as follows: "And the said Henry M. Ryan in consideration of the purchase of said stock by said Knox and McIntyre, hereby assigns and transfers and sets over unto the said Knox and McIntyre, all the claims of said Ryan against said Ajax Mining Company, aggregating \$9,015, and all securities held by said Ryan to secure the payment of the same." It will thus be observed that the account in question was a part of the consideration received by Knox and McIntyre for the \$18,697.56 paid by them in the transaction whereby they purchased from Ryan 49,812 shares of the capital stock of defendant company, which transaction is fully set forth in the foregoing statement of facts.

Nor was the purchase of this claim by McIntyre a fraud against the company. The company had repeatedly, through its board of trustees, by resolutions which were made matters of record, acknowledged the account as a valid and binding obligation on its part, even to the extent of authorizing the execution of trust deeds and mortgages on the company's property to secure the payment of this and other items of its indebtedness. At the time McIntyre purchased the account the corporation was solvent, and he was in no way charged with a duty by the company to pay off and discharge the claim for its benefit. Nor were the rights of creditors prejudiced, or in any way involved, in the transaction. Therefore, under these circumstances, we fail to comprehend upon what theory the purchase of a valid claim against a corporation by one of its directors should be deemed fraudulent. As stated by counsel for respondent in their brief, this is not a

case "where the corporation is insolvent, and the question arises between the director and other creditors of the corporation. In such a case it is very properly held that the property of a corporation constitutes a trust fund; that the director is to be regarded as a trustee; and that he may not, by purchasing outstanding claims against the company at a discount, and putting them in for their face value, thus reap an advantage, because of his position over the general creditors of the insolvent company; nor where the director or other officer of the company is charged with a present duty to pay off or discharge a claim for the benefit of the company, he may not acquire it in his own name at a discount, and compel the company to pay him the full face value." In fact, it is settled by the great weight of authority that a party may contract with a corporation of which he is a director, provided he acts in good faith. In 10 Cyc. 807, the rule is stated as follows: "There is no sound principle of law or equity which prohibits one or more of the directors of a corporation from entering into contracts and dealings with the corporation, provided they act in good faith, and provided there is a quorum of directors on the other side of the contract, so that the vote of the interested director is not necessary to the adoption of the measure; and even in the latter case the contract is good in law." (See cases cited in note.) This being the law, it necessarily follows that a party may rightfully purchase a bona fide existing claim against a corporation of which he is a director, provided that, as in this case, the rights of other creditors are not involved, and he is under no present duty to act in the transaction for the corporation. *Seymour v. Cemetery Ass'n*, 144 N. Y. 333, 39 N. E. 640, 26 L. R. A. 859; *Carpenter v. Danforth*, 52 Barb. 581; *St. Louis, etc., Ry. Co. v. Chenault* (Kan.) 12 Pac. 303; 1 *Morawetz, Corp.* (2d Ed.) § 521.

The contention of appellant that Burke and Sallsbury represented to the promoters of the corporation that they had an absolute and clear title to the mining property mentioned in the contract of June 7, 1894, and for which the company agreed to pay \$34,000, and that defendant, relying upon such representations, was induced to purchase the property, and that it subsequently transpired that Burke and Sallsbury had no title thereto, is not supported by the evidence. The contract by which defendant purchased and came into possession of these mining claims recited that certain litigation was pending, and contained provisions for the payment of the expenses of such litigation, and then, referring to the \$34,000 purchase price of said mines and the expenses of the litigation, further recited as follows: "And that said two sums shall be paid back to said parties pro rata out of the proceeds of ore sales, compromises, or otherwise." It is evident that the term "compromises" had reference only to the then pending litigation, as such litigation

was the only matter covered by the contract that was at that time susceptible of a compromise. In fact, counsel for appellant, in their brief, say: "That in 1894 P. C. Burke and Frank Sallsbury claimed to be the owners of 19/24 of the Champlain No. 2 mining claim and all of the Fraction claim; that there was litigation pending between them and the American Eagle Mining Company, a corporation, claiming to own said claim, and also adjoining properties. Burke and Sallsbury were unable to carry on the litigation, or to develop the property claimed by them. Accordingly they entered into a contract with W. I. Snyder and others by the terms of which the latter were to pay the expenses of the litigation. \* \* \* The litigation was concluded, and the company entered upon the work of developing its properties." The record further shows that at the time the contract was entered into appellant was in possession of an abstract of the title to the property, which showed that the title was clear and unclouded. Therefore the contention of counsel, in the face of the record and their own statement of the case that the promoters of this enterprise were ignorant of the adverse claims that were being made to the property and as to the character of title held by Burke and Sallsbury, is unwarranted, and not supported by the record.

We find no reversible error in the record. The judgment is therefore affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

#### BLEVINS v. TERRITORY.

(Supreme Court of Arizona. Jan. 28, 1893)\*

##### CRIMINAL LAW—FAILURE TO PLEAD—ERROR.

1. The omission to plead to an indictment is fatal to a judgment of conviction, even after verdict.

Appeal from District Court, Gila County; before Justice Kibbey.

Henry Blevins was convicted of crime, and appeals. Reversed.

E. J. Edwards, for appellant. The Attorney General and Miles Van Wagener, Dist. Atty., for the Territory.

GOODING, C. J. It appeared by the records in this case that the trial proceeded without a plea by the prisoner, and, this being urged against the judgment in the case, we think a new trial should be granted. "Until the defendant has pleaded to the indictment, there was no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict." *People v. Gaines*, 52 Cal. 481; *Douglass v. State*, 3 Wis. 820; *Dale v. Copple*, 53 Mo. 321.

SLOAN, J., concurs.

\* 1. See Criminal Law, vol. 14, Cent. Dig. §§ 612, 614.

\*Opinion not heretofore available.

DE LA VERGNE v. TERRITORY.

(Supreme Court of Arizona. Jan. 25, 1893.)\*

TAXATION—PUBLIC LANDS.

1. Where a holder of public land scrip selected his land thereunder, and was entitled to a patent without further act, subject only to a possible shifting of his boundary lines to conform to the United States survey thereafter to be made, the land was subject to territorial taxation prior to the issuance of the patent; the United States being the mere depository or trustee of the title for the benefit of the owner.

Appeal from District Court, Yavapai County; before Justice Gooding.

Action by the territory of Arizona against John C. De La Vergne for the recovery of taxes. From a judgment in favor of plaintiff, objector appeals. Affirmed.

Wilson & Norris, for appellant. John C. Herndon, Atty. Gen., for the Territory.

KIBBEY, J. The court below rendered judgment against a 40-acre tract of land owned by La Vergne for the taxes for 1889, amounting to \$221.50. La Vergne appeals, and here insists that the land in question is not subject to taxation.

In pursuance of the act of Congress of April 5, 1872, entitled "An act for the relief of Thomas B. Valentine" (17 Stat. 649, c. 89), the Commissioner of the General Land Office issued Valentine scrip. By the act this scrip entitled Valentine or his legal representatives to appropriate the quantity of unoccupied and unappropriated public land mentioned in the scrip. The scrip was issued for legal subdivisions of the public survey, presumably in 40-acre tracts. The act provides that the claimant, Valentine, or his legal representatives, might select and should be allowed patents for an equal quantity (that is, equal to quantity of a certain Mexican grant in lieu of which the scrip was issued) of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys. La Vergne became the owner of certain of the Valentine scrip, enabling him to select 40 acres of land. He selected the 40 acres upon which the disputed tax was levied, out of unsurveyed lands. He or his legal representatives will be entitled, without any further act upon his or their part, to a patent to that 40 acres, subject possibly to a shifting of his boundary lines to make them conform to the United States survey when that shall be made. Subject to that possible shifting of boundary lines, he is now the owner of that 40 acres. It is the subject of grant by himself, of mortgage, and may be taken upon execution against him. The legal title, it is true, is yet in the United States, but the United States is the mere depository of the title,

\*Opinion not heretofore available.

and but a trustee. No right of the United States remains in or to the land, and none could be divested by sale for taxes or by any other sale. The enforcement by the territory of its tax lien in no wise interferes with the summary disposal by the United States of its public lands. It seems to us clearly subject to taxation.

The judgment will therefore be affirmed.

GOODING, C. J., and SLOAN, J., concurring.

WORES v. PRESTON.

(Supreme Court of Arizona. Jan. 28, 1893.)\*

APPEAL—PERFECTION—BOND—TIME OF FILING—OBJECTIONS—WAIVER.

1. An appeal is perfected, under the Code, upon the concurrence of two acts—the giving of notice of appeal, and the filing of an appeal bond—and the fact that an appeal bond was filed before the ruling of the court upon the motion for a new trial does not vitiate the appeal, where notice of appeal was not given until after the motion for a new trial had been overruled.

2. An objection to the reception of a verdict on the ground that it was not unanimous was waived where it was not made at the time of the receipt of the verdict, and the fact of its want of unanimity was not preserved in the bill of exceptions, nor made a ground for the motion for a new trial.

Appeal from District Court, Pima County; before Justice Sloan.

Action by A. J. Preston against Charles Wores. From a judgment for plaintiff, defendant appeals. Affirmed.

O. T. Rouse, for appellant. William Lovell, for appellee.

KIBBEY, J. Appellee moved to dismiss this appeal because the appeal bond was filed before the trial court ruled upon appellant's motion for a new trial. We think that fact cannot affect the right of appeal. An appeal is perfected, under our Code, upon the concurrence of two acts, viz., giving notice of appeal, and filing an appeal bond. In this case the appeal bond was filed after the entry of judgment, but before the action of the court upon the motion for a new trial. The notice of appeal was given after the motion for a new trial had been overruled. The appeal was therefore properly perfected, and the motion to dismiss is accordingly denied.

Appellee sued appellant for \$335, the purchase price for 74,455 pounds of silver and gold ore alleged to have been sold and delivered by appellee to appellant. Appellant alleged that the contract of purchase was conditional, being dependent upon the ore assaying not less than 38 ounces of silver per ton; that he was induced to make the purchase upon the representation of the appellee that the ore would assay not less than 38 ounces of silver per ton; that, relying upon that representation, he hauled the ore from the dump of the Blue Jay mine, 30 miles distant from

\*Opinion not heretofore available.

Tucson, to that place, where he ascertained that it would not average over 27 ounces of silver per ton; that ore running less than 38 ounces was valueless to him, and there was a resultant damage to him, accruing from cost of hauling the ore, etc., of \$246.08, for which he demanded judgment against the appellee. There was a trial by jury, and verdict for the plaintiff for the sum demanded in the complaint. There was a motion for a new trial, a bill of exceptions, and a statement of facts. The errors assigned are that the verdict of the jury is void because concurred in by 10 jurors only, that the court erred in excluding certain evidence offered by appellant and in admitting certain evidence offered by appellee at the trial, and that the verdict is contrary to the evidence.

The want of unanimity of the jury in the verdict was not made a ground of the motion for a new trial; no objection was made to the receipt of the verdict at the time; and it does not appear in the record, as a matter of fact, that the verdict was not unanimous. The minute entry of the clerk recites that the jury came into court in charge of the bailiff, and, their names being called, all (12) answered thereto, and, being asked if they had agreed upon a verdict, replied, through their foreman, that they had, and that then the foreman presented a verdict, which was for the plaintiff, and signed by the foreman only; that the jury, being interrogated by the clerk, "say that is their verdict, and so say they all." In another part of the record the verdict appears signed not only by the foreman, but by nine others of the jury. We cannot say that one part of the record, both being transcript of the clerk's minutes, imports verity more than the others. If appellant wished to save this question—if in fact the verdict was not a unanimous one—he should at the time have objected to its receipt, and preserved the fact of its want of unanimity in the bill of exceptions, and made the receipt of the imperfect verdict a ground for a motion for a new trial. By failing to have done so, he has waived the objection.

The court did not err, so far as we can gather from the record, in excluding evidence offered by the appellant. The bill of exceptions does not disclose the facts proposed to be proved by the rejected evidence, and its relevancy is not disclosed by the questions propounded. The evidence admitted over appellant's objection was immaterial, but in no wise prejudiced appellant. The evidence in the case amply sustains the verdict.

The judgment is affirmed.

#### DON YAN v. AH YOU'S ADM'R.

(Supreme Court of Arizona. April 15, 1893.)\*

WRONGFUL DEATH—STATUTES—CONSTRUCTION—  
NEGLECT OF SERVANTS.

1. A statute (Rev. St. 1887, § 2145) authorizing a recovery for wrongful death provided (sec-

tion 1) that an action could be maintained when the death was caused by the negligence of the proprietor, owner, charterer, or driver of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their agents and servants; and (section 2) when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another. *Held*, that an action for wrongful death could not be maintained against a person not described in section 1, where the injuries resulting in death were caused by the negligence or wrongful act of his servants or agents.

Error to District Court, Pima County; before Justice Richard E. Sloan.

Action by Ah You's administrator against Don Yan. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Barnes & Martin, for plaintiff in error.  
C. W. Wright, for defendant in error.

KIBBEY, J. This was a suit by the administrator of the estate of Ah You, deceased, for the benefit of the widow and children of the deceased, for damages resulting from his death, caused by the alleged wrongful act of the appellant. There was a verdict for defendant in error.

There was evidence that Ah You and two or three others were co-owners of a drove of hogs; that among them was a vicious boar; that the hogs were kept and fed in a field through which ran an irrigating ditch; that the deceased had occasion to go into the field to clean out the ditch so that it would serve to carry water to his garden, for the irrigation of which the ditch was constructed, and was attacked by the boar, and received injuries from which he died; that the hogs were in charge of one of the co-owners, but not of the defendant; that the defendant had knowledge that the hog was vicious. There was a sharp conflict of evidence on most of these points. The wrongful act complained of was the keeping of the boar by defendant after knowledge of his viciousness. The court instructed the jury that if they believed from the evidence that the deceased was attacked and killed by the boar without fault on his part; that the boar was dangerous, and known to be so by those in charge of him; that at the time the boar attacked the deceased he was the property of the defendant in whole or in part; and that the deceased left a widow and children surviving him—they should find for the plaintiff. The court further instructed the jury that: "Before you can find for the plaintiff on the fourth proposition—that is to say, that the boar, at the time he attacked Ah You, was the property of defendant, either in whole or in part—you must first believe from the evidence that the defendant, Don Yan, had a moneyed interest in the said boar. If you shall believe from the evidence that the said boar was at the time of his attack upon said Ah You the property of the defendant, or that said boar at said time was the property of a

\* 1. See Death vol. 15, Cent. Dig. § 49.

which not heretofore available.

copartnership in which the defendant was at said time a member, or in which he had at said time an interest in the profits of said copartnership, although you may believe that he was not an active member thereof, then your verdict will be for the plaintiff as to this issue." There were other instructions on the subject, but they need not be quoted at length. They were, in effect, that the defendant below was liable in this action whether the negligence or default was his own or that of a partner or co-owner.

Defendant in error (plaintiff below) cites many cases to the general proposition that the principal is liable for the negligent acts of the agent, and urges that upon the authority of those cases the instruction of the court to the jury was correct. The action at bar, however, is statutory, and the right to recover must be sought within its provisions. The statute provides: "Section 1. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence of the proprietor, owner, charterer or driver of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers; or by the unfitness, gross negligence or carelessness of their servants or agents; (2) when the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another." Rev. St. 1887, § 2145. The right of action in this case, if given at all, is given by the second clause above quoted. The omission in that clause to impose liability for negligence, etc., of servants or agents is significant. The statute clearly makes a classification of the cases in which a right of action is given, and the only distinction between the two classes is, that in one class persons are liable for their own and as well the negligence of their servants and agents, while in the other persons are liable for their own neglect or wrongful act only. To insert into the second clause by construction the provisions that those included in that class shall be liable for their own negligence and that of their servants and agents at once destroys the classification which was so evidently intended by the Legislature, and practically eliminates the first clause of the section from the statute, for then those mentioned in the first clause would be inclusive within those in the second. The familiar rule of statutory construction requires that we shall give effect to both clauses if it can reasonably be done. Giving to the language of the statute its very plain meaning, and limiting ourselves to that, we are of the opinion that no persons in this territory, except those described in the first clause of the section we have quoted, are liable for damages for injuries resulting in death caused by the negligence or wrongful act of servants or agents. The plaintiff in error is not one of those persons; hence, if in fact the death of plaintiff's intestate was

caused, not by neglect of the defendant, but by his agent, he is not liable. The instructions are therefore erroneous, and, there being a sharp conflict of evidence as to the facts, prejudicial to the plaintiff in error. Our statute is an exact rescript of the Texas statute on the same subject. The Supreme Court of that state recently, in construing that statute, came to the same conclusion to which we arrive (*Hendrick v. Walton*, 69 Tex. 193, 6 S. W. 749); and the Circuit Court of Appeals for the Fifth Circuit follow the same construction (*Asher v. Cabell*, 50 Fed. 818, 1 C. C. A. 693).

The judgment will therefore be reversed, and the cause remanded to the lower court, with direction to grant a new trial.

### HUACHUCA WATER CO. v. SWAIN.

(Supreme Court of Arizona. April 15, 1893.)\*

NEGLIGENCE—DITCH IN STREET—INJURIES TO PEDESTRIAN—EVIDENCE—COMPETENCY—INSTRUCTIONS.

1. In an action against one who had excavated a ditch in a street for injuries to one who fell into it in the nighttime, it was error to permit a witness to testify as to whether a person ordinarily prudent could fail to see the ditch.

2. A question to plaintiff as to whether there was not sufficient light at the time of the accident to permit a person standing upon the sidewalk to see the trench was proper.

3. Testimony of a witness that he became aware of the ditch only by walking into the pile of earth from the excavation was irrelevant.

4. In an action against one who had excavated a ditch in a street for injuries to one who fell into it, a requested instruction that if the plaintiff fell into the excavation in question while walking along at night, absorbed in thought, and not looking where he was going, but might have seen the excavation if he had looked, and have avoided it, he was guilty of contributory negligence, was properly refused, as requiring too great a degree of diligence.

5. The fact that there was evidence that plaintiff knew of the ditch did not warrant the instruction, as it did not embody the element of such knowledge.

Appeal from District court, Cochise County; before Justice R. E. Sloan.

Action by George W. Swain against the Huachuca Water Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

William Herring, for appellant. W. H. Stilwell, for appellee.

KIBBEY, J. This is a suit by the appellee against the appellant for damages for personal injuries. It is alleged that the appellant, the Huachuca Water Company, excavated a trench 25 feet in length, 40 inches deep, and 30 inches wide, in a public street in the city of Tombstone; that the company left the trench open, unguarded, and without anything to indicate its dangerous character; that in the nighttime the appellee, while attempting to cross the street, without fault

\*Opinion not heretofore available.

on his part, fell into the trench, and sustained serious bodily injuries. There was a trial below, which resulted in a verdict for the appellee. The appellant here complains of the ruling of the lower court in excluding and admitting evidence and in giving and in refusing to give certain instructions to the jury. We will notice the alleged errors in the order in which they are presented in appellant's brief.

While a witness for appellee was on the stand, appellant asked him upon cross-examination: "Could a person, at the time Mr. Swain came to your office on the evening of this accident, who crossed from Barrows' barber shop diagonally across Allen street to your place, ordinarily prudent, fail to perceive the ditch which you have described—the line of earth which you have described?" The court sustained an objection to the question. Other questions of similar import were asked of this and other witnesses and objections sustained to them. We think this question clearly objectionable. The question of prudence or want of prudence is one for the jury, and not for the witness. Prudence or want of prudence cannot affect the sight. An imprudent man can see as well as a prudent one. True, an imprudent man may neglect the use of that faculty where safety to himself required its use. In such a case contributory negligence would be imputed to him. The question calls for the opinion of the witness, not so much as to the quantity of light, as urged by appellant, as to the exercise of prudence. If the witness had been permitted to answer the question, and had he answered it in the negative, it would have been but his opinion that the person who did not see the trench, under the circumstances described, was imprudent. Appellant urges that the question was intended to elicit information only as to the quality of light, and cites a number of authorities that opinions in such matters are competent. This is true enough. A witness may be asked whether it was light enough for objects to be seen, and may be asked at what distance they can be seen, to determine the quantity of light. But the inquiry must be confined to the degree of light or darkness. If it were broad daylight, and plaintiff walked into the trench, he might have been deemed imprudent; but that was for the jury, and not for the witness, to determine. The question is otherwise objectionable, but we need not further discuss it. There was no error in the ruling of the court in sustaining the objection.

The appellant asked the appellee upon cross-examination if there was not sufficient light at the time of the accident to permit a person standing upon the sidewalk (of the street in which the trench was excavated) to see the trench. The court sustained the objection to the question. We think the question was a proper one, but upon the whole record we cannot see that the appellant was materially injured by the ruling, inasmuch as

a very similar question was asked, and the witness was allowed to answer. A witness was permitted to testify that on the evening of the accident he, in company with his wife, came out of a restaurant, started across the street, and became aware of the existence of the trench only by walking into the pile of earth thrown out of it. Appellant moved to strike out this evidence. We think this evidence was not relevant, but we have carefully examined the record, and cannot see that appellant was materially injured by the ruling.

The appellant complains of one of the instructions given by the court to the jury. The instruction states the law correctly, and it is not open to the objections of the appellant that it comments on the evidence.

The appellant asked the court to give the following instruction to the jury: "The rule denying the right of recovery for negligence in cases in which the plaintiff, by simply looking, would have avoided the injury complained of, is one of wide application; and the jury is instructed that if the plaintiff fell into the excavation in question while walking along at night, absorbed in thought, or with mind preoccupied, and not looking where he was going, but might have seen the excavation if he had looked, and have avoided it, then he is guilty of contributory negligence, and cannot recover." The court refused the instruction. The court did, however, fully instruct the jury upon the subject of negligence and of contributory negligence. The instruction asked, and which the court refused, does not, in our opinion, fairly state the law. It requires of the plaintiff, a passenger along a public street which he has a right to assume is safe, a greater degree of vigilance than the law imposes. Appellant urges that as there was evidence in the case tending to show that appellee knew of the existence of the trench, or had such opportunities to know, that he might fairly be charged with such knowledge, and that, therefore, he would be negligent if he failed to look for it and avoid it. This is true, but the instruction asked does not embody the element of knowledge by the appellee of the existence of the trench.

We think the instructions given in the case were full and correct. We find no error in the record that warrants us in reversing the case. The judgment is therefore affirmed.

GOODING, C. J., and WELLS, J., concur.

#### HAYS v. CRUTCHER et al.

(Supreme Court of Idaho. June 27, 1904.)

APPEAL—EVIDENCE—STIPULATION OF ATTORNEYS—BILL OF EXCEPTIONS—STATEMENT.

1. Evidence contained in transcript, and not saved by bill of exceptions or statement allow-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 2367, 2433.



ed by court or judge, cannot be considered on the appeal.

2. Under the following stipulation of counsel, to wit, "It is hereby stipulated between counsel for the respective parties in this case that the same shall be heard before the Supreme Court at the May term thereof upon this transcript, all questions of time of service being hereby waived," *held*, that the evidence contained in the transcript cannot be considered on the appeal, as it was not saved by bill of exceptions or statement settled by the judge.

(Syllabus by the Court.)

Appeal from District Court, Ada County: George H. Stewart, Judge.

Action by Charles M. Hays against James I. Crutcher and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hon. J. W. Huston, for appellant. Hawley, Puckett & Hawley, for respondents.

**PER CURIAM.** This is an appeal from the judgment alone, and under section 4818, Rev. St. 1887, brings up the judgment roll, and all bills of exceptions, or any statements of the case, upon which the appellant relies. The transcript in this case contains the pleadings, judgment, and notice of appeal; also what purports to be a certified copy of the judgment roll from the Circuit Court of the United States within and for the District of Idaho in the case of *United States v. James I. Crutcher et al.*, and the motion made by the defendants in this case for a nonsuit. At the hearing in this case, counsel for defendants moved to strike from the transcript all that portion of the transcript containing the judgment roll from the United States Circuit Court. The motion is based upon the ground that this matter has no place in the transcript, that it is not incorporated in any bill of exception or statement, and that it cannot therefore be considered in this court. In reply thereto, counsel for appellant relies upon a stipulation attached to the transcript, which is as follows: "It is hereby stipulated between counsel for the respective parties in this case that the same shall be heard before the Supreme Court at the May term thereof upon this transcript, all questions of time of service being hereby waived. May 6th, 1904. Jo. W. Huston, Attorney for Appellant. Hawley, Puckett & Hawley, Attorneys for Respondent."

It will be observed that this stipulation amounts to nothing more than an agreement that the case shall be heard at this present term upon the transcript to which such stipulation is attached. If it were contended that this stipulation takes the place of a certificate from the trial judge settling a bill of exceptions or statement, that contention would be fully met by *Melnert v. Snow*, 3 Idaho (Hasb.) 112, 27 Pac. 677, and *Van Meter v. Squibb* (Idaho) 72 Pac. 884. In the former case it was held by this court that a bill of exceptions cannot be considered on

appeal unless it has been signed and certified by the trial judge. In the latter case it was held that the attorneys in the case cannot settle a statement on motion for a new trial by joining in a stipulation or certificate thereto, but that it must also be certified by the trial judge. In this case the judgment recites that, "Witnesses upon the part of the plaintiff were sworn and examined, and documentary evidence introduced, and plaintiff rested his case." Now, there is nothing in this record which shows or tends to show of what the documentary evidence introduced consisted, nor what evidence was given by the witnesses. It is not even shown by this record that the judgment roll from the United States Circuit Court was introduced in evidence in the trial of this case. In short, there is no bill of exceptions or statement in the record. The motion to strike out what purports to be a certified copy of the judgment roll, commencing at the top of page 15 of the transcript and ending on page 29 thereof, is sustained. This leaves the case here upon the pleadings and judgment. The judgment is regular upon its face, and, not being advised as to what was the class or character of evidence introduced by the plaintiff, we are not prepared to say that the trial court erred in granting the nonsuit.

The judgment will therefore be affirmed, and it is so ordered. Costs are awarded to the respondents.

#### In re ABEL.

(Supreme Court of Idaho. June 29, 1904.)

#### PEDDLERS—LICENSE TAX—RESTRAINT OF TRADE —INTERSTATE COMMERCE—CONSTITUTIONAL LAW.

1. Under the provisions of an act providing for the licensing of peddlers, hawkers, and solicitors, and prescribing penalty for failure to comply with the provisions of said act, approved March 18, 1901 (Sess. Laws 1901, p. 155), an agent or solicitor for a wholesale merchant, which agent has the goods which he is selling in this state, is required to pay the license tax provided by said act before he can legally do business in this state.

2. The phrase "taking orders" as used in the eighth section of said act (Sess. Laws 1901, p. 156), does not contemplate that the runner shall have the goods with him at the time of the sale, but, in the common acceptation of the phrase, the agent or runner sells the goods by sample, taking orders therefor, and thereafter delivers the goods.

3. That part of section 8 of said act (Sess. Laws 1901, p. 156), by which it is sought to confine the taking of orders for goods sold to merchants only, is clearly class legislation, and in contravention of both federal and state Constitutions; but as the remaining part of said act is capable of being enforced in accordance with the legislative intent, wholly independent of that provision, that provision is rejected therefrom, and the remaining part thereof permitted to stand.

4. That provision of said section 8, p. 156, Sess. Laws 1901, referring to peddlers and

¶ 1. See *Hawkers and Peddlers*, vol. 25, Cent. Dig. § 3.

hawkers in farm products, applies to farm products of other states as well as those of the state of Idaho, and is not class legislation, and in no manner interferes with interstate commerce.

5. Internal and domestic commerce are subject to the taxing and police power of the state.

(Syllabus by the Court.)

Application of D. O. Abel for writ of habeas corpus. Denied.

Forney & Moore, for petitioner. John A. Bagley, Atty. Gen., for the State.

SULLIVAN, C. J. This is an original application to this court for a writ of habeas corpus, and involves the constitutionality of an act approved the 16th of March, 1901 (Laws 6th Sess. p. 155). The following facts appear from the record: That the petitioner is a resident of the state of Iowa, and was, at the time of his arrest, an agent of Mason & Abel, wholesale merchants of St. Louis, Mo.; that the said Abel was traveling through Latah county as such agent and solicitor and selling buggies at retail to various people in Latah county at the time of his arrest. He was brought before the court on complaint of the district attorney of Latah county, and fined, and is now serving a term of imprisonment in the county jail in default of the payment of said fine. The case was submitted to the trial court on an agreed statement of facts, which statement contains the following: That the petitioner was the agent and solicitor of the firm above named, which firm is the manufacturer and wholesale dealer of buggies; that the petitioner was the duly authorized agent and solicitor of said firm for buggies in the state of Idaho, and as such agent and solicitor he engaged in the business of selling and offering to sell buggies in the state of Idaho by delivering to the purchaser at the time of sale the buggies so sold; and that on the 13th day of May, 1904, in said county, the petitioner sold to one Charles Hobart, and delivered the same to him, a certain buggy belonging to said firm; that neither the petitioner nor said firm at the time of such sale had procured a license from the county auditor of said county before engaging in said business and making said sale, as required by the above-mentioned law. It is further agreed that prior to the commencement of this action the board of county commissioners of said county fixed the license under said act as follows: Peddlers or hawkers on foot, \$25 per year; peddlers or hawkers with wagon, \$50 per year. Section 1 of said act makes it unlawful to peddle without a license. Section 2 provides that every peddler or hawker traveling with a pack and on foot shall pay a license of not less than \$25 nor more than \$50 per year. Section 3 provides that every peddler or hawker traveling with a wagon or other vehicle shall pay a license of not less than \$50 nor more than \$100 per year. Section 4 provides that every peddler or solicitor taking

orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than \$75 nor more than \$125 per year. Section 5 provides that the money so received for licenses shall be turned into the general fund of the county. Section 6 provides that every peddler or hawker shall be compelled to exhibit his license when called upon by any party to whom he is endeavoring to make a sale of goods. Section 7 provides that no license shall continue for a less period than one year. Section 8 is as follows: "The provisions of this act shall not be construed to apply to runners traveling for wholesale houses and taking orders from merchants only nor to peddlers or hawkers in farm products." Section 9 provides the penalty for the violation of the provisions of said act. Section 10 makes it the duty of the county commissioners to fix the amount of such license and provides that the county auditor shall issue such licenses upon payment of the prescribed fee.

It is first contended by counsel for the petitioner that under the provisions of said section 8 hawkers or peddlers traveling for wholesale houses may take their goods with them, take orders from merchants, and deliver the goods sold to the merchants at the time of the purchase, and that hawkers and peddlers of farm products may sell indiscriminately both to merchants and others, and contend that said law was enacted for the benefit of wholesale houses and for the benefit of merchants only, in that it permits them to buy from peddlers or hawkers whatever goods they may wish, and have them delivered at the time of the purchase, while it prevents every person not a merchant from purchasing from such peddler or hawker and receiving his goods at the time of the purchase. We cannot agree with these contentions of counsel. Said section does not authorize the runners or drummers traveling for a wholesale house to carry the goods to be sold with them. The phrase "taking orders," as used in said section, does not contemplate that the runner shall have the goods with him at the time of the sale, and deliver them. That would be a sale and delivery of the goods if that were done, and not taking orders for goods. The Legislature has not the power to restrict drummers and runners traveling for wholesale houses from taking orders from people generally, and they cannot by legislation confine the taking of orders to merchants only, as that would be class legislation. And that part of said section whereby it is attempted to confine the taking of orders for merchandise to merchants only is unconstitutional, and clearly class legislation. But that objectionable feature of said section does not render the whole act unconstitutional and void, as the remaining part of the act is capable of being executed in accordance with the apparent legislative intent wholly independent of that portion attempting to confine the taking of

orders to merchants only. The invalid part may be rejected, and the valid portion permitted to stand, as we think the Legislature would have passed the law regardless of the invalid part thereof. The provisions of said section except from the operation of said act peddlers and hawkers in farm products. That applies, of course, to the farm products of other states as well as those of the state of Idaho, and is not class legislation within the meaning of that term, and is not repugnant to the provisions of our Constitution, and in no manner interferes with interstate commerce. Under the stipulated facts it appears that the petitioner takes his buggies with him, and travels around among the farmers, and when he sells one he thereupon delivers it to the purchaser. It will be observed that the property at the time of the sale was within the state, and under the control of the agent. This court held in *Re Kinyon*, 75 Pac. 268, that, where both the property and the business or occupation are within the jurisdiction of the state, they are subject to its regulation and control, and that any transaction with reference thereto does not look to interstate commerce for carrying out the execution of the contract. This principle was announced and distinction made in *Emert v. The State of Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, where Mr. Justice Gray said: "The defendant's occupation was offering for sale and selling sewing machines by going from place to place in the state of Missouri in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer from one state to another, and were neither interstate commerce in themselves nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and the police power of the state. \* \* \* The necessary conclusion, upon authority as well as upon principle, is that the statute of Missouri now in question is no wise repugnant to the power of Congress to regulate commerce among the several states, but is a valid exercise of the power of the state over persons and business within its borders." The only business or commerce in which the petitioner was engaged was internal and domestic, and the vehicles which he was selling had become part of the mass of property within the state. Both the occupation and the property were therefore subject to the taxing power and to the police power of the state, and the licensing of that business was a valid exercise of the legislative power of

the state over such business and persons engaging therein.

The writ must be denied, and it is so ordered.

STOCKSLAGER and AILSHIE, JJ., concur.

# FIRST NAT. BANK OF HAILEY v. GLENN et al.

(Supreme Court of Idaho. June 22, 1904.)

MORTGAGE—ACKNOWLEDGMENT BY MARRIED WOMAN—EVIDENCE OF NOTARY—SIGNATURE BY MARK—WITNESS TO SIGNATURE BY MARK—ADOPTION OF SIGNATURE—USURY—AGREEMENT TO PAY TAX ON LOAN—VOID CONTRACT—CLAIM AGAINST ESTATE OF DECEASED—ALLOWANCE OF MORTGAGE INDEBTEDNESS—MORTGAGEE MAY FORECLOSE.

1. Where a notary explains to a married woman that the instrument to which her name is appended is a mortgage upon certain real estate, and the nature and contents thereof, and the property incumbered thereby, and she thereupon replies that whatever her husband does or says is all right with her, and that he is a good man, and she has confidence in him and will do whatever he does, *held*, that such facts constitute a sufficient acknowledgment, and justify the notary in attaching his certificate of acknowledgment in due form to such instrument.

2. Where a married woman acknowledges an instrument in due form, and at the time of such acknowledgment her name is affixed to her such instrument as follows, "Jennie X Glenn," mark.

but her signature by mark is not witnessed by any person writing his name as a witness thereto, *held*, that by such acknowledgment she adopted and approved the signature as her own, and thereby acknowledged the execution of the same as her act, and the officer's certificate of her acknowledgment, attached thereto, is a sufficient witnessing of her signature by mark, and constitutes a compliance with section 16, Rev. St. 1887, which provides that "signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness."

3. An officer cannot lawfully take the acknowledgment to an instrument of a person whose name is not at the time affixed to the instrument, and does not appear thereon.

4. Under section 2960, Rev. St. 1887, an acknowledgment to the execution of an instrument carries with it an adoption of the signature thereto, and recognition of the same as the name and signature of the person making such acknowledgment.

5. A notary who has taken the acknowledgment to a mortgage should not be allowed to give testimony upon the foreclosure thereof impeaching or tending to impeach his certificate of acknowledgment.

6. The certificate of acknowledgment to an instrument made by the officer constitutes his official statement and declaration, made at the time of the act, as to the truth and accuracy thereof, and is more likely to be true and correct than the memory of such person in years afterward.

7. Where a mortgage provided that a debt should draw interest at the highest legal rate permissible at the time of the execution thereof, and, in addition thereto, provided that the debtor should pay the taxes on the mortgage

¶ 5. See Acknowledgment, vol. 1, Cent. Dig. § 347.

and debt secured thereby, held, that such stipulation for the payment of taxes on the loan did not taint the contract with usury, since section 1425, Rev. St. 1887, provided that "every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void."

8. An action may be maintained in the district court for the foreclosure of a mortgage upon real estate, where the mortgagor is deceased, although the debt secured by the mortgage has been presented as a claim to the administrator, and allowed by him, and also by the probate judge of the county, where the only object of the action is to make the debt out of the mortgaged property, and the creditor waives all recourse against any other property of the estate of the deceased.

9. Section 5470, Rev. St. 1887, which provides that "no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint"—does not constitute any bar to the foreclosure of a mortgage by the holder thereof against the estate of a deceased person, although the claim thereby secured has been duly and regularly presented to the administrator for allowance.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; K. I. Perky, Judge.

Action by the First National Bank of Hailey against G. P. Glenn and others. Judgment for defendants, and plaintiff appeals. Reversed.

R. F. Buller, for appellant. W. C. Howie, for respondents.

**AILSHIE, J.** The First National Bank of Hailey commenced this action on the 24th day of July, 1895, for the foreclosure of a real estate mortgage executed by Oliver S. Glenn and Emma Glenn, his wife, and G. P. Glenn and Jennie Glenn, husband and wife. The mortgage was executed on the 27th day of July, 1887, to secure the payment of three promissory notes aggregating the sum of \$8,733, and bearing interest from August 1, 1888, at the rate of 1½ per cent. per month, in favor of H. E. Miller. Miller sold and transferred the notes and mortgage to appellant prior to the commencement of this action. At the time of the execution of the notes and mortgage, G. P. Glenn and wife were residing upon that portion of the land upon which the foreclosure was sought in this action, and the same was at that time the community property of the husband and wife. In 1889 G. P. Glenn died intestate, leaving his widow, Jennie, and six children, surviving him. Payments had been made on the mortgage indebtedness from time to time, and after the death of G. P. Glenn the mortgagee, Miller, duly and regularly presented his claim for the amount due, in principal, interest, and taxes, to the administrator of the estate; and the same was thereupon allowed by the administrator, and also

by the probate court of Elmore county. After the allowance of the claim, the administrator paid something over \$2,000 thereon. Under the statute as it existed at the time of the execution of this mortgage, it was lawful to charge and collect interest at the rate of 1½ per cent. per month. It was also the law at that time that all mortgages were taxable, and, under section 1425 of the Revised Statutes of 1887, then in force, it was provided that "every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void." By the terms of the notes and mortgage given in this case, the debtors contracted to pay the highest legal rate of interest permissible under the laws of the then territory; and, in addition thereto, it was provided that the debtors should pay all taxes that might be assessed against the mortgaged property, and also all taxes that might be assessed against the mortgage itself, or the debt secured thereby. Personal service was made upon all the defendants, and also upon the guardian for the six minor children of the deceased, G. P. Glenn. The action was dismissed as to Oliver S. Glenn and Emma Glenn, owing to their having no interest in the land, and the default of Jennie Glenn was duly and regularly entered. The minors, however, all appeared, through their guardian, and answered, and contested the action at every step of the proceedings, and are the respondents in this action. The answer denies the execution of the mortgage by the defendant Jennie Glenn. It also alleges that she never acknowledged that instrument in any manner or form. It also sets up the defense of usury, and charges that the contract was a usurious contract. It was further alleged as a separate defense that the claim had been presented to the administrator of the estate of G. P. Glenn, deceased, and that part payments had been made thereon, and that the mortgagee was thereby barred from maintaining his action upon the contract and to foreclose the mortgage.

The case was tried before the judge of the Fourth Judicial District, sitting in Elmore county; but, before it was finally submitted upon that trial, the judge (Justice STOCKSLAGER, now of this court) who heard the testimony was succeeded by Judge Perky, and the case was therefore retried, and judgment was entered November 14, 1902. Soon thereafter one of the plaintiff's attorneys died, and the case had slow progress in getting into this court. The trial judge found that the mortgage was never executed by the defendant Jennie Glenn, and that the execution thereof was never acknowledged by Jennie Glenn. He also found that the contract was usurious, and that the principal of the loan had been fully paid; and judgment was thereupon entered dismissing the action, and for costs against the plaintiff. Since the

court found that the mortgage was never executed or acknowledged by the defendant Jennie Glenn, we will consider both of these questions together.

The mortgage, which was introduced in evidence, appeared to have been executed in due form, and by all the parties, except by the defendant Jennie Glenn. Her name was affixed to the mortgage as follows, "Jennie her

X Glenn," but this signature by mark was mark.

not witnessed by any person writing his name as a witness thereto. Her acknowledgment, however, as shown by the certificate of the notary who took the same, seems to have been duly and regularly made and taken. At the trial she appeared, and testified as a witness on behalf of the minor children who were defending, and testified that she never signed her name to the mortgage, and that she never made her mark, and that she never saw the mortgage. She also denied acknowledging the same, but did admit that the notary came to see her about the matter, and claims that she did not understand anything about it. It should be observed that she is an Indian woman, and, while she speaks the English language fairly well, and appears to understand it reasonably well, as disclosed by her answers given on the witness stand, still, like most of her people, she did not fully grasp all that was said to her, and especially business methods and ordinary legal proceedings. Other witnesses who were about the house at the time the notary came to take this acknowledgment testify to his being there and having the mortgage with him, and going over and sitting down by the table or desk where she was seated, and explaining to her the contents and nature of the mortgage, and that she replied, in substance, that whatever her husband would do she would do, saying: "But Gus Glenn, he good man, and what Gus say and do I say and do all right." The defendants at the trial called the notary who took the acknowledgment, and examined him with a view to contradicting his certificate, and showing that no real acknowledgment had ever been taken from this woman. The plaintiff objected to the notary testifying to any fact that would in any manner tend to impeach his certificate, but the court overruled the objection and permitted the testimony. We think the objection by the plaintiff was well taken. No notary should be allowed to come into court upon the foreclosure of a mortgage and give testimony impeaching his certificate to the mortgage which is being foreclosed. In the first place, the certificate is made at the time of the acknowledgment, and is the solemn declaration of the officer in his official capacity, under his hand and seal, as to the truth and accuracy of the statements it contains, and it is much more likely to be true and correct than the memory of the person in years afterward. This case

is a practical illustration of the danger of allowing an official to come in and contradict his own certificate at a period, in this case, of more than 14 years after it was made. After persons have relied upon the faith and correctness of his official statement, and invested their money, and rights have grown up thereunder, the person who acted as such official and made such certificate should not be heard in a court of justice disputing its correctness. *Shapleigh v. Hull* (Colo. Sup.) 41 Pac. 1108; *N. W. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Hockman v. McClanahan*, 87 Va. 39, 12 S. E. 230; *Harkins v. Forsyth*, 11 Leigh, 301; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699. In this case, however, the evidence of the notary was as much in support of the certificate as in contradiction thereof. He testified to explaining to the witness the contents of the instrument, and its purpose and effect, and that, while she did not appear to understand it very well, she told him it was all right with her if it was with her husband, and that whatever he did or said was all right with her. He also testifies that after going over the matter, making as full explanation as he could, and conversing with her about it, he considered she had made a sufficient acknowledgment of the execution of the instrument, and that she was satisfied therewith, and that he felt justified in attaching the certificate of acknowledgment thereto. We think his conclusion was correct, and that he was justified in so certifying. *Banning v. Banning*, 80 Cal. 273, 22 Pac. 210, 13 Am. St. Rep. 156; *De Arnaz v. Escandon*, 59 Cal. 489. The record here shows that the wife reposed perfect confidence in her husband, and was entirely satisfied with whatever he said and did in business matters. We think an acknowledgment to this effect is a compliance with the statute. *Bank v. Rauch*, supra; *Gray v. Law*, 6 Idaho, 559, 57 Pac. 435, 98 Am. St. Rep. 280. More especially should this be true where, as in this case, it is admitted that the husband, and the family of which he was the head, received the full consideration for which the mortgage was executed, and there is no pretense or contention that any fraud or deception was practiced upon either the wife or husband. It further appears in this case that the money for which this mortgage was executed was received and used by Glenn and his wife in redeeming this identical tract of land from a sheriff's sale on foreclosure of a previous mortgage, and that the time for redemption was just about expiring. The money, therefore, sought to be recovered in this action, is, practically speaking, the purchase price for the tract of land. This brings us to the question of the signature to the mortgage by the defendant Jennie Glenn.

Section 16 of the Revised Statutes of 1887, which is devoted to definitions of various words and phrases used in the statutes, de-

lines a "signature" as follows: "Signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." It is argued by respondents that, under this statute, Jennie Glenn's signature does not appear to the mortgage, since it is shown on its face to have been made by mark, and there is no witness thereto. We think this contention would be correct if the signature were found in this condition to an unacknowledged instrument, or one that is not required by law to be acknowledged. But by the provisions of section 2921, Rev. St. 1887, it is provided that the community property occupied as a residence cannot be incumbered "unless both husband and wife join in the execution of the instrument by which it is so \* \* \* encumbered, and it be acknowledged by the wife, as provided in chapter III of this title." Section 2960, as found in chapter 3 referred to in section 2921, *supra*, provides the form of acknowledgment to be made by a married woman to an instrument affecting title to real property in which she has any interest. An examination of the acknowledgment will disclose that an officer is required to certify that "the person whose name is subscribed to the within instrument, described as a married woman," personally appeared before him, and that, "upon examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution." It is clear that an officer would not be justified in taking and certifying an acknowledgment of any person to an instrument whose name is not affixed to the instrument, and does not appear thereon; and it is equally clear that, in order to make a good acknowledgment, the person executing the instrument must adopt the name appearing thereon and the execution thereof as his or her own. The officer taking the acknowledgment is not required to see the person sign the instrument, nor is he required to witness the instrument; but he is required to ascertain whether or not the party acknowledges the instrument as his or her obligation or contract, and as having been executed by him or her. All these things appear from the certificate in this case to have been done regularly. The name of Jennie Glenn appeared subscribed to the instrument. Whether by her, her husband, or some other person, she approved of it, adopted it, and acknowledged it as her own. See *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Harris v. Harris*, 59 Cal. 620; *Kerr v. Russell*, 69 Ill. 660, 18 Am. Rep. 634. To "execute" an instrument, it is true, includes signing it; but the admission by a party whose name is appended to an instrument that he executed it is as binding upon the party contracting as if the

person to whom the admission is made had seen him affix his name thereto. Such admission becomes legal evidence of the fact. We therefore conclude that the notary's certificate that the party whose name is affixed acknowledged the execution of the instrument is as good a witness to the signature by mark as if he had written his name at the foot of the document "as a witness to her signature by mark." In a case like this, where there is no charge of deception or fraud, and where it is not denied that the contracting parties received and enjoyed all the fruits of their contract, and the full consideration therefor, it would be an injustice to allow a recovery to be defeated in a court of equity by reason of such a slight deviation from the forms usually recognized and followed.

We next come to appellant's contention that the court erred in finding that the contract was usurious. This finding was predicated upon the clause found in the mortgage providing that the debtors should pay taxes on the mortgage and the debt secured thereby. The defendants maintained that, since the mortgage was drawn for the highest legal rate of interest permissible, a stipulation for the payment of taxes on the mortgage in any sum whatever had the legal effect of raising the rate above that allowed by law, and therefore brought the contract within the provisions of section 1266, Rev. St. 1887, and made it usurious. In support of this proposition, respondents have cited *Mortimer v. Pritchard*, 1 Bailey, Eq. 505, and *Meem v. Dulaney* (Va.) 14 S. E. 363. In *Mortimer v. Pritchard* the South Carolina court held that where a contract provided for the highest rate of interest, and also provided for the debtor paying the state and city taxes, upon its face it would appear usurious, but that where, as in that case, it appeared that the parties acted in good faith, and had taken the advice of counsel as to the legality of such a contract, there was no corrupt intent, and the court held the contract legal. In *Meem v. Dulaney* the Virginia Court of Appeals held a contract very similar to the one at bar usurious. In *Banks v. McClelland*, 24 Md. 62, 87 Am. Dec. 594, the Supreme Court of Maryland, in the syllabus to that case, say, "An agreement by the mortgagor to pay the taxes on the mortgage debt is not usurious," and the question of usury in such a case is there held to depend upon the particular circumstances of the case. We find that in none of the cases cited by respondent on this question has there been a statute similar to ours, declaring such stipulations void. Since section 1425, as it stood when this contract was entered into, provided that every contract whereby the debtor agreed to pay the taxes on the money loaned or the mortgage was null and void, the stipulation, therefore found in this mortgage, was never such as could be enforced. If null and void, it could never have had any life or vitality in

it. If void from the beginning, it is difficult to see how it ever obtained the energy or ability to taint an otherwise legal contract with usury. This statute carried within itself its own penalty for its violation, namely, that the contract should "be null and void." To allow a stipulation which the statute says should be void from the beginning to have the effect of corrupting the whole contract in which it is found, and subject it to the penalties for usury, would be attaching a double penalty to a statute which carries its own penalty with it. It is also worthy of observation that the usury statute of this state does not declare the usurious contract void, but, rather, imposes a penalty upon both the debtor and creditor. If the contract under consideration were usurious, it would have been the duty of the trial court not only to declare the penalty against the lender, but also the borrower; and we are not prepared to say that the borrower, by inserting a stipulation in his mortgage which the statute says is void, thereby subjects himself to the penalty of a usury statute. On the other hand, the mortgagee in this case testifies that he never knew such a stipulation was in the mortgage until long after its execution, and that he never at any time collected such a tax from the mortgagors, nor did he ever charge them therewith. In *Re Price Fuller*, 1 Sawy. 243, Fed. Cas. No. 5,148, a judgment had been entered by confession, and provided for a greater rate of interest than allowed by law. It was contended that this made the judgment usurious, and subjected it to the penalties of the usury statute. Judge Dedy disposed of the usury phase of the question as follows: "There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The Code provides the rate of interest a judgment shall bear, and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and, if not, shall bear interest as principal."

We now come to the last contention made by appellant in this case. It is embodied in the following conclusion of law made by the trial court: "Plaintiff's predecessor, having presented his claim against the estate of G. P. Glenn, deceased, and having received payment thereon, cannot now maintain this action." Respondent claims that this conclusion of law is justified by section 5470, Rev. St. 1887. The provisions of that section are as follows: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate

subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." Respondent argues that if the plaintiff could not, in the first instance, maintain his action to foreclose his mortgage without expressly waiving "all recourse against any other property of the estate," then he cannot be allowed to present his claim against the estate, and, after obtaining all he can from the estate, be permitted to foreclose his mortgage, and then waive recourse against any other property of the estate. We have been cited to no authority sustaining this construction of the foregoing statute, and we have been unable to find any to that effect. In California they seem to have changed their statute on this subject from time to time, but at no time do they appear to have had a statute in the exact language of our provision. Still the courts of that state have frequently considered the right of a mortgagee to foreclose both with and without having presented his claim to the administrator, and have inferentially touched upon this question in the following cases: *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; *Willis v. Farley*, 24 Cal. 500; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6; *McGahay v. Forrest*, 109 Cal. 63, 41 Pac. 817; *Hibernia Savings & Loan Ass'n v. Thornton* (Cal.) 42 Pac. 447, 50 Am. St. Rep. 52; *Bull v. Coe* (Cal.) 18 Pac. 808, 11 Am. St. Rep. 235. We do not understand the statute to be a bar to the foreclosure of a mortgage simply because the mortgagee presented his claim in due form to the administrator, but, when he seeks to maintain his action to foreclose the mortgage, then, under the terms of the statute, he must waive all recourse against other property. It appears to be conceded by the argument of respondent, and, at any rate, exists as a fact, that section 5470 does not in express terms forbid the mortgagee foreclosing the mortgage, where he has previously presented his claim to the administrator. If that section means what respondents contend it does, it is only by implication, and not by express terms. We cannot, however, by mere implication, give to a statute like this a meaning or interpretation which will preclude, or tend to preclude, the creditor pursuing his remedy in a court of equity for the foreclosure of his mortgage. Section 20, art. 5, Const. Idaho; *Fallon v. Butler*, supra; *Pechaud v. Rinquet*, 21 Cal. 76; *Willis v. Farley*, supra; *Corbett v. Rice*, 2 Nev. 331; *Verdier v. Bigne*, 18 Or. 203, 19 Pac. 64.

The respondent makes the point that the plaintiff, after having received a large sum of money from the estate on the allowance of his claim, gains an advantage if he can afterward be allowed to foreclose his mortgage. This is a matter with which the administrator and probate judge have ample authority to deal. If the estate is solvent, over and above the family allowances and such homestead as may be set off by the pro-

bate judge, in that case it can make no difference to the estate or any creditor thereof, for the reason that the claim should be fully paid, and there would be no occasion for a foreclosure. If, on the other hand, the estate is insolvent, the administrator should not pay, and the probate court should not allow paid, any secured claim, except as the money therefor is made out of the incumbered property. The order of payments and preferences to be made out of an estate is directed by sections 5606, 5607, Rev. St. 1887. Provision is also made for the sale of the incumbered property by the probate court where the mortgagee or lienholder has presented his claim under sections 5536, 5537, Rev. St. 1887. Under these statutory provisions governing the administration of the estates of deceased persons, a mortgagee can acquire no advantage or preference by being allowed to present his claim and thereafter foreclose his mortgage. Of course, he cannot foreclose his mortgage after having presented his claim if the incumbered property is sold by order of the probate court, and the proceeds thereof are applied to the payment of the mortgage debt. In such a case he would have exhausted his security, and could not pursue it any further.

We therefore conclude that the plaintiff was entitled to a decree foreclosing its mortgage, and the judgment of the lower court will be reversed. The cause is remanded, with directions to the trial court to compute the amount due to the plaintiff on its mortgage, and to make findings of fact and conclusions of law in accordance with the facts proven upon the former trial, and in harmony with the legal conclusions herein announced, and to enter judgment and decree in accordance therewith. Costs awarded to appellant.

SULLIVAN, C. J., concurs. STOCKSLAGER, J., having heard the case at the first trial, took no part in the foregoing decision.

#### IDAHO MUT. CO-OP. INS. CO. v. MYER.

(Supreme Court of Idaho. July 1, 1904.)

##### STATUTES—CONSTRUCTION.

1. Statutes will be construed with a view to ascertain the intent of the lawmaking power, and to give force and meaning to the language used.

2. A statute that deals exclusively with one subject, and repeals all acts and parts of acts in conflict with it, will be construed to have been intended to cover all subjects and matters of the new act.

3. The Legislature may enact a law relative to one class of insurance, so long as it is general in its terms as to that particular class of business.

(Syllabus by the Court.)

Application by the Idaho Mutual Co-operative Insurance Company for a writ of

mandamus to John H. Myer, Insurance Commissioner of the state of Idaho. Writ granted.

Davidson & Hutchinson, Good & Roberts, and T. J. Jones, for plaintiff. John A. Bagley, Atty. Gen., for defendant.

STOCKSLAGER, J. This is an original proceeding in this court to determine the right of plaintiff to conduct its business in this state without paying the annual license and taxes as provided by the Session Laws of 1901, p. 165. The hearing was on a demurrer. We find the following headlines for chapter 2, p. 167, of that act:

"General Provisions Dealing Entirely with Insurance Companies Other than Fraternal Beneficiary Societies.

"Section 1. It shall not be lawful for any person to act within this state as an agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state, or out of it, without first procuring a certificate of authority from the Insurance Commissioner.

"Sec. 2. It shall be the duty of the president, or the vice president and secretary of every insurance company doing business in this state, annually, on or before the first day of April of each year, to prepare, under oath, and deposit with the Insurance Commissioner of this state a full, true and complete statement of the condition of said company on the last day of the month of December preceding."

Section 3 provides that the annual statement shall contain: "(1) The name of the company and where located. (2) The names and residences of the officers of said company doing business in the state. (3) The amount of the capital stock or assets of the company. (4) The amount of capital stock paid up. (5) The property or assets held by the company, viz.: The real estate owned by such company; the amount of cash on hand and deposited in banks to the credit of the company; the amount of cash in hands of agents; the amount of cash in course of transmission; the amount of loans secured by first mortgage on real estate, with the rate of interest thereon; the amount of all bonds and other loans, with the rate of interest thereon; all other securities, their description and value. (6) The liabilities of such company, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense and the cause thereof; losses resisted and in litigation; the amounts due banks and other creditors; the amount of money borrowed by the company; the rate of interest thereon and how secured; the net value of all policies in force, circulated as per the Combined Experience Table of Mortality, at 4 per cent. interest, and all

¶ 1. See Statutes, vol. 44, Cent. Dig. §§ 259, 266.



other claims against the company, describing the same. (7) Net surplus over all liabilities. (8) The income of the company during the preceding year, stating the amount received for premiums, specifying separately health, life, fire, marine or inland premiums, deducting reinsurance; the amount received for interest and from all other sources. (9) The expenditures during the preceding year, specifying the amount of losses paid during said term; the amount paid for return premiums. (10) The amount of risks written during the preceding year."

Section 13 of the same act provides that "all insurance companies now doing business in this state, or that may hereinafter do business in this state, under the provisions of this chapter must file with the Insurance Commissioner annually, on or before the 15th day of April of each year, a statement under oath stating the amount of all premiums received by said company during the year ending December 31st preceding in this state, and the amount actually paid policy holders during the same time, and shall pay into the state treasury a tax of two per centum on all such premiums collected, less the amount of all losses actually paid policy holders, and premiums returned. The commissioner shall file such verified statement and schedule in his office and certify the amount of gross receipts, less amounts of losses actually paid policy holders and premiums returned as aforesaid to the State Treasurer. Within thirty days thereafter such insurance company shall pay or cause to be paid into the state treasury a tax of two per centum, or two per centum upon all such gross receipts, less such amounts of losses actually paid policy holders and premiums returned in the state of Idaho, which payment, when made, shall be in lieu of all taxes upon the personal property of such company, and the shares of stock or assets therein."

The Legislature of 1903 enacted a law with the following title: "To Authorize the Organization of Mutual Co-Operative Insurance Companies, to Insure Both Personal and Real Property Against Loss by Fire, Lightning, Tornado, Cyclone, Windstorm, and the Fidelity of Persons and to Regulate Their Conduct." This act was approved March 10, 1903. Sess. Laws 1903, pp. 74 to 81, inclusive. Section 1 provides for the organization as follows: "Any number of persons residing in this state who own personal or real property of not less than \$100,000.00 in value which they desire to have insured may associate themselves together for the purpose of mutual co-operative insurance against loss by fire, lightning, tornadoes, cyclone, windstorm and the fidelity of persons, and form an incorporated company for such purposes and issue policies. Such companies shall embody the words, 'Mutual Co-operative,' in its name." Section 2 provides that "the articles of incorporation of such company shall

be filed with the Insurance Commissioner for examination. If by him found to be in accordance with the provisions of this act, and the name of such company is not similar to the name of any other insurance company organized in this state, he shall thereupon deliver to such company a certified copy of the articles of incorporation, which on being recorded in the office of the recorder of the county where the principal office of such company shall be located, and a copy thereof, certified by the county recorder, filed with the Secretary of State, the Secretary of State must then issue to the corporation, over his official seal, a certificate that a copy of the articles containing the required statement of facts has been filed in his office; and thereupon the persons executing the articles, and their associates and successors, shall be entitled to transact business \* \* \* for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided." Other sections of this act provide for the general management of the business of companies organized under the provisions of this law, until the twelfth section, which provides for assessments, to wit: "All assessments shall be determined by proper classification and rating of the property insured, so that each member will be assessed according to the greater or less risk of the property insured to the hazard insured against. An assessment may be made on the members due and payable within thirty days thereafter to enable the company to provide for losses and expenses necessary in the conducting of its business whenever the board of directors so determine. No assessment shall be made on a member for liabilities incurred prior to his or her membership. Any member may be excluded from the benefits of insurance during all the time in which he or she may be in default of payment of an assessment, and the acceptance of such assessment after the same has become delinquent shall not in any manner make the company liable for any loss or damage that may have occurred during the period that such policy was suspended. Any member shall not be liable directly to any other member for such other member's loss or damage, but the liability of a member shall be solely and exclusively through the channel and process of an assessment and the amount of such assessment shall be only his pro rata share in proportion to the amount of insurance carried and rate on the same of all losses and expenses, making reasonable allowances and deductions for uncollectible and unpaid assessments." Section 13 provides how losses shall be paid, and section 14 provides that any disputes between members and the company shall be settled by arbitration. Section 15 provides how a member may withdraw from the company, and how his policy shall be canceled. Section 16 provides that such companies shall be bodies corporate. Section 17 provides for an annual

statement requiring the president and secretary to prepare, under oath, a full and complete statement of the condition of the company on the 31st day of December each year, and present the same at the annual meeting of the members. Section 18 provides for certificates, to wit: "It shall be the duty of such company to file an annual statement with the proper Insurance Department of this state not later than the 31st day of January of each year, on blank furnished by said Insurance Department. Such department, if it thinks necessary, or one deputized by it, having no interest in an insurance company and unprejudiced, may make an examination into the affairs of such company and for such purposes shall have access to all the books and files of the company, and may examine the officers and other witnesses under oath. If such company is doing business in accordance with and under the provisions of this act, is solvent and properly managed, the Insurance Department shall furnish such company and its authorized agents a certificate stating that such company has complied with the provisions of this act and is authorized to do business for the ensuing year, unless certificate is sooner revoked. If upon such examination it shall appear to the department that the condition of such company does not justify it continuing in business, it may apply to the district court of the county where the principal office of such company is located for an order requiring such company to show cause why it should not be closed. For examining the company's annual report and issuing certificate it shall be paid \$—— and for each agent's certificate \$——." Section 19 provides penalties for any company or agent to do business without authority given them by the insurance department. Section 20 permits other mutual insurance companies doing business in this state under any of the provisions of the law thereof, with the written consent of a majority of the members, to accept the conditions of this act, and thereupon be governed by it. Before such company shall be entitled to the benefits of this act, it shall file with the Insurance Department its articles of incorporation and by-laws, and record a certified copy thereof, as provided by section 2 of this act. Section 21 provides, "All acts and parts of acts in conflict with the provisions of this act are hereby repealed in so far as they affect any company or companies hereafter organized under or taking advantage of this act."

We have endeavored to recite every provision of the Session Laws of 1901, as well as the act of 1903, that will throw any light on the questions that are submitted to us for determination. The plaintiff insists that it is subject to the provisions of the law of 1903 only, whilst the Attorney General, for the defendant, insists that the plaintiff is not only subject to and controlled by the law of 1903, but all the provisions of the law of

1901. The entire contention seems to be the payment of the 2 per centum tax on the earnings of the company; yet, if we understand the articles of incorporation and by-laws of the plaintiff, we are unable to see how it can be affected by the provision of the law of 1901 requiring the payment of 2 per centum on the net earnings of the company, as it does not seem that there is ever a fund accumulated, only as it may be necessary to pay losses or conduct the business of the company. The law of 1901 seems to have been enacted to require all classes of insurance companies, except fraternal organizations, to pay 2 per centum on their gross earnings, less their losses and premiums returned, and this shall be in lieu of their personal property taxes. It would seem that, if the Legislature did not want to encourage the citizens of the state to engage in insurance of the character contemplated by the organization and by-laws of the plaintiff corporation, it would have been unnecessary to enact the law of 1903, with all its provisions governing companies of this character. We think it was the intention of the Legislature to encourage the organization of corporations of this kind to engage in mutual insurance, and thus save the citizens of the state thousands of dollars that go elsewhere each year in payment of premiums. If a number of citizens can join together in an organization or corporation, and by their mutual acts protect each other from loss by fire on the payment of the actual loss, with the small expense of conducting the business, and thus save the payment of premiums to foreign corporations, it is certainly commendable in the citizens, as well as just and wise legislation. The very fact that the Legislature required that such companies should embody the words "Mutual Co-operative" in their names is significant, and, we think, signifies that it was the intention to allow corporations of this character to conduct their business on a cheap, equitable plan, and, as an inducement to the organization of such companies, provided that they should be protected from the assessment of any taxes against them. The amount to be paid to the Insurance Commissioner is left blank in section 18 of the act, as well as the amount to be paid for each agent's certificate.

It seems to be conceded that the plaintiff paid the Insurance Commissioner \$50, and counsel for plaintiff does not dispute the right of the department to collect this sum from the plaintiff annually. This being true, we do not feel called upon to pass upon this question, as it has been paid, and the next Legislature can make such modifications as seem best to settle the question of fees to be paid.

A number of authorities are cited by counsel for plaintiff in support of its contention that the act of 1903 is not class legislation. In our view of the case, the Legislature is empowered to pass any and all laws in the

interest of the people, and for the betterment of their condition. So long as they do not infringe upon the rights of one class in the interest of or for the benefit of another, they are within their constitutional power; and, in the passage of the act of 1903 providing for the organization of companies or corporations of the character of the plaintiff, we are unable to see any injustice done one class in the interest of another. Hence the writ of mandate will issue.

This being a final action, and the defendant being a state officer, no costs are awarded.

SULLIVAN, C. J., and AILSHIE, J., concur.

### PURDUM v. NEIL.

(Supreme Court of Idaho. June 28, 1904.)

JUSTICE'S COURT—SERVICE OF SUMMONS OUTSIDE OF COUNTY—JURISDICTION—NONSUIT.

1. Under subdivision 4 of section 4726, Rev. St. 1887, the objection that the action has been commenced in the wrong county may raise not only a question of law, but one of fact, and entitle the defendant to a judgment of nonsuit after the evidence is in, although he does not defend against the action on its merits.

2. Where a defendant appears in a justice's court, and makes and files his objections to the jurisdiction on the grounds that he resides and was served in another county, and that the contract sued on was not in writing, and was not to be performed in the county where the action was commenced, and at the same time files his affidavit raising those issues, and they are denied by the plaintiff's counter affidavit, and facts showing jurisdiction are set up in the counter affidavit, the objections are properly overruled and the evidence should be heard.

3. If, upon the trial, it appears that the court has no jurisdiction of the person of the defendant and of the contract sued on, and objection be made on that ground, a nonsuit should be granted under section 4726, Rev. St. 1887.

(Syllabus by the Court.)

Appeal from District Court, Blaine County; Lyttleton Price, Judge.

Action by A. M. Purdum against J. M. Neil. From an order of the district court reversing a judgment of the justice, plaintiff appeals. Reversed.

Sullivan & Sullivan, for appellant. E. J. Dockery, for respondent.

AILSHIE, J. This action was originally commenced in Halley precinct, Blaine county, and the complaint alleged that on the 18th day of February, 1901, plaintiff sold and delivered to the defendant a quantity of ice, for which defendant promised and agreed to pay the sum of \$100, and that he thereafter neglected and refused to pay. In addition thereto it contains the following allegation: "That all the terms and conditions of said contract were to be performed in Blaine county, Idaho." Summons thereupon issued, and was served upon the defendant in Boise City, Ada county. The summons was in sub-

stantial compliance with section 4653, Rev. St. 1887, but, like the complaint, made no mention as to whether or not the contract was in writing. On the day fixed in the summons for the appearance, the defendant filed his motion to dismiss the action upon the ground that he was a resident of Ada county, and that he had never been a resident of Blaine county; and on the further ground that the service of summons had not been made in the county of Blaine, but was made in Ada county, and that the court had obtained no jurisdiction over the person of the defendant. The motion closed as follows: "This motion is made upon affidavit hereto attached and the complaint, summons, and return thereto in this action." So far as the transcript shows, it does not appear that any affidavit was attached to the motion, but on the same day that the motion was filed an independent document was also filed entitled in the cause which purported to be the affidavit of the defendant, in which he denies all the allegations of the complaint, and avers that he is a resident of Ada county, and that he never entered into a contract in writing with the plaintiff whereby he agreed to perform any obligation or pay any sum in the county of Blaine. Four days after the filing of this motion and affidavit the plaintiff filed what appears to be a counter affidavit, wherein he alleges that the contract sued upon was a contract in writing, wherein and whereby the defendant had promised to pay the plaintiff the sum of \$100 in Blaine county. The justice appears to have heard the defendant's motion on the same day on which the last-named affidavit was filed, and overruled the same. No further pleadings or papers were filed in the case, and thereafter, and on the 1st day of September, 1903, the case was called for trial, and all parties appear to have been present. The plaintiff introduced his evidence, and thereupon the defendant renewed his motion to dismiss on the ground of want of jurisdiction over the person of the defendant, and especially on the ground "that the evidence in this case introduced by the plaintiff fails to show that the cause of action was brought upon a contract in writing which by its terms was to be performed in the precinct of Halley or in the county of Blaine, and that the summons shows that it was served outside of Blaine county." This motion was also overruled by the justice, judgment was entered in favor of the plaintiff, and the defendant thereupon appealed to the district court upon questions of both law and fact. When the case was called in the district court the defendant renewed his original motion made in the justice's court, which was sustained by the district judge, and the judgment of the justice was thereupon reversed. From this judgment plaintiff has appealed.

The contention of defendant both in the justice and district courts was that, since neither the complaint nor summons showed upon

its face that the contract was a contract in writing to be performed in Blaine county, the justice had not, therefore, acquired jurisdiction to issue a summons to be served outside of the county. By the terms of section 4639, Rev. St. 1887, "actions in justice's courts must be commenced and subject to the right to change the place of trial as in this chapter provided, must be tried: \* \* \* (7) When a person has contracted to perform an obligation at a particular place and resides in another county, precinct or city; in the precinct or city in which such obligation is to be performed or in which he resides." Under section 4668, Rev. St. 1887, a complaint in a justice's court "is a concise statement in writing of the facts constituting the plaintiff's cause of action or a copy of the account, note, bill, bond or instrument upon which the action is based." Section 4655, Rev. St. 1887, provides, among other things, that a summons from a justice's court shall contain "a sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him." Section 4659, Rev. St. 1887, provides that "the summons cannot be served out of the county in which the action is brought, except \* \* \* when an action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides." An examination of the foregoing statutory provisions will disclose that the section providing the precinct or justice's court in which actions may be commenced authorizes an action to be instituted in the precinct where the obligation is to be performed, but does not require that obligation to be in writing. On the other hand, it is provided that a summons cannot be served out of the county in which the action is commenced unless the contract was in writing, and to be performed in the county in which the action was begun. The respondent contends that this question of jurisdiction in such a case must appear from the record at the time the summons is issued and served. The appellant, on the other hand, argues that the statute nowhere requires these things to appear upon the complaint or summons or justice's docket, and that, therefore, if they exist as facts, and appear upon the trial, that will be sufficient; and that the action cannot be defeated in limine by a motion to dismiss; that the case should be heard, and if, upon the trial, the want of jurisdiction appears, then the action will abate. A determination of that point is not essential to a decision of this appeal for the following reason: The defendant did not rest his motion upon the record made by the plaintiff; that is, he did not rest upon the fact that it nowhere appeared in the complaint, summons, or upon the justice's docket that the contract sued upon was a contract in writing to be performed in Blaine county. He raised that issue him-

self by filing his affidavit alleging that he had never entered into any contract with the plaintiff to be performed in Blaine county. This raised an issue of fact on that point, to which the plaintiff replied. Under those circumstances we think the justice properly overruled the motion.

It is evident from the record in this case and the proceedings had before the justice that both plaintiff and defendant, as well as the justice who heard the case, considered the issue that the action had been commenced in the wrong county had been properly raised, and that it remained an issue throughout the entire trial, as contemplated by subdivision 4 of section 4726, Rev. St. 1887. After the court had ruled adversely to the defendant upon his original motion, he remained through the trial, and at the close of plaintiff's evidence renewed his motion, and based it upon the additional ground that the evidence in the case failed to show that the contract sued upon was in writing, and to be performed in Blaine county. This question of jurisdiction could be kept good as a question of fact in this manner as well as it could be preserved as a question of law by an original motion to dismiss. Section 4726, Rev. St. 1887, is as follows: "Judgment that the action be dismissed without prejudice to a new action, may be entered with costs, in the following cases: \* \* \* (4) When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or precinct, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived." A defendant might have no defense to an action upon its merits, and still the court have no jurisdiction of the defendant, for the very reasons urged by the defendant in this case. In such case, however, he would not be required to defend upon the merits in order to save the objection, but might rely upon the question of jurisdiction both as a question of law and a question of fact; and this issue, while it would not defeat plaintiff's right of eventually recovering when he proceeds in the proper jurisdiction, still it would completely and effectually defeat the recovery in that particular action and within that jurisdiction. In the manner the question of jurisdiction was raised from the beginning in this case, it presented both an issue of fact and law, rather than an issue of law alone. When presented to the district judge upon affidavits with discordant and conflicting evidence thereon, we think the motion should have been denied in the first instance, and should have been determined upon the evidence in the case; and, if it appeared therefrom that the action was commenced in the wrong county, the judgment of the justice's court should have thereupon been reversed, otherwise plaintiff would have been entitled to recover.

The judgment of the district court is reversed, and the cause remanded, with instructions to take further action in the case in harmony with the views herein expressed. Costs of this appeal awarded to appellant.

STOCKSLAGER, J., concurs.

**CORKER v. ELMORE COUNTY COM'RS.**

(Supreme Court of Idaho. June 27, 1904.)

COUNTY COMMISSIONERS—ROAD DISTRICT CONTRACTS—RELEASE OF CONTRACTOR.

1. A board of county commissioners has neither express nor implied power to accept the resignation of a bidder to whom they have duly and regularly awarded a contract under section 875, Rev. St. 1887 (Sess. Laws 1899, p. 129), for the care, keeping, and repair of the roads of a contract road district.

2. It is to the interest of the county that such contracts be enforced. On the other hand, it is against the interest of the county for contractors to be released and relieved from their obligations.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

From a judgment approving and affirming an order of the board of county commissioners, C. E. Corker, a citizen and taxpayer, appeals. Reversed.

W. C. Howie, for appellant. Daniel McLaughlin, Co. Atty., for respondents.

AILSHIE, J. On the 19th day of July, 1902, the board of commissioners of Elmore county duly and regularly let the contract to W. H. Davis for the keeping of the roads of Contract Road District No. 4 of Elmore county in good repair, as provided by law, for the term of two years from and after the 29th day of July, 1902. After the execution of the contract, and on the 25th day of July, the contractor made, executed, and delivered to the board of commissioners his bond in due form conditioned for the faithful performance of his contract. At the July, 1903, meeting of the board of commissioners, the contractor, Davis, filed his written resignation as such contractor, and asked the board to relieve him from his contract and discharge him from all liability thereon. The matter came on regularly for hearing on the 21st day of July, and, so far as the record shows, no evidence whatever was taken or heard by the board in the consideration of such resignation and application for discharge, and by a vote of two ayes and one nay the board made and entered its order accepting the resignation. From the order so made and entered the appellant, C. E. Corker, a resident and taxpayer of Elmore county and Road District No. 4 thereof, appealed to the district court. When the cause was called for trial in the district court the appellant introduced the record of the proceedings of the board of commissioners in accepting the resignation, the contract entered into

between the board and the contractor, and the bond given for the faithful performance of the terms of the contract. Thereupon the appellant offered to prove by his own testimony that the contractor had entirely failed to keep the roads of his district in repair, and had neglected and failed to do any work thereon; that he had not lived up to the terms of his contract, and had not complied with the requirements of law as to the duties of such contractor, and that by reason of his neglect to work and repair the roads and keep them in fair condition they had become impassable, and that at the time the board accepted his resignation it would have cost the county at least double the amount of the contract price to put the roads in a reasonable state of repair and condition for travel. After an extended statement by counsel for appellant as to the nature and character of the evidence he proposed to introduce by the witness, the court ruled upon the offer as follows: "The proffer of proof made by Mr. Howie is denied for the reason that the court thinks it does not show an abuse of discretion on the part of the board in agreeing to terminate the contract in question; but that in that act they exercised a discretionary power, which the law vests in them; and, as far as the court can see, their act does not involve any abuse of that discretion, and for that reason the offer is denied." To this ruling appellant excepted, and thereupon rested his case. No evidence was introduced by the respondents, and the court rendered and entered his judgment approving and affirming the action of the board of commissioners. From this judgment the appellant has prosecuted this appeal. No appearance was made on the part of the respondents at the hearing in this court, but since that a brief has been filed by the county attorney on behalf of the board of commissioners.

We have made a very careful examination of this question, independent of the citations and authorities presented, in order to find, if possible, some authority directly in point, but our research has not been rewarded with any case covering a similar state of facts. The authority for entering into such contracts as the one executed by the board in this case is found in sections 875, 876, 877, 878, and 879, as enacted and added to the Revised Statutes of 1887 by act of February 7, 1899 (Sess. Laws 1899, pp. 127-132). Section 875 authorizes the execution of such a contract, and provides that it shall not be entered into for a period "less than two nor more than three years for the respective contract road districts." Section 876 prescribes the duties of such contractor in reference to keeping roads, bridges, etc., in good repair. Section 877 contains the only power and authority found in the statute for the board of commissioners enforcing the terms of the contract and compelling a compliance therewith. That section is as follows: "The board of county commissioners upon learning that any

of the public roads are not repaired and kept in good order by any one contracting to do so in a contract road district shall have power and shall cause the same to be done by placing labor thereon; and such expense shall be retained from any amount that may be due him on his contract, and should that be insufficient, or nothing be due thereon, the deficiency or whole amount (as the case may be) shall be collected from his bondsmen, as other liabilities." Section 878 provides for making quarterly payments to the contractor, and section 879 directs that the tax collector shall collect the road poll taxes for such district, and turn the same in to the county treasurer. The contention of appellant is that the board of commissioners have no right or authority to terminate such a contract, or accept the resignation of a contractor, or discharge him from the obligations of his contract. It must be conceded that there is no express authority in the statute for any such action on the part of the board of county commissioners, and, if the authority exists, it is implied, rather than express. This court has heretofore been inclined to confine the action of boards of county commissioners within the express power granted them by the statutes. *Gorman v. County Commissioners*, 1 Idaho, 553; *Conger v. Board of County Commissioners*, 4 Idaho, 740, 48 Pac. 1064; *Howell v. Board of Commissioners*, 6 Idaho, 154, 53 Pac. 542; *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264; *Hampton v. Board of Commissioners*, 4 Idaho, 646, 43 Pac. 324; *Meller v. Board of Commissioners*, 4 Idaho, 44, 35 Pac. 712. We are of opinion, however, that in the discharge of the duties for which such boards are created they should not only be allowed to exercise the powers expressly granted, but, in addition thereto, should be allowed the exercise of such implied powers as are necessary to the complete discharge of the duties imposed upon them by statute. Entertaining this view of the scope of their authority to act, the question arises: Is it necessary to the complete discharge of their duties in reference to contracting for the care and keeping of the roads in contract road districts that they have authority to accept resignations from road contractors, and terminate such contracts, and relieve them from the obligations of their contracts? It seems to us that the answer to this question must inevitably be in the negative. The board of commissioners contract for and on behalf of the county. They are not the county, but are rather its chief executive agents. The county can have no interest in relieving a contractor from his obligation. If the contractor has made a good bargain, it is evident that he will never consent to a termination of the contract; if he has made a bad bargain, it is equally certain that the county, from a business point of view, is interested in enforcing that contract. So soon, however, as he finds he has entered into an unprofit-

able contract, he is sure to bring all the pressure he can to bear upon the board of commissioners to have them relieve him from his obligation. In such a case, by underbidding others, he has possibly deprived the county of a more advantageous contract than it may thereafter be able to obtain. On the other hand, by the terms of section 877, supra, if the contractor fails to keep his obligation, the board is not authorized to terminate his contract, but rather to cause the work to be done, and the roads to be kept in repair from time to time, and to charge the same to the contractor, and retain the expense thereof from any sum due him on his contract; and, if there be not sufficient due for that purpose, to charge and collect the remainder from his bondsmen. It would appear, however, that the contract is still in force and effect, and that its terms are enforceable by all the parties thereto. From the action of the board in awarding a contract any person aggrieved thereby, or any taxpayer of the county, may appeal to the district court (*Sess. Laws 1899*, p. 248), and, if no appeal is taken within the statutory time, the order is final, and can no longer be questioned. The contract becomes an obligation from which the board cannot grant relief to the contractor or his bondsmen.

There is another consideration which leads us to believe that it was never intended that the board should have power to relieve a contractor from his obligation, and that is the provision of section 875, wherein it is enjoined upon the board that they cannot award such a contract for less than two years nor more than three years. Now, if they cannot award a contract for less than two years, and still by implication are permitted to release a contractor at any time, they would be doing by indirection what they cannot do directly, and thus defeat the express terms of the statute. We do not think this can be done.

We conclude that the district judge should have reversed and vacated the order of the board of commissioners in accepting the resignation of the contractor. The order and judgment of the district court affirming such action is reversed and vacated, and the cause is remanded, with direction to enter judgment in harmony with the views herein expressed. Costs awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

HESSE et al. v. STRODE et al.

(Supreme Court of Idaho. June 27, 1904.)

ADVERSE POSSESSION—EVIDENCE—TAXATION BY CITY—ESTOPPEL.

1. Where the city erected a fire engine house on its own lot and on a small fraction of an adjoining lot, and maintained such house there for about 20 years, and in the meantime assessed for taxation said fractional part of the ad-

joining lot with the remaining part thereof to the owner, and collected and received such taxes and charges for street paving, sidewalk, sprinkling, and other city purposes, it is estopped from claiming title thereto by adverse possession.

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Action by C. W. Hesse and others against William Strode and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Alfred A. Fraser and Charles M. Kahn, for appellants. W. E. Borah, for respondents.

SULLIVAN, C. J. This action was begun by Boise City, and thereafter the present appellants were substituted as plaintiffs. The action is to quiet title to a strip of ground 2 feet 9 inches wide off of the east side of the west half of lot 8, block 7, of the original town site of Boise City. The case was tried upon an agreed statement of facts, and upon that statement the court rendered its decision in favor of the defendants, who are the respondents here. The appeal is from the judgment.

The following facts appear from the record: It was stipulated by the respective parties that the abstract of title marked "Exhibit A" was a true and correct abstract of title to lot 8, block 7, of the original town site of Boise City, and showing correctly the chain of title to said lot; that in the year 1870 there was erected and has since been standing on the west half of said lot 8 a one-story brick or adobe building, and that said building was erected by the predecessors in interest of the respondents; that said building has been there ever since said year, and is now standing thereon as the same was originally constructed; that there are 2 feet 9 inches of the east side of the west half of said lot which are not covered or occupied by said building; that in the year 1884 Boise City erected upon the east half of said lot a city fire engine house of brick, two stories in height, and that said house was erected over and upon the west half of said lot 8 to the extent of 2 feet 9 inches, and has remained so ever since, and so stands at the present time, and has been occupied during said time by the city as a fire engine house; that neither respondents nor their predecessors in interest have ever at any time objected or complained to the city authorities of Boise City as to the building or the erection of said city engine house, or as to the same being maintained thereon; that the respondents, as heirs to John Strode, deceased, are now the owners and holders of all title and interest which said Strode had in the west half of said lot; that taxes, county, city, and state, have been legally levied and assessed each year upon and against the west half of said lot; that said levies and assessments

were made not against the entire lot, but against the west half of said lot, separate and distinct from the east half thereof each year; that no part of said taxes so levied and assessed has at any time been paid by the appellants or their predecessors in interest, but that the respondents and their predecessors in interest have each year paid all of such taxes; that from time to time special assessments and expenses for sidewalks, street paving, and sprinkling have been levied and assessed against and upon the west half of said lot, and that all such amounts so levied for such purposes have been paid by the respondents and their predecessors in interest. Upon those facts judgment was entered in favor of the respondents. The stipulated facts show that the respondents have a clear paper record title to the west half of said lot.

The questions for decision are: (1) Did the appellants and their grantor, the city, acquire title to said 2 feet and 9 inches of land by adverse possession? or (2) was there a boundary line agreed upon? or (3) are the respondents estopped from questioning the title of the appellants? We will answer the second and third questions first. The stipulated facts do not show that a boundary was ever agreed upon between the city and the owners of the west half of said lot, and there are no facts shown that estop the respondents from questioning the title of the appellants. The only other question for decision is, "Did the city acquire title to the 2 feet 9 inches on the easterly side of said lot by adverse possession? It is shown by the stipulated facts that Boise City levied taxes for city purposes, and from time to time made special assessments for sidewalks, street paving, and street sprinkling purposes upon the west half of said lot 8, and that all such amounts so levied, assessed, or charged against said west half of lot 8 have been paid by the respondents and their predecessors in interest. This would indicate that the city was not holding said tract of ground adversely to the respondents, but recognized their title thereto by levying such taxes and charges against it. The city has thus from year to year treated this property as belonging to the respondents, and accepted their money for the taxes so levied on the theory that the property belonged to them. And the city, by those acts, is estopped from denying that said property was legally assessed, and that it was not, in fact, subject to taxation, and did not belong to the respondents.

The judgment of the district court must therefore be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondents.

STOCKSLAGER and AILSHIE, JJ., concur.

## BRANCA v. FERRIN.

(Supreme Court of Idaho. June 24, 1904.)

ACTION TO QUIET TITLE—WHEN MAINTAINABLE  
—FORECLOSURE PROCEEDINGS—ADMISSION  
AS EVIDENCE.

1. Where it is shown that the action is to quiet title to land which is a part of the public domain, that the plaintiff or his predecessor in interest have never occupied the land or filed a possessory claim to such land, as provided in section 4552, Rev. St. 1887, it cannot be maintained.

2. Where it is shown that the plaintiff in the action neither in person nor by his predecessor in interest ever filed a possessory claim on land to which he seeks to quiet the title, nor was ever in possession thereof, it is error to admit the record of the foreclosure proceedings through which he claims title when the defendant is in the possession of the premises.

(Syllabus by the Court.)

Appeal from District Court, Custer County; James M. Stevens, Judge.

Action by Mal Branca against Ellen Ferrin individually and as administratrix. Judgment for plaintiff, and defendant appeals. Reversed.

Hawley, Puckett & Hawley, for appellant.  
E. E. Chalmers, for respondent.

STOCKSLAGER, J. The plaintiff commenced his action in the district court of Custer county, alleging that at the time of commencing his action he was, and for a long time had been, the owner, possessed, and entitled to the possession of certain land situated in Custer county. Then, after describing same as property in the town of Bay Horse, we find this description of property: "And also that undivided one-half interest of, in, and to that certain piece or parcel of land situate, lying, and being at the mouth of Bay Horse creek, being inclosed by a fence, and known as the Calkins Ranch or land claim, together with all improvements and appurtenances thereto belonging, and all water and ditch rights therewith connected and heretofore used upon and for the same." The second allegation is that the said plaintiff claims title in fee to the said premises, and that the said defendants and each of them, claim an estate or interest therein adverse to the said plaintiffs, as the plaintiff is informed and believes, and therefore alleges. The third alleges that the claim of the said defendants, and each of them, is without any right whatever. Then follows the prayer for relief in accordance with the above allegation. Defendants, answering, deny each and all the allegations of the complaint, and for a further answer and defense allege: "That all the land and premises described in the complaint herein is vacant public land, and is unsurveyed; that on the 22d day of August, 1896, the defendants herein settled upon the premises described in the complaint herein as being inclosed by a fence at the mouth of Bay Horse creek, which said premises were at said time, and ever since

have been, and now are, unsurveyed public land belonging to the United States; and have ever since resided thereon; and have been in the actual and peaceable possession thereof, and entitled to the possession, and the owners thereof, except as against the government of the United States, since said date." The next allegation is: "That the defendants have been in the quiet and peaceable possession of the premises described in said complaint, holding and claiming the same adversely to the said plaintiff, and adversely to all other persons, except the government of the United States, for more than five years last past, and before the commencement of this suit; and that neither the plaintiff, nor ancestor, nor predecessor or grantors was or were possessed of the said lots of land, or either or any portion thereof, within five years before the commencement of this action; and that the defendants have paid all the taxes that have been assessed against said premises." By way of cross-complaint defendants allege that they are now, and were at the commencement of this suit and for more than five years before that time, and from thence up to that time had been, in the quiet and peaceable possession and occupancy of the land in controversy, together with all improvements and appurtenances thereto belonging, also water and ditch rights therewith connected, etc.; that the said plaintiff has no right, title, or interest, or right of possession in or to the said described premises, or any part thereof; that the said plaintiff claims to have some right, title, interest, or right of possession in or to the said described pieces and lots of land adverse to defendants, and claims that he is the owner thereof, and claims title thereto in fee. Defendants allege that the said claim of plaintiff to said lots and pieces of land above described, whatever it may be, as against the rights of these defendants is without foundation, and is called upon for his title to said land and premises. Then follows prayer in compliance with the allegations above referred to. The answer to the cross-complaint denies that the defendants were at the time of the commencement of the suit, or at any time, or at all, in the quiet and peaceable possession of the premises in controversy; denies that the plaintiff has no right, title, or interest or right of possession, etc.; denies that the said claim of plaintiff as against the right of defendants is or ever was without foundation, or ever was a cloud upon defendants' or either of their title or right in or to said land and premises, or that either of them has or had, immediately preceding the commencement of this action, any title or right whatever in or to said premises, or any part or portion thereof, which is or ever was or could be the subject of or cloud or incumbrance thereon. Then for affirmative defense the plaintiff set up a judgment and decree of the district court of Custer county by which it is shown that in an action of fore-



closure then and there pending in which the plaintiff and one John Millick, as administrator of the estate of Nick Millick, deceased, the predecessor in interest of the defendants herein, were defendants, and one Boaz D. Pike, intervener, a judgment and decree of foreclosure and sale was given in favor of the plaintiff therein and herein and against the intervener therein, which decree, among other things, provided that the plaintiff had a prior and superior lien upon the premises involved in the action; that execution issued on said decree, and was delivered to the sheriff of Custer county, who on the 10th day of September, 1900, sold said premises to the plaintiff in this action; that the sheriff issued to said purchaser a certificate of sale, etc.; that on the 11th day of September, 1901, no redemption from said sale having been made, the sheriff executed and delivered to plaintiff a deed to the premises; that ever since that time plaintiff has been in the actual, continuous, and peaceable possession of said premises, and the whole thereof, and has paid all taxes, state, county, and municipal, thereon. These were the issues joined, and upon them the cause was tried by the court. Findings of fact and conclusions of law were filed, and judgment entered accordingly.

The first finding is "that the plaintiff is now, and for a long time heretofore has been, the owner, possessed and entitled to the possession . . . of that undivided one-half interest in and to that certain piece of land." Then follows the description of the land in controversy. The third finding is "that the claim of the defendants, and each of them, is without any right whatever, and that the said defendants, or either of them, have not any right, title, or interest whatever in and to said lands or premises, or any part or portion thereof, except said undivided one-half interest in said Calkins ranch." It seems to be an undisputed fact that the land in controversy is unsurveyed public land, the plaintiff basing his right to recovery on his title from the sheriff of Custer county through a foreclosure proceeding and sale thereunder, and defendants basing their right to possession by virtue of a settlement which it is alleged was open, notorious, and undisputed from the 22d day of August, 1896, and more than five years prior to the institution of this action. It being practically conceded that the property in dispute is a part of the public domain, and also unsurveyed land, hence not subject to entry and sale, the important question arises as to who has been in possession, and who was in possession at the time of the commencement of this suit. It is conceded that the title to the property is in the government of the United States, and at most the only question that can be settled here is the right to possession. We will only examine the pleadings and evidence to determine this question. From the evidence it is shown that the defendants have

been living in the house upon the premises in dispute since August, 1896. As we view it, it is unimportant, at this late date, how or under what circumstances they became possessed of the property. They were there beyond a question under color of right, and it is nowhere shown that they were placed in possession by the plaintiff or his grantor in the mortgage, or that they were the co-tenants, partners, or agents of Nick Millick, who it is shown at one time was the owner of the improvements on the land, and the party from whom plaintiff, through his mortgage foreclosure proceedings, obtained all the claim he has to the property. It is not shown that the plaintiff or his predecessor was ever in the actual possession of the property. It is alleged in the pleadings of the plaintiff that such was the fact, but he does not prove it. The only parties shown to have actually lived upon the premises were the defendants and one Sereaphiro Galacio, who sold his interest in the premises to the defendants, who immediately took possession, and have resided there ever since. This transfer was made, as shown by the record, on the 22d day of August, 1896. We think the evidence establishes the fact that Nick Millick was at one time the owner of the improvements on the premises in controversy, and that he mortgaged a one-half interest to O. J. Salisbury, and thereafter mortgaged the same interest to the plaintiff herein for a sum sufficient to pay the Salisbury mortgage. Also that he sold the other half interest to Galacio, the party from whom the defendants claim to have obtained possession. These conclusions are supported by the evidence.

W. J. Treloar, a witness for the plaintiff, testified that he had known Nick Millick 15 or 16 years; that he resided in Bay Horse, and was engaged in the hotel business and ranching; that he knew the ranch at the mouth of Bay Horse creek, sometimes called the "Calkins Ranch" and sometimes called the "Millick Ranch." Being asked if he ever knew Millick to live upon this piece of land, he replied he never lived there that he knew of. He further testified that he knew both of the Ferrins. "They lived on this piece of land. They commenced living there five, six, or seven years ago, and have resided there continuously ever since. No one else lived there that I know of." The plaintiff testified that he resided in Bay Horse, and had resided there 18 years. This is all of the evidence of plaintiff with reference to the occupancy or possession of this land; and the evidence of witness Treloar, taken in connection with the evidence of the defendant Ellen Ferrin, shows conclusively that the Ferrins have resided upon the land continuously since 1896. It is also shown that they have paid the taxes assessed against the property since 1896, and that the property was assessed in the name of Arthur Ferrin. It is not shown that the property was ever assessed as the property of plaintiff. We find

In the record that certain ranch property was assessed as the property of plaintiff, but it is shown to have been a ranch about a mile below the town of Bay Horse; hence not this property. The assessment roll of Custer county shows that the plaintiff paid taxes for the years 1899, 1900, 1901, and 1902, on a valuation of \$50 each year, on a ranch about a mile below the town of Bay Horse, formerly owned by Clestel Branca.

Counsel for respondent urges that the notice given by Arthur Ferrin, and published in the Challis Messenger, is conclusive evidence that he did not claim this land by virtue of his settlement and occupancy thereof, it being unsurveyed public lands until after the date of such publication. The notice is as follows:

"To all Whom it May Concern: You are hereby notified to remove all improvements off the Millick and Ferrin ranch as provided by law and pay all claims against said improvements.

"[Signed.] Arthur Ferrin.

"Dated March 6, 1901."

It is shown that the Ferrins had been residing upon these premises as the sole occupants for almost five years prior to the date of this notice. The only taxes ever shown to have been paid upon the premises were paid by the Ferrins. The notice was not directed to any particular person; simply a notice, in effect, that they claimed the right to possession, and, if any one claimed any of the improvements, they must remove them, after paying all claims against said improvements. If conclusions are to be drawn from this notice, they must be that Mr. Ferrin did not recognize any one's right to occupy or possess any portion of the land in controversy, but that, if any one claimed any of the improvements, they might remove them by paying all claims against them.

A number of errors are assigned by appellant as to the admission of certain exhibits offered by the plaintiff. They were the records in the case of Mal Branca against John Millick as administrator of the estate of Nick Millick, deceased, and Boaz D. Pike, intervenor, wherein the plaintiff foreclosed a certain mortgage theretofore executed and delivered by Nick Millick to plaintiff, a part of the property described in said mortgage being the property in controversy here. Millick could only mortgage the improvements on this land, as the title then and now is in the government of the United States. We cannot see how this evidence could aid the plaintiff in a recovery in this action under the pleadings and evidence, as it was not shown that the plaintiff or his predecessor in interest ever filed a possessory claim to the property in dispute, or ever lived upon or occupied it, and he must have shown one or the other fact to exist before he could maintain an action of this character.

Other errors are assigned, but with our view of the case it is unnecessary to pass up-

on them, as the plaintiff is not entitled to the relief demanded in his complaint under the proof he has submitted. He asks for that which the court is powerless to give, and the judgment must be reversed, and remanded to the lower court for further proceedings in harmony with the views herein expressed. Costs are awarded to the appellant.

SULLIVAN, C. J., and AILSHIE, J., concur.

(10 Idaho, 270)

BEDAL et ux. v. SAKA.

(Supreme Court of Idaho. June 28, 1904.)

DIVORCE — DECREE — EFFECT ON COMMUNITY PROPERTY—RENDITION IN FOREIGN JURISDICTION.

1. Where the wife abandons her husband and home in the state of Idaho, takes up her residence in the state of Oregon, and thereafter procures a decree of divorce on service by publication, forms a new community by another marriage, and eight years, and more, after abandoning her husband, returns to Idaho, and, by an action in the name of herself and husband, as coplaintiff with her, seeks to obtain her interest in the homestead of herself and former husband, *held*, that after forming a new community she abandons all claim on the old one, and cannot recover.

2. One who voluntarily leaves this jurisdiction, and the domicile and community property located in this state, and obtains a decree of divorce in another jurisdiction, cannot maintain an independent action thereafter in this jurisdiction for a division of the community property.

Sullivan, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Action by Charles Bedal and wife against Harry Saka. Judgment for defendant, and plaintiffs appeal. Affirmed.

C. C. Cavanah, for appellants. T. J. Jones and T. D. Cahalan, for respondent.

STOCKSLAGER, J. The plaintiffs filed their amended complaint, to which defendant demurred. The demurrer was sustained, and, plaintiffs refusing to further plead, judgment was ordered entered in favor of defendant for costs.

The amended complaint alleges "that plaintiffs, Charles Bedal and Maggie Bedal, ever since the 20th day of March, 1900, have been husband and wife; that the plaintiff Maggie Bedal and the defendant, Harry Saka, are the joint owners and tenants in common of 80 acres of land in Ada county"; alleges the marriage of Maggie Bedal and Harry Saka in the state of Iowa in the year 1872, "and thereafter lived together as husband and wife until January, 1895; that in the month of March, 1899, said Maggie Bedal commenced a suit against said Harry Saka for a divorce in the circuit court of the state of Oregon, in the county of Clackamas, and in the month of May, 1899, a decree of divorce was duly allowed and entered, \* \* \* and

that said decree of divorce is now in full force and effect; \* \* \* that no mention was made in said plaintiff's complaint for divorce of any property of any kind or description whatever, nor was any property rights of said parties mentioned in any of the proceedings, nor did said court adjudge or decree any property rights, or give plaintiff any alimony, or require said Harry Sake to give or pay to plaintiff in that action any money or property. \* \* \* The only effect of the decree being to dissolve the marriage relation. \* \* \* That there never has been any settlement or agreement of any kind between said plaintiff Maggie Bedal and defendant, Harry Sake, of any property rights existing between them, nor has said plaintiff Maggie Bedal, by any act on her part, waived her interest in and to the aforesaid community property; that the said circuit court of Oregon had full jurisdiction at the time said divorce decree was rendered of the said parties and subject-matter in said divorce proceedings; that in said divorce proceedings personal service was not had upon said defendant, Harry Sake, but service was duly had by publication in compliance with the laws of the state of Oregon relative to service by publication in divorce proceedings; that at the date of said decree of divorce said plaintiff Maggie Bedal and said defendant, Harry Sake, were, now are, and ever since said date of said decree joint owners and tenants in common of all of the aforesaid real property, and the whole thereof, was acquired, purchased, and taken up from the United States government with the efforts, labor and expense of both plaintiff Maggie Bedal and defendant, Harry Sake, during the time they were living together as husband and wife; that on or about October 4, 1893, with the consent and request of said defendant, Harry Sake, said plaintiff Maggie Bedal filed for record a written declaration of homestead upon the aforesaid real property in recorder's office of Ada county; said declaration was duly signed and acknowledged by said Maggie Bedal in the name of Maggie Sake who at the time was the lawful wife of said Harry Sake, and was living and residing upon said real property with said defendant, as their home and place of residence." The fourth allegation is "that plaintiffs are informed and believe, and therefore allege, that Maggie Bedal is now the owner of, and entitled to an undivided one-half part or interest in and to the aforesaid real estate, and that Harry Sake is now the owner also of an undivided one-half part or interest in said real estate; that defendant, Harry Sake, now is, and ever since on or about the 30th day of January, 1895, has been, in the possession of said property, and does and has ever since said date refused to allow said plaintiff Maggie Bedal to enter upon, take possession, occupy, or use said real estate, or any part thereof, although she has requested and demanded said defendant

to allow her to use said real estate, and has asserted her rights to her interest in said property by claiming and notifying said defendant as to the same; that she has never made conveyance of her said interest in said property to any one; that there are no liens or incumbrances on said property appearing of record, or to the knowledge of plaintiffs, and that no persons other than the said plaintiff Maggie Bedal and said defendant are interested in said premises as owners or otherwise; that plaintiffs are informed and believe, and therefore allege, that said premises produce each year a crop of the value of \$500 net over and above all expenses necessary for maintaining said premises and the raising of said crop, and that said premises have produced said crops each year since on or about the 30th day of January, 1895." Then follows a prayer for judgment for a partition of the said real property according to the respective rights of the parties aforesaid, or, if a partition cannot be had without material injury to those rights, then for a sale of said premises and a division of the proceeds. The demurrer to this complaint is on two grounds. "(1) That the complaint does not state facts sufficient to constitute a cause of action. (2) That said complaint is ambiguous, unintelligible, and uncertain, in this: that paragraph 3 of said amended complaint, commencing at the word 'that,' in the fourteenth line of said paragraph, to and including the word 'Sake,' in the thirtieth line of said paragraph, is a single sentence, in which no positive allegation of fact is made, in that several allegations are attempted to be made in said sentence, said allegations being connected with each other by the conjunctions 'or' and 'nor,' and that it does not appear therefrom what course or action was taken with reference to the matters and things therein referred to, and as to what was and was not done with reference to the matters and things and by the parties therein referred to, and that it does not appear therefrom upon what theory the plaintiffs rely as to the matters and things therein stated; that in the fifth paragraph of said amended complaint, in the ninth and tenth lines thereof, that the following allegation, 'that said Maggie Bedal has never made a valid conveyance of her said interest in her said real property to any one,' is ambiguous and uncertain, in this: that the inference is that a conveyance of some kind or character was made by said alleged Maggie Bedal to some person or persons who may or may not have an interest in this litigation, and who may be proper and necessary parties, either plaintiffs or defendants, herein; and that said language implies that a conveyance was made by plaintiff, said alleged Maggie Bedal, either to this defendant or some other person or persons, leaving said allegation ambiguous and uncertain as to the intent and meaning of the plaintiffs."

We have read the brief of counsel for appellants, together with the authorities cit-

ed, with a great deal of interest and care. He insists that notwithstanding the fact that the plaintiff Maggie Bedal left her husband and home in Ada county, Idaho, in the month of January, 1895, went to the state of Oregon, and in the month of May, 1899, obtained a decree of divorce from her husband, and on the 20th day of March, 1900, became the wife of her coplaintiff, Charles Bedal, she is entitled to recover her interest in the property left in Idaho when she took up her residence in Oregon. The laws of Idaho deal very fairly with the wife in regard to community property. Certainly no fair-minded person would say that the wife should not share equally in the accumulation of a lifetime spent in the acquisition of property, and that is what our statute gives to the wife. Our divorce laws are certainly as liberal as could be desired. The grounds upon which a divorce may be granted in this state are as numerous as any of our sister states. Hence, under ordinary circumstances and conditions, it is unnecessary for any one to seek another forum in which to prosecute an action for divorce. The plaintiff in this action, for some reason best known to herself, saw fit to leave this state and prosecute her action in Oregon, certainly knowing that a division of the community property could not be decreed by the courts of that state on a service by publication. We are not informed by the complaint upon what ground or grounds she obtained her divorce, and it is immaterial and unimportant, so far as her right to recover in this action is concerned. Suffice it to say, however, that it is hard to conceive of an excuse for her to leave this state, or even Ada county, to prosecute her action. If her charge was extreme cruelty, or if she felt she was in danger of bodily harm from her husband in case she commenced her action, on a proper showing, the court would have protected her from any danger from her husband, and required the defendant to furnish her with means of support during the pendency of the action. On the final determination the court could and certainly would have rendered such a decree as to do equal justice to both parties to the controversy, thus ending the differences between them for all time. As we view it, it was the duty of the plaintiff to commence her action in the jurisdiction where the property was situated, procure personal service on the defendant, and thus acquire jurisdiction of the property, and, in the disposition of the case, place the court in a position to settle their marital relations as well as their property rights. The plaintiff Maggie Bedal in this action does not enlighten the court as to her reason for seeking a dissolution of the marital relations in another forum; standing on the naked legal proposition that the property once held by reason of her marriage relations with defendant remained hers until she disposed of it, or until five years after her decree was granted in Oregon,

when it is practically conceded that the statute of limitations would run against an action of this character unless she asserted her right to her interest in the community property.

The questions presented to us by this appeal are new in this jurisdiction. We find no case, either in territorial times or since statehood, wherein these particular questions have been before this court. We have examined the authorities cited by appellant, and many others, bearing on the questions involved, but find no one where the facts have been similar. In all our investigation, we have been unable to find a case where the plaintiff left the home voluntarily, sought redress in another forum, procured a decree of divorce, and took unto herself another husband; thereby dissolving the marital community of herself and her former husband, and creating a new one with her present husband, who is coplaintiff in this proceeding.

We are not prepared to say that if personal service had been made on defendant in the state of Oregon, or if he had appeared and contested the action of his wife for divorce in that state, that court would not have acquired jurisdiction of the community property in this state. But it is alleged in the complaint that the service was by publication, and it is not alleged that the defendant appeared to contest the action. Hence we conclude that court did not acquire jurisdiction of the community property. The statute of this state only gives the court power to dispose of community property after the divorce is granted. Indeed, it acquires its power from this source alone. The husband controls the community property up until the very hour of the dissolution of the marriage relation. This being true, the question arises, how can the courts of this state acquire jurisdiction of what was community property at least up until the time the divorce was granted by the Oregon court, even though it be true that that court was not asked to, and made no attempt to, settle the property rights between the parties as husband and wife? It is presumed from the complaint, and the demurrer concedes it, that the plaintiff Maggie Bedal in this action, and Maggie Sake in that action, got all she asked for, which seemed to satisfy her until three years and more after she had assumed a new community, and entered into a life contract with another husband. As we see it, the courts of this state are powerless to dispose of this property as community property under the existing circumstances. The courts of this state have not been called upon to dissolve the marital relations existing between Harry Sake and Maggie Sake, and, if our conclusion is correct, that our courts can only acquire jurisdiction in an action of this character—that is, for the purpose of disposing of the community property—by the entire di-

voce proceedings being before the courts of this state, then our courts are powerless to grant the relief demanded. We think our statutory provision is in the interest of good morals and public policy, and any other rule would be dangerous to the welfare of the citizens of our state.

The plaintiff Maggie Bedal says in her complaint that she has made frequent demands for the possession of and the right to occupy her interest in the property settled upon and improved by herself and former husband. She does not say when or how she made these demands, and counsel for respondent insist in their brief that the first information defendant had of her claims was when the summons was served upon him. We do not think this a matter of great importance, only as it might show the good faith of the plaintiff Maggie Bedal. Certain it is that she had lived separate and apart from her former husband almost nine years before she commenced this action, and we are not informed by the complaint why it was not commenced at an earlier date. It would seem that after she had lived away from her former husband and home for almost nine years, and had taken unto herself another husband, who must necessarily have entered into a contract to support and protect her until death ended the contract, or another decree, and three years and more had passed under this new contract, the defendant had reason to believe that his "labor alone" on the 80 acres of land would be left to him and his children, if he had any, for his declining years. This would certainly be the equitable view to take of it. It may be that the husband was entirely to blame for the separation. We know nothing of this, or what their troubles were. But as we have heretofore said, the courts of this state were open to her, and would have provided her with all the protection she needed, and required the defendant to support her and provide her with means with which to employ counsel and conduct her case through the court of last resort, if she desired to do so. It is a matter of common information, not only in this state, but throughout the Union, that courts will always see that the wife is properly represented and protected in the trial of her case; and, when the final decree is entered, she usually has her full share of the property, if there is any.

We will now briefly review the authorities cited by appellants in support of their contention that under the complaint in this case the plaintiffs should recover in this action. Counsel says: "The primary question involved in this case is whether either party to the decree of divorce may thereafter maintain an action for a partition of an undivided one-half interest in the real property acquired during their marriage, when the pleadings and decree in said divorce proceedings did not refer to or determine any disposition of any property, and such decree

was rendered in a state other than where such property is situated." This we conceive to be the important question, and the one upon which this case must be reviewed in the light of our statute.

The first authority to which our attention is called in support of this contention is *De Godey v. Godey*, 39 Cal. 157. The following facts are stated in the opinion: "It appears by the allegations of the bill that the parties were married in 1862, and that for some years thereafter, and up to May 20, 1869, they were lawful husband and wife. On the last-mentioned day the decree of divorce was entered, divorcing the parties, in the Sixteenth Judicial District Court, for the county of Kern. The appellant instituted the action in that court, though at the time of its commencement the parties in fact resided in the county of Santa Barbara, in the Seventeenth Judicial District. He fraudulently brought the respondent into Kern county for the purpose of having the process served upon her, and, the service having been effected, he misinformed her of the purport of the papers so served upon her, and, with a view to conceal their true nature from her, he, as soon as the officer making the service had departed, violently took them from her possession and destroyed them. He thereafter returned the respondent to her home, in Santa Barbara county, and there kept her restrained of her liberty, and secluded from all intercourse with her friends, and in ignorance of the pendency of the action, and thereby deprived, of course, of any opportunity to make her defense, though she had a good one on the merits." Can it be seriously contended that the facts in this case have any bearing on the issues involved in the case at bar? It would have been a gross injustice to the wife to have permitted the husband to take the advantage of her in the manner there attempted, and permit him to thus deprive her of her rights by fraud and deception. It will be observed, however, that the plaintiff in that action did not leave the state of California, in which both parties resided, to commence his suit for divorce; only going into another county and judicial district of the state. He also procured personal service on the defendant, but destroyed it before she had an opportunity to inform herself of the nature and character of the action, and his every act was tainted with an attempt to defraud the defendant. He goes into another county of the state to commence his action, and does not attempt to have the property rights settled. She commences her action at a later date, and after she is informed of the nature of the decree in the former action to settle the property rights, and the court says she is not barred. What else could the court say, under the facts in that case? She had not voluntarily had her day in court, and had had no opportunity to litigate her rights. In other words, she had not prosecuted an action for a decree of divorce in another forum,

and then come back to the home county that she had voluntarily left to prosecute another action in the name of herself and another husband for a division of the community property of herself and former husband.

Our attention is next called to the case *In re Burdick's Estate* (Cal.) 44 Pac. 734. The facts in this case have no relation to the case at bar, and it follows the case of *De Godey v. Godey*, above referred to, and we are in full sympathy with the former case, under the facts as therein related.

In the case of *Biggi v. Biggi*, 98 Cal. 35, 32 Pac. 803. Mr. Justice Harrison states the facts as follows: "The plaintiff was at one time the wife of the defendant Narcissa, and in October, 1888, pending an action between them for divorce, they entered into an agreement for the division of their property, in which it was provided that a lot of land situated on San Pablo avenue, in Oakland, should be sold, and the proceeds of the sale equally divided between them, but that such sale should not be for less than \$3,100, and that, whenever offer should be made therefor, one Vandercook should be the exclusive judge as to the value of said premises, and as to accepting or rejecting said offer, and that they would abide by his judgment, and sell the premises for such sum as Vandercook might determine. This lot of land had been purchased during the marriage of the parties, and the title thereto taken in the names of them both, but the judgment of divorce which was afterward rendered between them was silent upon the disposition of the community property. In June, 1889, Vandercook received an offer of \$3,200 for the property, which he deemed sufficient therefor, and which the plaintiff agreed to accept; but the defendant, when requested thereto, refused to accept the offer or sign a contract of sale unless he should receive the entire proceeds thereof. \* \* \* The trial court held that the plaintiff had no interest in the land, which the Supreme Court said was error. Why not error? The parties to the divorce suit had agreed upon a settlement of this property as community property. The court had jurisdiction of the persons and property. They had entered into a solemn contract that the proceeds should be equally divided when the property should be sold, and the court of last resort said the contract should be enforced.

In *Galland v. Galland*, 38 Cal. 265, cited by appellants, Mr. Justice Crockett, speaking for the court, states the facts as follows: "The question presented on this appeal is whether or not a wife, who, without cause or provocation, is driven from her husband's house with her infant child, and is wholly without the means of support, can maintain an action against the husband for a reasonable allowance for the maintenance of herself and child unless she couples with the application a prayer for a divorce." The facts in this case certainly are not in harmony with the case

presented to us by the complaint, which contains no allegation as to why she left her home in Idaho and went to Oregon to procure her divorce. In the California case just cited the complaint stated "that in the month of November, 1864, defendant, without cause or provocation, drove plaintiff from his house, and ever has and still does refuse to live or cohabit with plaintiff, allow her to return to his house, or to speak to him. \* \* \*" It is true, plaintiff alleges in her complaint that she has demanded possession of her portion of the real estate which was community property, and that the defendant refused to allow her to occupy it, but it is not shown when she made this demand; owing to the fact that she took up her residence in Oregon, procured her divorce there, and was married to her coplaintiff, Charles Bedal, on the 20th of March, 1900. We assume that she did not make this demand until after she had formed a new community with her present husband. It is hardly fair to assume that defendant, Sake, would extend a very warm reception to the plaintiff Maggie Bedal, or encourage her very much in her ambition to procure for herself and husband one-half of the property that he had been left to care for and improve during her absence in procuring a divorce and the selection of another life companion.

In the case of *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74, we find the facts to be stated as follows: "When the cause came on for trial, it was agreed by the respective parties and ordered by the court that the issues relating to the disposition of the property should be withdrawn from the consideration of the jury, and reserved for future consideration and determination by the court, in case a divorce should be granted. Upon the special findings and the verdict of the jury the divorce prayed for was granted. Subsequently the court, sitting without a jury, tried the issues relating to the character and disposition of the property, and found that it belonged to the defendant individually. It does not seem that any judgment rendered under the above state of facts could in any way affect the case at bar. It is a very long, instructive case, with the authorities bearing on the issues presented, collated, and commented upon; but we find nothing that enlightens us on the issues involved in the case we are considering, or that strengthens counsel in his position.

Again, in *Weiss v. Bethel*, 8 Or. 522, Mr. Justice Watson states the facts in this language: "This suit was originally commenced in the circuit court of Jackson county, but was afterward transferred to that of Benton county by an order of the court first named, upon written stipulation of parties. After the transfer, plaintiff filed an amended complaint, by leave of court, and made several other parties defendants. Her amended complaint states, in substance, that she was married to defendant, Albert Bethel, in 1857, and lawfully obtained a divorce from him on

the ground of desertion at the June term, 1866, of the circuit court of Jackson county; that at the time of the divorce the defendant, Bethel, was the owner of the Adam Holder donation land claim, in Benton county, Oregon, containing 320 acres; also of lots 1, 2, 3, and 4, block 3, of the city of Corvallis, in said county; that at the time she filed her complaint for divorce she was ignorant of the condition of said real estate; that said Bethel kept his business secret from her, and led her to believe that he had sold or effectually incumbered it, so that at the time she did not know what disposition he had made of it. \* \* \* How can this case, under this statement of facts, have any bearing on the question at issue? The wife commenced her action in the jurisdiction where the defendant resided and the property was situated, but in her action for relief she pleads that by the fraudulent representations of the defendant she was led to believe that the property was incumbered, and that she could not reach it. No such charge against the defendant in this action, and no reason given for leaving the jurisdiction of the defendant and property to commence her action in another state.

In the case of *Whetstone v. Coffey*, 48 Tex. 269, the facts, as we gather them from the opinion, are that the plaintiff in that action lived with her husband upon 320 acres of land, the right to which had been obtained under the pre-emption laws (Whetstone and his wife). The plaintiff in this case resided upon the land from 1850 to 1859. In 1859 the husband sold the land to Ben Vansickle, without her consent being given to the said sale. The court says it was then community property of Anderson Whetstone and his wife, Margaret Whetstone. To show that she never parted with said right by abandonment or otherwise, she alleged that she was forced to leave her said homestead and follow her then husband and family; that he shortly thereafter abandoned her; that neither he nor she had any other homestead up to the time that a divorce was obtained, in 1865; that she has never acquired one since. Under such a state of facts, it is not to be concluded that she had lost her right to the land up to the time of the decree of divorce by his abandonment of and separation from her. It is not shown here that the plaintiff, who seeks to establish her right to her interest in the community property of her deceased husband, although she was divorced from him, sought such relief with her co-plaintiff, her husband, at the time of the institution of the action. In other words, she had not formed a new community. But it was shown that all proceedings were in the state of Texas—both in the action for divorce, as well as the one for her interest in the property.

*Colvin v. Reed*, 55 Pa. 375, is cited by appellants. The statement in this case is that James and Susanna Taylor at the time of their marriage, in May, 1857, were citizens

of Pennsylvania. Shortly after their marriage they made a visit to Iowa and returned, Mrs. Taylor not being pleased with the country. After their return she declared to him her intention not to live with him, and refunded to him \$40—his bill for the expenses of her journey to Iowa. She remained in Allegheny City and he went back to Bedford county in October, and remained there until May, 1858, when he sold his farm to the defendant, and removed to Iowa, leaving his wife in Pennsylvania. In 1860 Taylor commenced proceedings for a divorce a vinculo, and, after due publication of notice, a divorce was decreed on the ground of the desertion alleged to have taken place in Pennsylvania. Susanna Taylor had no actual notice, and at the time was a resident citizen of the state of Pennsylvania, never having left it. The question, on this state of facts, is whether the Iowa court had jurisdiction to declare the divorce of Mrs. Taylor, so as to discharge the lands of her husband in Pennsylvania from her right of dower. In closing, the court say: "These arguments have been noticed, and it has been shown, I think, that the principle finds limit, when confronted by the equal and prior right of another state, and by the acts of a plaintiff who has abandoned his domicile and his remedy to take up a new domicile, where the defendant has never appeared." Applying this rule to the case at bar, what standing has the plaintiff in this court? She voluntarily abandons her domicile and takes up her residence in another state, there procures her decree of divorce on a service by publication, the defendant not appearing to contest her action, and then, after a number of years, and after her new contract of marriage, comes to the court that always had jurisdiction of the property for relief.

In *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414, cited by appellants, we find the following language in the syllabus: "The injured party in the marriage relation must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both."

We scarcely feel justified in prolonging this discussion, or reviewing the large number of authorities cited by learned counsel for respondent. It seems to us that the authorities we have heretofore copied from and discussed preclude the appellants from a recovery in this action on the pleadings, at least as they now stand; and the plaintiff having dissolved the old community, if not by her Oregon divorce, by her new one formed in the marriage to her coplaintiff, precludes her from maintaining an action for the community property.

In *Heaton et al. v. Sawyer*, 60 Vt. 495, 15 Atl. 166, it was held that where the wife and children on the granting of the divorce moved from the premises, and were absent two years, it was an abandonment of the homestead. *Wiggin v. Buzzel*, 58 N. H. 329, holds

that "a divorce obtained by a wife bars her homestead right in her husband's property, unless such right is reserved by the decree of divorce." *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771, holds: "Where the relation of husband and wife is terminated by divorce, she ceases to have any claim upon or right in his property, whether homestead or otherwise, unless such right is reserved to her by the decree of divorce. Whenever thereafter she seeks to assert any claim of any character in any part of the husband's property, she must establish her right by such decree, or by valid contract between herself and him."

In *Rosholt v. Mehus* (N. D.) 57 N. W. 783, 23 L. R. A. 230, a well-considered and interesting case, in which the authorities are collated and discussed by Chief Justice Bartholomew, he uses this significant language: "And it is true that courts liberally construe homestead laws for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and, when the homestead consists of a farm, as in this case, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce." See *Doyle v. Coburn*, 6 Allen, 71. *Barnett v. Barnett*, 50 Pac. 337, a New Mexico case, by Chief Justice Smith, is a very interesting one. We find this pertinent language used: "It is wisdom that forbids the multiplication of litigation on the same subject, and spares suitors needless vexation in the determination of their rights. The parties to this controversy, having been separated by final decree of a court of competent jurisdiction, are estopped from further harassing each other as consorts in another tribunal."

A great many other authorities are cited by counsel for respondent, supporting those already referred to in this opinion, but we do not feel called upon to pursue this discussion further. The plaintiff Maggie Bedal voluntarily abandoned her home, and obtained her decree of divorce in a forum without jurisdiction to dispose of the community property—being service by publication—thereafter marries another, and then forms a new community, and she will have to look to her present community for her future support and happiness. We do not think she should enjoy the fruits of her new community, and have a pension from her former one.

The judgment of the district court is affirmed, with costs to respondent.

AILSHIE, J., concurs.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. Section 2480, Rev. St. 1887, provided how community and

homestead property shall be disposed of in case of divorce, and is as follows: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows: (1) If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties deems just. (2) If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property must be equally divided between the parties. (3) If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided. (4) If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." In the case at bar it is alleged in the complaint that the property involved is community property acquired by the joint efforts of both husband and wife, and thereafter was homesteaded under the laws of this state by the wife. While it does not appear on what grounds the wife obtained the divorce in the Oregon court, the presumption is that it was on sufficient ground, and that the husband was in fault. If it was obtained on any other ground than that of adultery or extreme cruelty, and had been obtained in a competent court of the state of Idaho, said section of the statute provides that the community property must be equally divided between the parties, and in other cases it must be divided as the court, from all the facts of the case and condition of the parties, deems just. And I do not think the fact that the divorce was obtained in the state of Oregon is a sufficient reason for depriving the wife of a part of the property that she had helped to accumulate. A court of equity would have power to do justice between the parties after the evidence was introduced on the trial, and, if it showed the wife was entitled to receive a portion of the property that she assisted in accumulating, she certainly ought to have it. The plaintiff in this action had filed a declaration of homestead on the land in controversy, and section 3041, Rev. St. 1887, declares that a homestead can be abandoned only by a declaration of abandonment, or a grant of conveyance thereof, executed and acknowledged as therein specified.

The question of an innocent purchaser of said property, for value, without notice, is not involved in this case. I think the allegations of the complaint state a cause of action, and the demurrer should have been overruled.



(10 Idaho, 194)

MOE et al. v. HARGER et al.

(Supreme Court of Idaho. June 15, 1904.)

## APPEAL—TIME OF TAKING—EXTENSION.

1. An appeal is not taken until the notice thereof is filed and served, both of which acts must be done within the statutory time.

2. The taking an appeal is a jurisdictional question, and the court has no power to extend the time therefor, or to cure any defect therein.

3. On an appeal from the judgment, where the same has not been taken within 60 days after the rendition thereof, the appellate court cannot examine the evidence for the purpose of ascertaining whether or not it supports the decision or verdict.

(Syllabus by the Court.)

Appeal from District Court, Custer County; K. I. Perky, Judge.

Action by S. T. Moe and others against Henry Harger and others. From the judgment and from an order refusing a new trial, defendant J. H. Baxter appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. N. H. Clark, for respondent Boone.

AILSHIE, J. Counsel for respondent has moved for a dismissal of the appeal from the order denying the motion for a new trial on numerous grounds, the principal of which is the third: "That the appeal from the order overruling appellant's motion for new trial was not filed within sixty days after said order was filed for record, said order having been filed September 29, 1903, and the notice of appeal filed December 4, 1903." The notice of appeal having been filed more than 60 days after the filing of the order refusing a new trial, this court has not acquired jurisdiction to consider such appeal. Under subdivision 3 of section 4807, Rev. St. 1887, an appeal from an order granting or refusing a new trial must be taken "within sixty days after the order \* \* \* is made on the minutes of the court or filed with the clerk." This is a jurisdictional question, and the court has no power to extend the time or cure the defect. On this question there is a unanimity of opinion among the courts. The notice of appeal appears to have been prepared at Boise by appellant's counsel on the sixtieth day, and mailed on the same day to the clerk of the district court at Challis. The notice appears to have also been served on the same day. An appeal is not taken, however, until the notice is filed and served, both of which acts must be within the statutory time. See section 4808, Rev. St. 1887. From the affidavit of one of appellant's attorneys it seems that the tardiness in preparing and filing this notice of appeal was brought about by the failure and neglect of the clerk of the district court to answer letters written by the attorneys for information concerning the files and records of the case. We have no doubt but that, if the clerk had answered the communications directed to him—as most persons would have done—we would not be under the necessity of dismissing the appeal.

These delinquencies, however, are matters between the appellant and the clerk, and do not justify us in assuming jurisdiction of an appeal which has not been taken within the statutory time. The appeal from the order refusing a new trial will be dismissed. This leaves the case here on appeal from the judgment. Since the only complaint made on this appeal is the insufficiency of the evidence to support the findings and judgment, and the appeal from the judgment having been taken more than 60 days after the rendition thereof, we are not at liberty to consider that question. Section 4807, Rev. St. 1887.

The judgment is affirmed, with costs to respondent.

STOCKSLAGER, J., concurs. SULLIVAN, C. J., did not sit at the hearing, and took no part in the decision.

(10 Idaho, 302)

MOE et al. v. HARGER et al.

(Supreme Court of Idaho. July 5, 1904.)

## WATERS AND WATER COURSES—IRRIGATION—APPROPRIATION—DIVERSION—INJUNCTION.

1. Evidence of expert and nonexpert witnesses with reference to the theory of the formation of a natural reservoir along the course of a stream examined, and held insufficient to justify a court in departing from the uniform and well-established doctrine that the first appropriator has the first right; and in this case the position of appellants that their diversion and use of the water is not injurious or prejudicial to the rights of a prior appropriator lower down the stream is held untenable.

2. So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that such appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted.

(Syllabus by the Court.)

Appeal from District Court, Custer County; K. I. Perky, Judge.

Action by S. T. Moe against Henry Harger and others. From a judgment for plaintiff, defendants Bradshaw and others appeal. Affirmed.

S. T. Moe commenced an action against a large number of appropriators and users of the waters of Big Lost river, in Blaine and Custer counties. A judgment and decree was made and entered determining the respective rights and priorities of all the parties to the action, and an injunctive order was incorporated in the decree, running against all the parties to the action; restraining and enjoining each from in any way interfering with or diverting or using any of the waters of Big Lost river, except in accordance with the terms of the decree. From an order denying a motion for a new trial, Thos. Bradshaw and other defendants appealed. Affirmed.

N. M. Ruick, for appellants. Sullivan & Sullivan and G. F. Hansbrough, for respondents.

**AILSHIE, J.** (after stating the facts). This action was commenced in the district court against numerous appropriators and users of the waters from Big Lost river in Blaine and Custer counties. The controversy on this appeal arises over the peculiar situation and condition of the waters of that stream. The river rises far up in the mountains, and during the high or flood waters, in April, May, and June, each year, flows in a continuous surface stream from its source to a few miles below Arco, in Blaine county—a distance of upward of 75 miles. It is shown that about 25 or 30 miles above Arco is a place called the "Narrows," where the valley through which the stream flows is only about one-fourth of a mile wide; the bedrock coming to the surface there, and the mountains closing in, and above which point the valley widens out into a basin some 8 miles wide. This valley or basin is covered with a thin soil, and contains an unascertained depth of gravel deposit, and extends for a number of miles up the stream from the Narrows. It appears, that after the close of the flood season or high-water period, the stream flowing through this valley above the Narrows gradually lessens until it finally disappears for a distance ranging from 8 to 14 miles above the Narrows. During the entire season, however, the water rises at the Narrows, and flows out through that point in a perpetual stream of about the same volume flowing in the channel above the point where it sinks. It is shown by the evidence that in the springtime it takes from 20 to 30 days of high water or flood season to raise the stream and flood the valley above the Narrows sufficiently to cause the water to flow over the surface through the entire length of the valley. It is in this valley that the appellants in this case reside, and have water rights subsequent, in point of time of appropriation and use, to the rights and claims of the respondents. At the trial appellants sought, by the introduction of expert evidence and the testimony of witnesses who had lived in the community since 1872, to establish the fact that the taking of water from the stream above the point where it sinks, and irrigating the lands within the valley above the Narrows, does not in any manner lessen the flow of the water at the point where it rises and flows out through the Narrows at the lower end of the basin. In attempting to establish this proposition, it was shown by at least one witness, who has been familiar with the stream and country through which it flows since 1872, that there has been some irrigating going on in that basin for about 20 years, and that the water level in wells and other excavations made in the basin above the Narrows has been gradually rising from time to time, until at the present time it is considerably higher than when he first made observations there. It is also shown that, when he first knew the stream, it went dry for a distance of at least

14 miles from year to year during the dry or low-water period, whereas in later years that distance has been shortening, until it now goes dry for a distance of only about 8 miles. In other words, the stream now sinks only about 8 miles above the Narrows in the driest season of the year. In addition to this evidence, Mr. Ross, a civil engineer of wide reputation and recognized ability, who has also had large experience in practical irrigation, was called as an expert, and testified to having made one examination of the stream and the basin above the Narrows, and the general lay and contour of the country, and the nature of the deposits therein. From his evidence it appears that the general level of the upper end of the valley is about 100 feet above the point where the water rises at the Narrows. He says that, in his judgment, when the flood waters come they fill up and saturate the entire gravel and earthen deposits of the basin, and that when that is done the water rises until the stream runs in a continuous flow on the surface throughout the length of the valley; that, as the dry season comes on, the water begins to sink higher up the valley, while the waters from the higher grounds, percolating through the soil and gravel, gravitate to the lower points, and thus force the stream out at the lower end of the valley or the Narrows. He also says that since this flooding process takes place once every year, in the spring months, and fills up the entire valley or basin, which serves as a natural reservoir, it thereby stores a sufficient water supply to cause a continuous and uniform flow of the stream through the Narrows. In keeping with this theory of the witness, he testifies that, in his opinion, the use of the water from the stream above where it sinks during the irrigation period would not in any appreciable degree diminish the volume of water discharged from the basin at the Narrows, and that all the water used in irrigating the lands of the valley or basin not taken up by plant and vegetable life, and lost by evaporation, will find its way back to the stream, and serve as a constant feeder thereto. On cross-examination he testifies that, in the ordinary irrigation of the lands in that valley, about 75 per cent. of the water spread upon the land will be lost by evaporation and absorbed by plant and vegetable life.

If the entire volume of water should be diverted from the stream above the point where it sinks, and applied to the lands in the irrigation thereof, and by the process 75 per cent. should be lost, and only 25 per cent. ever reach the stream again, it would be difficult to understand by what process the stream would remain as large at the point where the water rises as it would have been, had the 75 per cent. of the original flow not been diverted and lost. This court has uniformly adhered to the principle, announced both in the Constitution and by the statute,

that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted, and 75 per cent. of it never returns to the stream, it is pretty clear that not exceeding 25 per cent. of it will ever reach the settler and appropriator down the stream, and below the point of diversion by the prior user.

Appellants complain of the action of the trial court in incorporating in the decree in this case an order perpetually enjoining them from in any manner interfering with or diverting or using the waters of Lost river, except in accordance with the terms of the decree. By the decree the time was fixed from which each appropriator and claimant was entitled to have his right date, and the number of inches to which he was entitled. It is the usual and approved practice in this state, in all water cases, where a decree is entered establishing the rights and priorities of the parties litigant, to incorporate in the decree an order in the nature of cross-injunctions restraining each and every party thereto from in any wise interfering with the use of water by any other party thereto, as fixed and established by the decree. That is what was done in this case, and we think it was proper to incorporate such an order in the decree.

A somewhat similar theory as to the storage and percolation of waters was advanced in the case of *Cartier v. Buck*, 75 Pac. 612, and considered by this court at the February, 1904, term. In referring to the injunctive order contained in the decree, Mr. Justice Stockslager, speaking for the court, said: "Before the plaintiff in the lower court could obtain injunctive relief, it was incumbent upon him to show that the use of the waters of Camas creek, or some of its tributaries, by the defendants, prevented the water flowing down to him in the natural channel, and also that, had they not disturbed it, it would have found its way to his premises." The right to the use of 40,000 inches of water from the Big Lost river was settled and decreed in this suit, while the stream only carries 9,000 inches at low water. It is therefore clear that no water will be left for some of the subsequent appropriators. Where prior appropriators have diverted the amount of water to which they are entitled, and, for example, say 100 inches, to which the next appropriator is entitled, is left in the stream, and a settler above diverts a part or all of the remaining water, the presumption must at once arise that such diversion will be to the injury and damage of the appropriator entitled thereto. So soon as the prior appropriation and right of use is established, it is

clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator, who claims that such diversion will not injure the prior appropriator below him, should be required to establish that fact by clear and convincing evidence. In the *Cartier* Case the trial court had found against the storage reservoir and sponge theories of appellant, and this court, after reviewing the evidence, concluded that there was a substantial conflict, and that the judgment of the lower court should be sustained. In this case the conclusion of the expert witness, and possibly one nonexpert, is to the effect that the use of the waters in the basin and above the Narrows by appellants will in no way diminish the flow below the Narrows, and can in no way affect or injure prior appropriators down the stream below the basin. Many of the answers given by these witnesses on cross-examination are, to our minds, irreconcilable with their general conclusions. Since the trial court heard all the evidence, and found against the theories of appellants, we must conclude that he understood them, and we think his findings and judgment on that point are correct.

The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded to respondents.

STOCKSLAGER, J., concurs. SULLIVAN, C. J., having been a party to the action in the lower court, did not sit at the hearing, and took no part in the decision.

#### GRANNIS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 3,786.)\*

(Supreme Court of California. June 18, 1904.)

DIVORCE—JUDGMENT—PROCEEDINGS TO VACATE—ORDER FOR PAYMENT OF WIFE'S COUNSEL FEES—JURISDICTION—PRESUMPTIONS—STATUTES—CERTIORARI.

1. In the absence of a showing to the contrary, everything is presumed in favor of jurisdiction of the court.

2. On certiorari to review the action of the trial court in setting aside, on plaintiff's motion, a so-called final judgment in a divorce case, in which plaintiff therein was granted a divorce, and in ordering defendant therein to pay counsel fees for services to be rendered on behalf of plaintiff on the motion to set aside the judgment, the petition in the certiorari proceedings stated that plaintiff, the wife of the petitioner, had obtained the order for the purpose indicated; but it did not state the grounds of her motion, nor the facts on which she relied in its support. Six months had not expired from the date of entering the judgment until the motion was filed to vacate it. *Held*, that the reviewing court would assume that the motion was made under Code Civ. Proc. § 473, granting power to trial courts to relieve a party

\*Rehearing denied July 18, 1904.

from a judgment where application therefor is made within six months.

3. Where a motion is made which the trial court has power to entertain, and the party the right to present, the action of the court on the motion cannot be reviewed in certiorari.

4. The power of the court to compel the husband to pay the wife's counsel fees for services of her attorney in an action for divorce, where she is without means to pay them, is not exhausted by the granting of a final judgment.

5. Civ. Code, § 137, provides that during the pendency of the action the court may require the husband to pay any money to enable the wife to prosecute her action for divorce. Code Civ. Proc. § 1049, provides that an action is deemed pending until time for appeal has passed. *Held*, that these sections are applicable to a proceeding to vacate a judgment in a divorce case under Code Civ. Proc. § 473, granting the trial court power to relieve a party from judgment where application is made within six months from entry.

In Bank. Petition for certiorari by James B. Grannis against the superior court of the city and county of San Francisco and others. Petition denied.

Galpin & Bolton, for petitioner. Thomas K. Kase and A. P. Van Duzer, for respondents.

**SHAW, J.** This is an application for a review of an order adjudging the petitioner guilty of contempt. The respondents submitted the case upon the demurrer to the petition.

In an action for divorce the superior court of the city and county of San Francisco on July 1, 1903, made and entered a judgment in favor of the plaintiff, Amelia B. Grannis, against the defendant, James B. Grannis, purporting to dissolve the marriage, award the plaintiff the custody of one of the minor children, and divide the community property. The court ignored the provisions of the act of 1903 (St. 1903, p. 75, c. 67) amending sections 131 and 132 of the Civil Code, requiring first the entry of an interlocutory judgment, and allowing a final judgment only after the lapse of a year from such interlocutory judgment, and entered, in form, at least, a final judgment, immediately upon its decision that the plaintiff was entitled to a divorce. Thereafter, and within six months after the entry of this so-called final judgment, the plaintiff began proceedings upon a motion to vacate the judgment thus rendered in her favor. Thereupon, on October 23, 1903, the court made an order that the defendant forthwith pay to the plaintiff in the action the "sum of fifty dollars as attorney's fees for services to be rendered on her behalf on motion to set aside and vacate" the said judgment. The defendant refused to pay this sum, and for this refusal he was adjudged guilty of the contempt. The petitioner asks us to review this order adjudging him guilty of contempt; claiming that the order is void for the reason that the court had no jurisdiction, after final judgment, to make the order for the payment of additional attorney's fees.

The proposition presented to this court is

that the judgment rendered in the action for divorce was, in form, final, and that, unless reversed or modified on appeal, it must in this proceeding be considered as final to all intents and purposes, and therefore that the order for additional fees was void. It is conceded that if the judgment was not in effect final, though so in form, the action is still pending in the superior court, and that in that event the court had jurisdiction to make an order for further attorney's fees, which, though it might be erroneous, could not be reviewed on certiorari.

We are of the opinion that, under the circumstances shown by the petition, the order for the payment of the additional fees cannot be reviewed in this proceeding, even if, for the purposes of this decision, it is conceded that the judgment was final. Although the judgment was in favor of the plaintiff in the action, she nevertheless may have had just cause, under section 473, Code Civ. Proc., for an application to the superior court to have it set aside. In the absence of a showing to the contrary, everything is presumed in favor of the jurisdiction of the court. The petition states that she obtained the order to pay for the services of attorneys to assist her in making the motion to vacate. It does not state the grounds of her motion, nor the facts on which she relied in its support. We must therefore presume, what possibly may be true, namely, that she attempted to make a motion for relief under section 473, and, as the six months allowed therein within which the motion could be made had not expired, the court had power to entertain it, and she had a right to present it. *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Bernheim v. Cerf*, 123 Cal. 171, 55 Pac. 759. This being the case, although the order may be erroneous, so that it would be reversed on appeal, it was within the jurisdiction of the superior court to make it, and hence it cannot be reviewed in certiorari.

The power of the court to compel the husband to pay the wife counsel fees for services of her attorney in an action for divorce, where she is without means to pay them, is not exhausted by the granting of a final judgment. In *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732, it was held that the court, after judgment, could allow additional attorney's fees to enable the wife to prosecute an appeal. To the same effect are *Larkin v. Larkin*, 71 Cal. 330, 12 Pac. 227; *Ex parte Winter*, 70 Cal. 291, 11 Pac. 630; and *Reilly v. Reilly*, 60 Cal. 624. In *Storke v. Storke*, 116 Cal. 51, 47 Pac. 869, 48 Pac. 121, the same rule was held applicable to an allowance to pay the expenses of a motion for new trial. These cases cannot be distinguished in principle from the present case. If the plaintiff had good cause, or claimed in good faith to have cause, to have the judgment vacated, as we must assume that she did, her application to set it aside is of the same nature as a motion for a new trial or an appeal. It

is a direct attack upon a judgment in the action, which we must presume was in some particular prejudicial to her; and, to enable her to prosecute her motion to vacate it under section 473, the court was empowered to grant her additional counsel fees. Section 137, Civ. Code, provides that "during the pendency of the action" the court may require the husband to pay any money necessary to enable the wife to prosecute her action. An action is deemed to be pending until the time for appeal has passed. Code Civ. Proc. § 1049. It was upon these sections that the decisions above cited were based. They are equally applicable, both in letter and spirit, to proceedings to vacate a judgment under section 473, Code Civ. Proc. The court therefore had jurisdiction to make the order in question, as well on the theory that the judgment was final, as upon the theory that it was, in legal effect, only an interlocutory judgment, or upon the theory that it was absolutely void. For these reasons, the petition must be held insufficient.

The petition is denied and the proceeding dismissed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(143 Cal. 678)

BRACKEN et ux. v. SOBRA VISTA OIL CO.  
(L. A. 1,450).\*

(Supreme Court of California. June 24, 1904.)

VENDOR AND PURCHASER—AGREEMENT TO CONVEY—CONSTRUCTION—RESERVATION.

1. Plaintiff sold defendant the oil and mineral rights in 20 acres of land for \$8,000, under an agreement reciting that, as plaintiff had agreed in a prior lease of other lands that no oil wells should be sunk on the plaintiff's land within a certain distance of the wells of said lessee, a survey should be taken of the land sold to defendant, and a deduction of \$300 per acre should be made for all lands within the prohibited distance, unless within six months plaintiff had secured the written waiver of his former lessee to the said provision of the lease. Plaintiff did not procure the waiver, and defendant paid the purchase price less a deduction for about 8 acres found by the survey to be within the prohibited distance, and received a deed conveying 20 acres. *Held*, that plaintiff, on procuring a waiver three months afterwards, could not maintain an action against the defendant to recover the 3 acres.

Commissioners' Decision. Department 1. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by James Bracken and wife against the Sobra Vista Oil Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. L. Murphy, for appellants. John P. Percy, for respondent.

COOPER, C. Action to quiet title to 3.85 acres of land. The defendant's demurrer to the amended complaint was sustained, and,

upon plaintiffs declining further to amend, judgment was entered for defendant. This appeal is from the judgment, and the sole question is as to the ruling on the demurrer.

The amended complaint states, in substance, that on the 27th day of February, 1901, the plaintiffs were the owners of the tract of land described in the amended complaint, containing 20.10 acres, and on the same day they entered into a written agreement with defendant whereby they agreed to sell, and defendant agreed to buy, the oil and mineral rights in the said land for the sum of \$8,000, of which sum \$1,000 was to be paid down, \$1,000 within 30 days from the date of the agreement, and \$4,000 within 5 months thereafter. The agreement provided that the plaintiffs should execute a proper deed to the land, and deposit the same with the bank of William Collins & Sons at Ventura, to be delivered to defendant upon its making full payment of the purchase price according to the terms of the agreement. The deed was executed and left with the bank as per agreement. The agreement provided that "time shall be of the essence of this contract," and that if the defendant should fail to make the payments in full, as provided in the agreement, then the sums already paid should be forfeited to the plaintiffs. The defendant was permitted under the agreement to immediately enter into possession, sink wells, and proceed with the development of the said land, and it did so enter into possession. Prior to the time of making the said agreement and delivering the said deed in escrow, the plaintiffs had incumbered a small part of the tract by a lease to Edward Double et al. of certain other lands, in which lease plaintiffs had agreed that no oil wells should be sunk upon the lands of plaintiffs within 300 feet of the wells to be sunk by said Edward Double et al. upon the lands so leased to them. As the following clause in the agreement is the one upon which plaintiffs predicate their claim, it is deemed necessary to state it in full, and it reads as follows: "And whereas in the lease from James Bracken herein to Edward Double et al., dated September 27th, 1900, it was agreed that no wells should be sunk on the lands of James Bracken within 300 feet of the wells of said lessees or their assigns, and whereas the lands so leased to said Double et al. touch a portion of the northern boundary line of the premises herein described, it is agreed between the parties hereto that a survey shall be made by John A. Barry, Civil Engineer at Ventura, and for all the land above described within 300 feet of the line of said lease there shall be deducted from the last payment to be made thereon a sum of money equal to \$300 per acre, said survey to be binding upon the parties hereto, and the certificate of the surveyor to be furnished both parties hereto and the bank, and which certificate shall designate the exact number of acres, and showing the exact amount to

\*Rehearing denied July 21, 1904.

be deducted from the last payment of said purchase price, it being agreed, however, that if within six months from this date two-thirds of the stockholders of the Whidden & Double Oil Co., the assignees of Edward Double et al., consent in writing to the waiver of said 300-foot clause in said lease, then there is to be no deduction, but the full purchase price is to be paid." The plaintiffs did not procure the consent in writing to the waiver of the 300-foot clause in the Double lease within the six months, nor were they required to procure it afterwards. In pursuance of the said clause herein quoted, the parties procured said Barry to survey and ascertain the amount of land affected by the lease to Double et al., and the said Barry found the same to be 3.85 acres, and in his certificate stated that the amount, at \$300 per acre, was \$1,155. On the 26th day of October, 1901, defendant paid the balance of the \$6,000, less \$1,155, and demanded the deed of the bank. The deed was delivered to defendant and placed of record. It does not appear that plaintiffs, at the time of the last payment, made any objection to the deduction of the \$1,155. Knowing the facts and the amount so deducted, the plaintiffs accepted the balance, and made no objection to the deed being delivered. On the 14th day of May, 1902, without the request of defendant, the Whidden-Double Oil Company, which had succeeded to the rights of Edward Double et al., conveyed to plaintiffs all its interest and title to the 3.85 acres, and released the same from the effect of the lease made by plaintiffs to Edward Double et al., which conveyance or release was placed of record by plaintiffs. Prior to the commencement of this action, which was December 29, 1902, the plaintiffs demanded of defendant that it pay to them the sum of \$1,155, or that it reconvey the said 3.85 acres, all of which it refused to do. Judgment is prayed that defendant be debarred from all claim to the 3.85 acres, and that it be required to reconvey the same to the plaintiffs.

The demurrer was properly sustained. The defendant purchased the oil in the land for the lump sum of \$6,000. There was no sale at so much per acre. The amount deducted was from the last payment, as liquidated damages, agreed to by the parties in case plaintiffs could not release the 3.85 acres within six months. They agreed that the \$1,155 might be deducted unless they did a certain thing in a certain time. They did not do the thing within the time, and the \$1,155 was deducted. They made the agreement, and must be held to its terms. Any other rule would leave business transactions uncertain and lead to endless litigation. After the six months expired, the purchase price of the land became \$4,845. Defendant agreed

to pay \$6,000 for a clear title to what it was buying, but if the title was not clear it was only to pay the \$4,845. This latter sum it paid, and plaintiffs accepted it. Defendant was bound to take the land whether the title to the 3.85 acres was cleared or not. Plaintiffs were bound to accept the amount expressly agreed upon in case they did not clear it. After the six months there was no obligation upon plaintiffs to procure the release. As the release was not procured until nearly nine months after the expiration of the six months, the defendant may have been damaged more than the \$1,155 by the delay. It could not sink wells nor bore for oil in the 3.85 acres during said nine months. Particularly is this so when the contract provides: "It is mutually agreed that time shall be the essence of this contract." There is no suggestion of fraud nor mistake in the complaint. The contract did not mean that defendant should purchase less than the 20.10 acres. Plaintiffs agreed to convey and did convey the oil and mineral in the whole tract for a gross sum. The agreement as to the incumbrance on the 3.85 acres affected the price to be paid, but not the quantity of land to be conveyed. The agreement contained the covenant that the grantors "are lawfully seized of the tract of land above described in fee simple unencumbered." The bargain and sale deed made by plaintiffs, and the covenant of title contained in the agreement, if not modified by the further provisions of the agreement made at the same time, would have carried with them the covenant that the grantors had not created any incumbrance on the property. But the agreement shows that the parties knew precisely the kind of incumbrance that had been created as to a portion of the land, and provided for a reduction of the price in case it should not be removed within a certain time. As to whether or not it was removed after the expiration of time limited, and the delivery of the deed upon payment of the reduced price, was no concern of plaintiffs. The provision for a reduction of the price, when fully carried out by such delivery of the deed, operated as a full satisfaction of the covenant of title expressed in the agreement and implied by the deed. Thereafter the grantee held the property conveyed subject to an incumbrance which the grantors were under no obligation to pay, and they could not make the grantee their debtors by a voluntary payment.

We advise that the judgment be affirmed.

I concur: HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

143 Cal. 673

## PEOPLE v. DAVIS et al. (L. A. 1,238.)

(Supreme Court of California. June 23, 1904.)

JUDGMENTS — DEFAULT — VACATION—TIME OF APPLICATION—JUDGMENTS VALID ON THEIR FACE—VOID JUDGMENTS — JUDGMENT ROLL — WHAT CONSTITUTES—REGULARITY OF SERVICE — RECITALS IN JUDGMENT.

1. Under Code Civ. Proc. § 473, providing that, where a summons has not been personally served, the court may allow defendant, at any time within a year after judgment, to answer to the merits, the court has no power to set aside a judgment not void upon its face after the expiration of a year.

2. A judgment is not void on its face, unless its invalidity is apparent from an inspection of the judgment roll.

3. Where the invalidity of a judgment is not apparent from an inspection of the judgment roll, and no application has been made for opening the same within the year specified by Code Civ. Proc. § 473, relative to the opening of default judgments where process has not been personally served, the sole remedy of the aggrieved party is a new action on the equity side of the court, and a purported order attempting to open the judgment is void upon its face, on either direct or collateral attack.

4. A court may vacate a judgment or order void upon its face after any lapse of time, regardless of the want of any motion for such action or any notice to an adverse party.

5. Whether or not a judgment or order is void upon its face is purely a question of law, presented by the judgment roll, and the jurisdiction of the court to vacate such judgment or order depends upon what the judgment roll shows as a matter of law, and not upon any determination of the court as to what it shows.

6. Neither the failure on the part of a party to appeal from an order void on its face, nor lapse of time, can make such order valid, or impair the power of the court to formally vacate it on its own motion and without notice.

7. Under Code Civ. Proc. § 670, subd. 1, which, prior to the amendment of 1895, provided that the judgment roll, in cases where the complaint is not answered, should consist of the summons, with the affidavit and proof of service, the complaint, with the memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment, neither the affidavit for publication of summons, nor the order for publication, constitute any part of the judgment roll, so that it will be conclusively presumed, in an attack upon the judgment, that such affidavit and order were sufficient.

8. Slight discrepancies between the copy of a summons served by publication and the original summons, which are not capable of misleading defendant as to the nature of the proceeding, the land affected, and the relief demanded, do not affect the validity of the publication.

9. A recital in a judgment that defendant has been regularly served with process, as required by law, is not rebutted, where the judgment roll merely contains the original summons, with the return of the sheriff that he was unable to find defendant, and the affidavit of publication, which does not show that an alias was not issued prior to the publication.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the people against S. Davis, in which Fred W. Lake, as successor in interest of said Davis, obtained an order vacating a default judgment, and appeals from a subsequent order setting aside such order of vacation. Affirmed.

F. D. Brandon, for appellant. J. W. Ahern, for the People.

ANGELLOTTI, J. Appeal from an order vacating and setting aside a prior order vacating and setting aside a judgment by default. The action was brought to foreclose and annul a certificate of purchase of state lands in Kern county, which had been issued to defendant Davis. Service of summons was not made upon Davis personally, but was attempted to be made by publication, in pursuance of an order of court. Davis did not appear, and a default judgment was entered against him in December, 1892, annulling and declaring void the certificate of purchase held by him and his rights thereunder. In December, 1900, upon notice given and affidavits served, the appellant, as successor in interest of defendant Davis, moved the court for an order setting aside and vacating the default judgment; and the court, after hearing the parties, and upon the affidavits and the record, made an order purporting to vacate the default judgment. The order recites that the affidavits of Fred W. Lake, C. H. Gilman, and S. Davis, together with the summons, affidavit for publication, order of publication, and notices, were read without objection and duly considered by the court. The order purports to set aside and annul the judgment and the service of summons. On November 11, 1901, the court, on application of the plaintiff's attorney, made its order vacating its previous order setting aside the judgment, upon the ground that said order was beyond the jurisdiction of the court, and was null and void. There is some doubt under the bill of exceptions as to whether the attorneys for the appellant were present and participated in the hearing and argument on the application of plaintiff's attorney, but we deem that question immaterial. From the order so made, this appeal is taken.

It is well settled that a court has no power to set aside or vacate, on motion, a judgment not void upon its face, unless the motion is made within a reasonable time; and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no case exceeds one year. It is also settled law that a judgment is not void upon its face, unless its invalidity is apparent from an inspection of the judgment roll. It is hardly necessary to cite authorities to sustain these propositions. See *People v. Temple*, 103 Cal. 447, 453, 37 Pac. 414; and *Canadian & Am. Mtg. & T. Co. v. Clarita L. & I. Co.*, 140 Cal. 672, 74 Pac. 301, and cases there cited. The effect of these well-settled rules is that, unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, in the absence of application made within the time specified in section 473, Code of Civil Procedure, to make any order vacating or set-

ting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action on the equity side of the court. See *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; *People v. Temple*, supra.

Under such circumstances, the judgment which is not invalid on its face is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void. *People v. Temple*, supra; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22. Such an order occupies no better position than a judgment that is void upon its face, and, like such a judgment, is assailable wherever and whenever it may be produced, and whether the attack upon it be direct or collateral. In *People v. Temple*, supra, the attack upon such an order was collateral, and the order was held to be a mere nullity.

The power of a court to vacate a judgment or order, void upon its face, is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action on the part of the court is entirely appropriate, neither motion nor notice to an adverse party is essential. The court has full power to take such action on its own motion and without any application on the part of any one. *Kreiss v. Hotelling*, 96 Cal. 617, 622, 31 Pac. 740. As was held in *People v. Greene*, 74 Cal. 400, 405, 16 Pac. 197, 199, 5 Am. St. Rep. 448: "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant."

This is, of course, equally true of an order, invalid on its face. While it is immaterial in a certain sense whether such a judgment or order be formally set aside, for it neither binds nor bars any one, still it is well settled that the court, whose records are thus incumbered with what is a mere form, without substance, may at any time formally remove the same by declaring it a nullity. It derives its jurisdiction to do this, however, solely from the fact that the judgment or order upon the face of the judgment roll demonstrates to the world its own invalidity. If the judgment or order on its face is such that it could not be successfully assailed in a collateral proceeding, the court that rendered or made it cannot, by determining otherwise, give itself jurisdiction to vacate it. Whether or not it is such a judgment or order is purely a question of law, presented by the judgment roll, and the jurisdiction of the court to vacate it depends upon what such judgment roll shows as a matter of law, and not upon what such court may determine that

it shows. The case is very different from one where a court in a proceeding pending before it is vested with the power to determine certain facts essential to its jurisdiction, such as a question of residence of the deceased on an application for letters of administration or of letters testamentary. *Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441. In such cases the court, in determining its jurisdiction, is simply exercising its jurisdiction, and an incorrect determination as to the facts essential to give jurisdiction is only error, reviewable on appeal.

What has been said disposes of all questions on this appeal, except the single one as to whether the original judgment was void upon its face. If it was not void upon its face, the order setting it aside was, upon its face, an absolute nullity, and it was not necessary for the plaintiff to appeal therefrom. Neither failure on the part of plaintiff to appeal nor lapse of time could make it valid, or impair the power of the court to formally vacate it on its own motion, and without notice. Therefore it is immaterial, first, whether plaintiff took any appeal; second, whether plaintiff's motion was made within six months from the making of the order; third, whether notice of the motion was ever given; and, fourth, whether the grounds of the motion were sufficiently stated.

Was the judgment void upon its face? This question, as we have already seen, must be determined from an inspection of the judgment roll. Under the statute, as it was at the time of the entry of this judgment and for several years thereafter, the judgment roll, in cases where the complaint was not answered by any defendant, consisted of the summons, with the affidavit and proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. Subd. 1, § 670, Code Civ. Proc., as it stood prior to the amendment of 1895. Neither the affidavit for publication of summons nor the order for publication constituted any part of the judgment roll, under the law then in force, and cannot, therefore, be considered, notwithstanding the fact that they have been placed in the bill of exceptions. *People v. Temple*, 103 Cal. 447, 453, 37 Pac. 414. The case in which the judgment in question was rendered was one in which service by publication was authorized, and it must be conclusively presumed, upon the attack made upon it, that there was a sufficient affidavit and a sufficient order. There is, therefore, nothing in the point that the affidavit and order for publication were insufficient.

It is further urged, in support of the claim that the judgment was void on its face, that the summons was not published as issued. While a comparison of the original summons with the copy attached to the affidavit of publication shows a few discrepancies, they are very slight, and not capable of mislead-



ing the defendant as to the nature of the proceeding, the land affected, and the relief demanded. As was said in regard to a similar objection in *Sharp v. Daugney*, 33 Cal. 505, 513: "In sense and meaning the original summons and the published version of it are identical, and that is enough."

It is further urged that the original summons was returned and filed with the clerk five days after the date of its issuance, and that the attempted service by publication was thereafter had without withdrawing it from the files or having an alias summons issued. There is nothing in this contention. The judgment roll does not show that no alias summons was issued, but simply contains the original summons, with the return of the sheriff that he was unable to find the defendant, dated and filed August 30, 1892, and the affidavit of publication, which does not show that an alias summons was not issued prior to the publication. The judgment recites that the defendant had been "regularly served with process, as required by law." There is nothing in the judgment roll tending to rebut this recital of the judgment. *People v. Harrison*, 84 Cal. 609, 24 Pac. 117; *Whitney v. Daggett*, 108 Cal. 235, 41 Pac. 471.

These are the only points made in favor of the contention that the judgment was void upon its face. The lower court did not err in holding that the judgment was, upon its face, a valid judgment, and that the order purporting to vacate it, made after the lapse of eight years, was a mere nullity, and should be vacated.

The order appealed from is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

143 Cal. 663

LEET v. ARMBRUSTER. (S. F. 2,825.)

(Supreme Court of California. June 22, 1904.)

MORTGAGES—FORECLOSURE—REDEMPTION—TENDER—EFFECT—EJECTMENT.

1. Under the express provisions of Code Civ. Proc. § 700, the purchaser of real property at foreclosure sale acquires all the right, title, and interest of the mortgagor.

2. Notwithstanding such provision, the purchaser takes his title subject to the laws in force at the time of the sale; and Code Civ. Proc. §§ 703, 704, declaring that, if the debtor redeem, the effect of the sale is terminated and he is restored to his estate, and that tender of the money is equivalent to payment, are not unconstitutional, as depriving a person of property without due process of law.

3. Under Code Civ. Proc. §§ 703, 704, and under Civ. Code, § 1504, providing that an offer of payment or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect on all its incidents as performance, a tender by the mortgagor to the purchaser, though refused, immediately divested the purchaser of the estate, and destroyed his lien for the amount, and left him only a money claim for the amount.

4. Since a tender by a mortgagor, after foreclosure, of the amount necessary to redeem, re-

vested title in him, he was entitled to maintain ejectment against the purchaser.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Ejectment by William J. Leet against George W. Armbruster. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter Perry Johnson, for appellant. Garoutte & Goodwin and John H. Durst, for respondent.

HENSHAW, J. This action is in ejectment to recover possession of a piece of realty in the city and county of San Francisco. David Ross was the owner of the property in question, and held title subject to a mortgage. The mortgage was foreclosed, and at the sale which followed the property was bought by defendant herein, and the certificate of sale issued to him. The mortgagor had previously been adjudicated a bankrupt, and his interest in the property had passed through his trustee in bankruptcy to one George Golder. Golder conveyed to R. McColgan, who within the time prescribed by law made a tender in redemption to the defendant, Armbruster. Question arises as to the exact amount tendered, but the court, upon conflicting evidence, finds that the tender was made in the full amount required by law. The tender was refused. Thereafter McColgan conveyed all his right, title, and interest to the plaintiff, who commenced this action in ejectment. He recovered judgment, and defendant appeals from that judgment, and from the order denying his motion for a new trial.

Appellant's contentions are: First, that the purchaser of realty at foreclosure sale acquires all the right, title, and interest of the mortgagor. This proposition may not be gainsaid. It is in accord with the express declaration of section 700 of the Code of Civil Procedure, and with the cases of *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120, *Duff v. Randall*, 116 Cal. 228, 48 Pac. 66, 58 Am. St. Rep. 158, *Breedlove v. Norwich Ins. Co.*, 124 Cal. 164, 56 Pac. 770, *Reynolds v. Fire Ins. Co.*, 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17, and *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648. Second, that the provisions of the Code, hereinafter quoted, cannot be construed to work a divestiture of title so acquired, and, if so construed, contravene the constitutional inhibition against the deprivation of property without due process of law. The provisions of the Code, to which reference has just been made, are: "If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate." Code Civ. Proc. § 703. "Tender of the money is equivalent to payment." Id. § 704. As corollaries to the second proposition, appellant contends that this action in ejectment will not lie, that plaintiff's sole remedy is by an action to redeem, and, as the tender was not kept good, which is undisputed, no recovery should have

¶ 4. See *Mortgages*, vol. 35, Cent. Dig. § 1811.

been allowed; and, finally, if plaintiff was entitled to any relief, the utmost which he could claim was a restitution of title and possession, subject to a lien in favor of defendant for the amount found due in redemption.

We cannot agree with the appellant's contention that a law declaring that a valid tender works a restoration to the judgment debtor or of his estate is in any sense violative of the constitutional provision against depriving a person of property without due process of law. The rule is that a purchaser at public sale is protected from any impairment of his title by subsequent legislation, but that his title, whatever it may be, is wholly governed by the laws in force at the time of his purchase. "The purchaser of either lands or chattels at a public sale, acquires an estate or right resting in contract and protected by the contract clause from impairment by subsequent legislative action. This contract springs into being at the time of sale, not sooner, and generally the law then in force controls the rights of the purchaser." 15 Am. & Eng. Ency. of Law, 1038. So, also, redemption and its incidents and rights are governed by the laws in force at the time of the sale. 17 Am. & Eng. Ency. of Law, 1034. If, then, the law declares that an offer to redeem shall be, so far as the restoration of the estate is concerned, the equivalent of redemption, the purchaser buys with knowledge of this, and takes his title subject to the condition that he may be divested of it by either redemption or a valid offer to redeem. His title is conditional therefore, and subject to be defeated under the very terms of its creation, either by redemption or by proper tender, if, as to the latter, such be found to be the meaning of the law. And that such, in truth, is the meaning of the law, namely, that a proper tender, even if refused, works a divestiture of the purchaser's estate, there can be no doubt. Our Code declares (Civ. Code, § 1504) that an offer of payment, or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as performance. This means, as it is well expounded by Mr. Freeman (2 Freeman on Executions, § 271a): "Tender of the amount due upon the writ, though not accepted, discharges the levy. It is a general rule of law that, where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it. The principle governing the subject is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered; but he does lose all collateral benefits and securities. The instantaneous effect is to discharge any collateral lien as a pledge of goods, or a right of distress. After the action is over, judgment obtained, and execution levied, the case be-

comes clearly assimilated to that of an ordinary lien, and, if tender is made and not accepted, the lien will be extinguished."

In *Hershey v. Dennis*, 53 Cal. 77, after mortgage foreclosure, judgment for the deficiency was docketed against the mortgagor. He conveyed his right and title in the land to Hershey. Hershey tendered to Dennis, the purchaser at foreclosure sale, the statutory amount to redeem. The tender was refused. Hershey then brought action to quiet his title. The court found that Hershey had not kept his tender good and rendered judgment in favor of the purchaser. On appeal the judgment was reversed, this court saying: "It follows that the mortgagor or his grantee could redeem from Dennis on payment of the amount of his bid and costs, etc. The plaintiff having tendered a sufficient sum to redeem, the sheriff had no power to execute a conveyance to the defendant Dennis." In *Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369, after sale under foreclosure proceedings, the plaintiff made tender in redemption, which the sheriff refused, and subsequently made his deed to defendant, the purchaser. This court said: "The moment a redemption occurred, all interest to the realty possessed by the purchaser at the sale ceased, and the title of the judgment debtor stood as if no sale had ever taken place. Such being the fact, the power of the sheriff to pass title by deed no longer existed, and any deed made by him was a nullity." In *Halle v. Smith*, 113 Cal. 656, 45 Pac. 872, it is said: "While the unaccepted tender did not release the defendant from his obligation to pay the money, it had the effect to release the land from any further claim thereto by the plaintiff, and to remit the plaintiff to his personal claim for the money." The decision quotes with approval *Tiffany v. St. John*, 65 N. Y. 318, 22 Am. Rep. 612, to the following effect: "The principle governing the subject is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities." By the Supreme Court of Maine it is laid down: "A legal tender within the time prescribed by law of the amount for which an equity of redemption is held under an execution sale is sufficient to revest the property without a deed of conveyance from the purchaser." *Legro v. Lord*, 10 Me. 161. In *Jonsen v. Nabring*, 50 Ala. 392, the same principle is declared in the following language: "In this action all that is required is a payment or tender of the money to the execution purchaser or his vendee, which the Code prescribes as necessary to perfect the redemption. If the execution purchaser chooses to refuse the payment or tender thus made, he does so at his own risk. The payment or tender, either one or the other, is all that the statute requires to be done in order to revest the execution debtor

with the title." The same rule is applied to tender made in redemption under tax sales. Thus in Texas it is said: "The tender thus made ipso facto worked an immediate redemption of the lands from the tax sale, and left the defendant Ledbetter with no title to the same by reason of that purchase." *Burns v. Ledbetter*, 54 Tex. 374. In *Broughton v. Journeay*, 51 Pa. 31, it is said: "He tendered to Mr. Davis \$41 in legal tender notes, the amount of taxes, costs, and interest. This was the same summer as the notice that Mr. Smith proves, and was a valid redemption of the tract, if the tender to Davis, the purchaser, instead of the treasurer, was sufficient." And in New Jersey the declaration of the court is to like effect: "In this case the owners made a tender of the money to the purchaser within two years, but he refused to receive it. If the tender was a compliance with the provision for redemption in the act, the certificate should be held to be canceled, and the lease which was subsequently given to be void." *Ruddy v. Woodbridge*, 47 N. J. Law, 142. And by the Supreme Court of the United States it is said: "It is well established by many decisions of this court that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action and making every subsequent step illegal and void." *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185.

The general principle, therefore, is that which is enunciated in section 1504 of our Civil Code. Tender and refusal are equivalent to performance in discharging all collateral and accessorial liens and rights, and in the case of redemption of land in this state ipso facto work a restoration to the judgment debtor, or his successor in interest, of his title. As to the argument of hardship upon the purchaser, in that the result must be that he is deprived of his title or of his lien without the payment of the money, this is well answered by the Supreme Court of Minnesota in *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247, where it is said: "If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished, and he runs no risk in accepting it. If, upon the other hand, it is sufficient in amount, his debt is paid, and that is all he has any right to demand. It is his own folly if he attempts to exact more than the exact amount. The proof should be clear that it was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered." And to like effect is *Mitchell v. Roberts*, 17 Fed. 776, where the Circuit Court says: "This rule accords with justice

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and fair dealing. It would be an exceedingly great hardship on the debtor, if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property, or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed, and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem, and on a bill to redeem a debtor would have to pay interest and costs down to the decree unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money, at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt, when lawfully tendered, cannot complain at the loss of his security for that debt, 'because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him.'"

As to appellant's objection that the tender was not kept good, the answer is that it was not necessary to keep it good for the purposes of plaintiff's action. It was the tender itself and its refusal which instantaneously worked the discharge of the purchaser's lien and the divestiture of his title. The effect of the tender did not, of course, operate as a payment of the debt for all purposes. The debt still remained due, but the sole right that remained in the purchaser was an action at law for the recovery of the money. For the purpose of paying the debt, or stopping the running of interest, or maintaining a suit to redeem, it is, of course, necessary to keep the tender good; but the lien is extinguished and the title divested without this. This is the general rule, recognized in *Hershey v. Dennis*, 53 Cal. 77, and in the decisions of our sister states. Thus, in *Loomis v. Pingree*, 43 Me. 299, the Supreme Court says: "It is said the money tendered should have been brought into court. This is not an action to recover the money. An offer of payment within the time allowed by law, for the purpose of saving the forfeiture, must be regarded for this purpose as equivalent to an actual payment made at the time of the offer." In *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, it is said: "A tender of the principal and interest of a mortgage debt, at any time before foreclosure, though after the day appointed for the payment thereof, discharges the lien of the mortgage; but the debt remains. In such case, it is not necessary that the tender should be kept good; nor in a foreclosure suit is it requisite to bring the money into court, since the land is discharged." And again, in *Adair v. Cummin*, 48 Mich. 383, 12 N. W. 495, it is said: "When the tender was refused, the lien was discharged, and the mortgage gave

no right thereafter to disturb her possession. Her right to the property was rendered plenary, and was not dependent at all on the tender being kept good." And the Circuit Court in *Mitchell v. Roberts*, supra, says: "The rule is settled that a tender of the debt for which the property is pledged as security extinguishes the lien, and the pledgor may recover the pledge or its value in any proper form of action without keeping the tender good or bringing the money into court, because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien, it is gone forever."

Plaintiff, therefore, was entitled to maintain this action in ejectment, since the tender operated instantaneously to redeem the property and revest the title in the redemptioner. *Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 848, 54 Am. St. Rep. 369. In the case of personal property, where the lien is lost by tender, the pledgor may maintain the appropriate personal actions of trover or replevin, and in the case of realty his action may either be to quiet title, as in *Hershey v. Dennis*, supra, or ejectment, as in *Phillips v. Hagart*, supra. A minor question has arisen as to the proper amount of the money judgment rendered in this case. To cure the possibility of error in this regard, respondent has offered to waive all of such judgment in excess of the sum of \$315.25.

The judgment and order appealed from are affirmed, the amount of the money judgment being modified from \$447 to \$315.25.

We concur: LORIGAN, J.; McFARLAND, J.; VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

(148 Cal. 642)

BARNUM v. COCHRANE et al. (S. F. 2,360.)  
(Supreme Court of California. June 20, 1904.)

SALES—COVENANTS TO FURNISH TITLE—BREACH—SUBSTANTIAL DAMAGES.

1. A purchaser of personalty, who has taken possession under a bill of sale purporting to convey title, and who is in the undisputed possession and enjoyment thereof, is not entitled to recover substantial damages based on the breach of the seller's covenant to furnish a good title.

Department 2. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by Amelia D. Barnum against James W. Cochrane and another. From a judgment for plaintiff, defendants appeal. Reversed.

W. M. Cannon, for appellants. Crandall & Bull, for respondent.

PER CURIAM. This is an action for damages for false and fraudulent representations by which plaintiff was induced to purchase a certain hotel property situated at Point Tiburon, in Marin county, alleged to consist of a

hotel building and furniture and an 11-year lease of the land on which the same was situated. The plaintiff had a verdict and judgment for \$1,450. Both defendants appeal from the judgment. The defendant McLeod also appeals from an order denying him a new trial.

The false and fraudulent representations complained of related to the character and profits of the hotel business carried on in the building purchased, to the character and value of the furniture, and to the value of the good will of said business. The complaint also alleged that defendants falsely represented "that they had and were authorized to sell" said property, "and that said defendants could and would furnish a good and perfect title to said hotel business, hotel furniture, and property aforesaid to a purchaser thereof," and that these representations were false, "and said defendants were not able and did not furnish to said plaintiff a good or perfect, or any, title to said property." The complaint contained no allegation that the plaintiff was ousted or evicted from the premises, nor was there any evidence to that effect; but, on the contrary, the evidence showed that the plaintiff went into possession of the premises soon after the sale and continued in such possession up to the time of the trial of the case. The court instructed the jury, at the request of defendants, as follows: "There is no representation charged in the complaint herein to the effect that defendants, or either of them, falsely or fraudulently represented that the title to said property was good or perfect; but the representation charged is that defendants falsely and fraudulently represented that they could and would furnish a good and perfect title to the hotel building, hotel furniture, and property described in said complaint to a purchaser thereof. You are therefore instructed that there can be no recovery in this action against defendants, or either of them, on the ground of false or fraudulent representations as to the state of the title to said property at the time of the purchase thereof." The court of its own motion added to this instruction as follows: "But, if such representation was made as alleged, it constitutes a contract to make the title good within a reasonable time." At the request of plaintiff the jury were instructed as follows: "If the jury shall find from the evidence that the defendants agreed to give Mrs. Barnum a good title to the property in question, then they are bound to furnish such title; and, if they fail to do so, then your verdict should be for the plaintiff. If you shall find from the evidence that either one of said defendants agreed to furnish Mrs. Barnum with a good title to the property in question, then I instruct you that the plaintiff is entitled to a verdict in her favor, as against the defendant so agreeing to give her a good title, if either defendant so agreed." The court refused defendants' requested instruction as follows: "You are in-

structed that you cannot award plaintiff substantial damages for breach of covenant to furnish a good and perfect title in this action, as no substantial damages have been proved; but, if you find in her favor on that issue alone, you can only award her nominal damages, say one dollar."

The action of the court as to these instructions was duly excepted to, and it is now claimed on behalf of appellants that the court therein committed prejudicial error. We think this contention must be upheld. No effort seems to have been made to produce evidence as to what extent, or how or wherein, plaintiff had suffered damage by reason of any failure to furnish a good title. From the instructions the jury were left to presume that they might find substantial damages from failure on the part of defendants to comply with their agreement to furnish good title, even though there was nothing to show that plaintiff had either been evicted or disturbed in her possession and enjoyment of the premises, or had been put to any expense to make her title good. The property in question, including the lease for years, is personal property. *Jeffers v. Easton*, etc., 113 Cal. 345, 45 Pac. 680. The plaintiff had gone into possession of it under a bill of sale furnished by defendants and purporting to convey title to the property; and it is clear that the full possession and enjoyment of this property could not be retained by plaintiff and at the same time she be permitted to recover as for a loss of it. *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482. She bought the property to run it as a hotel. If she stays the 11 years out, and then is permitted to remove it, and no one thereafter interferes with her right to the property, she will have suffered no damage by reason of any failure to furnish good title. To recover damages for defect of title to personal property, it must be alleged and shown that plaintiff has suffered damages thereby. The rule is the same where the claim for damages is based on breach of agreement to furnish good title as it is where the action is for breach of warranty of title. Indeed, an agreement to furnish a good title, followed by a bill of sale of the property, is in effect a warranty of title. This rule that the vendee cannot recover on such warranty while still retaining undisputed possession of the property has been frequently recognized in this state. *Gross v. Kierski*, 41 Cal. 112; *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Alden v. Pryal*, 60 Cal. 215; *Jeffers v. Easton*, etc., 113 Cal. 345, 45 Pac. 680. In this case, to warrant a recovery upon a covenant for good title, the complaint should have shown that plaintiff had been disturbed in her possession or in some way put to expense by reason of defect of title; also, the evidence should have sustained that branch of the case. For these reasons the instructions asked by defendant to the effect that this was not a proper case to award damages for breach of covenant to furnish good title

should have been given, and the instructions to the contrary were erroneous.

Many other errors are claimed by appellants; but as most of them arose from a misunderstanding of the scope of the action already discussed, and as none of them may arise upon another trial of the case, it seems unnecessary to further discuss them here.

The judgment and order are reversed.

143 Cal. 646

ALFERITZ et al. v. ARRIVILLAGA et al.  
(Sac. 1,109.)

(Supreme Court of California. June 21, 1904.)

HUSBAND AND WIFE—CONVEYANCE TO WIFE—  
SEPARATE PROPERTY—PRESUMPTIONS  
—EVIDENCE.

1. Under the express provisions of Civ. Code, § 164, property conveyed to a married woman by an instrument in writing is presumed to be her separate property.

2. Evidence on the issue whether property conveyed to a married woman is her separate property or is community property examined, and held insufficient to overcome the presumption created by Civ. Code, § 164, that it is her separate property.

3. A deed by a husband, conveying his own or the community property to the wife, vests in her the property as her separate property, in the absence of evidence of a contrary intent; Civ. Code, § 158, authorizing husband or wife to enter into any transaction with the other respecting property which either might do if unmarried.

4. A deed made by a third person to a wife at the husband's request vests in her the property as her separate property, in the absence of evidence of a contrary intention.

Commissioners' Decision. Department 2. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by George C. Alferitz and another, executors of Peter Alferitz, deceased, against Martin Arrivillaga and others. From a judgment of nonsuit as to defendant Menjoulet, plaintiffs appeal. Affirmed.

Lyman I. Mowry, for appellants. F. H. Henderson, for respondent.

COOPER, C. Action to quiet title. At the close of plaintiffs' testimony the court, on motion of respondent, granted a nonsuit. Judgment was accordingly entered for respondent. This appeal is from the judgment, for the purpose of reviewing the order granting the nonsuit. The complaint sought to have plaintiffs' title, as executors, quieted to the lands therein described, consisting of several thousand acres. The answer of respondent disclaimed any interest or claim to any portion of the land described in the complaint, except 320 acres, which respondent alleged belonged to him in fee simple. The controversy is as to this 320 acres.

Martin Arrivillaga and Francisca Arrivillaga were, at all times set forth in the pleading, husband and wife. The plaintiffs claim title through a sheriff's deed upon foreclosure proceedings to foreclose a mortgage executed by the husband to plaintiffs' estate upon all

the lands described in the complaint. The respondent claims title to the 320 acres by virtue of a deed executed and delivered to him for a valuable consideration by the wife. The record title to the 320 acres was never in the husband, and no such claim is made; but appellants claim that it was community property, and passed by the mortgage and the subsequent foreclosure proceedings to the deceased. The wife's title came through two deeds for 160 acres each—the first being made July 9, 1891, by Lulu Ashcroft; the second being made August 15, 1891, by Francisca Sanchez. These deeds were both ordinary grant, bargain, and sale deeds, and each recited a consideration of \$10. Section 164 of the Civil Code, which was in force at the time these deeds were made to the wife, provides that: "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." A presumption is a deduction which the law expressly directs to be made from certain facts, and, unless controverted, the finding must be according to the presumption. Code Civ. Proc. §§ 1959, 1961. The deeds were made to the wife long before the husband executed the mortgage to the deceased. By reason of the deeds the wife became presumptively the owner of the lands therein described as her separate property. It was therefore incumbent on plaintiffs to overthrow this presumption by sufficient and proper evidence. The burden was upon plaintiffs to show by sufficient evidence that the lands so conveyed to the wife were community property. This evidence must have been sufficient to justify the court in finding as a fact that the lands were community property. The trial court, after hearing the evidence, concluded that it was insufficient and granted the nonsuit.

We have carefully examined the evidence and conclude that the nonsuit was properly granted. The appellants attempted to show that the lands in contest were paid for out of community funds, and offered some evidence tending to show such facts. The substance of the evidence is that about the 1st of July, 1891, Martin Arrivillaga wrote to Delleplane & Co., with whom he was doing business, and of whom deceased was a member, requesting that \$1,100 be sent to him at Stockton "to pay for five filings," inclosing in the letter five printed notices of intention to make final proof in the land office at Stockton; two of the notices being the notices of Ashcroft and Sanchez respectively, and describing the land here in contest. The \$1,100 was sent to Martin Arrivillaga as requested, who afterwards sent to Delleplane & Co. five separate deeds from the five parties who had made final proof in the land office; two of the deeds being the deeds to the wife of the lands in contest. Delleplane & Co. afterwards recorded the deeds, always kept possession of them, in due time procured and recorded

the patents to the lands, and have always kept possession of the patents. The above is in substance all the evidence as to the consideration for the two conveyances to Francisca Arrivillaga. It does not appear whether in fact any of the \$1,100 was paid to the grantors of the lands in contest. It does not appear how much was paid for the two claims conveyed to the wife, nor how much was paid for either of them. The purchase price is not mentioned. It may be that the \$1,100 was all paid to the parties who made final proof on the three other claims. It may be that the conveyances were made to the wife in payment of a debt due her from her husband. He may have intended the property to be a gift to her. He certainly had and intended to have the deeds made to her. A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and *ipso facto* operates to transfer or convey the title of the property described to the grantee. Civ. Code, § 1053; *Shanahan v. Crampton*, 92 Cal. 13, 28 Pac. 50; *Hamilton v. Hubbard*, 134 Cal. 605, 65 Pac. 321, 66 Pac. 860.

In this state a husband may make a deed, whether of his own or community property, to his wife, and in such case it is well settled that, in the absence of evidence of a contrary intent, the deed will vest in her the land conveyed as her separate property. Civ. Code, § 158; *Burkett v. Burkett*, 78 Cal. 312, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; *Taylor v. Opperman*, 79 Cal. 471, 21 Pac. 869; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Ions v. Harbison*, 112 Cal. 266, 44 Pac. 572; *Tillaux v. Tillaux*, 115 Cal. 672, 47 Pac. 691; *Hamilton v. Hubbard*, *supra*. And the same principle applies where the deed is made by a third party to the wife at the husband's request. *Hamilton v. Hubbard*, *supra*, and cases cited. Here all presumptions are in favor of the conveyances to the wife. They are presumed to have been made for a consideration paid by the wife, or, if we concede that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property. The law will not allow idle presumptions to be indulged in as against a deed delivered and recorded. Facts must be proven from which it is clearly made to appear that the property in such case is community property, or the deed will be given effect according to its terms. Here sufficient facts to show that the property was community property were not proven. Neither the husband nor the wife was called as a witness. The land had stood in the wife's name for more than two years before the mortgage was executed by the husband. It so stood of record at the time of the execution of the mortgage, and yet the wife's signature was not obtained thereto.

If the views above expressed are correct, it becomes unnecessary to decide the question as to whether or not the plaintiff can

maintain an action to quiet title, as against one holding the legal title.

We advise that the judgment be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

(143 Cal. 664)

PAINE et al. v. SAN BERNARDINO VALLEY TRACTION CO. (L. A. 1,443.)

(Supreme Court of California. June 22, 1904.)

STREET RAILROADS—COLLISIONS—PERSONAL INJURIES—FINDINGS OF FACT—CONCLUSIVENESS—SUFFICIENCY TO SUPPORT JUDGMENT—INJURY TO WIFE—JUDGMENT.

1. In determining whether the findings of fact support the judgment, the findings must receive such a construction as will uphold rather than defeat the judgment; and if, from the facts found, other facts may be inferred which support the judgment, it will be assumed that the trial court made the inferences.

2. Where a street car, as it approached a crossing 200 feet away, was running at the rate of 25 miles an hour, and the motorman made no effort to slacken its speed until he reached the crossing, and the street car collided with a buggy at the crossing and injured its occupant, it is reasonable to infer that the collision was the result of the mode of operating the car, and, in the absence of any other fact from which the collision could have been caused, the finding of the court that the company was negligent in its management of the car involves the inference that the collision resulted from this negligence, so as to sustain a judgment for plaintiff.

3. Where the injury to plaintiff resulted directly from a collision of a street car with a buggy in which she was riding, and where the collision was caused by the negligence of the company, the finding of the court that plaintiff was injured by reason of the company's negligent act, and that it is liable therefore, is not rendered insufficient to support plaintiff's judgment by the statement in the finding that plaintiff sustained the injury by reason of the collision.

4. In the absence of a bill of exceptions, it will be presumed that the evidence was sufficient to support the findings of the court.

5. As damages resulting from a personal injury to the wife are community property, and the husband is a necessary party to an action therefor, a judgment for such damages is properly rendered in favor of both.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Texas M. Paine and husband against the San Bernardino Valley Traction Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. R. Annable and Goodcell & Leonard, for appellant. L. M. Sprecher and Henry M. Willis, for respondents.

HARRISON, C. The plaintiffs are husband and wife, and brought this action to recover damages from the defendant for a personal injury sustained by the wife by

reason of the negligence of the defendant. The case was tried by the court without a jury, and findings and judgment were given in favor of the plaintiffs. The defendant has appealed from the judgment upon the ground that it is not sustained by the findings, bringing the appeal here upon the judgment roll without any bill of exceptions.

The plaintiffs were driving in a buggy in the city of San Bernardino, along G street, in a northerly direction towards Third street, and had reached the south crosswalk of the intersection of said streets when they perceived a car of the defendants on Third street, about 200 feet west of the crossing, coming towards them from the west, which was being propelled by electricity at the rate of from 25 to 30 miles an hour. By reason of obstructions to their view to the west, the plaintiffs were unable to see the car until they were at said crosswalk, or to hear any warning of its approach. The motorman of the car saw the buggy and horse approaching the line of the road when the front of the car was 200 feet west of the crossing, but made no effort to stop the car or slacken its speed until it reached the west side of G street. Immediately upon seeing the car the plaintiffs turned their horse's head sharply to the east, cramping the buggy as far as possible, but notwithstanding their precaution the car violently struck the left front wheel of the buggy and hurled it, together with the plaintiffs, to the ground, and dragged them a great distance thereon. The court found "that plaintiffs acted with due care and caution in approaching said crossing, and did not contribute to the said accident by any negligent act or conduct on their part; that defendant was guilty of negligence in the operating and managing of said car, and in running at the said rate of speed;" and that, by reason of said negligent acts and conduct of defendant, and said collision, the plaintiff wife was severely injured in her person, and suffered great pain and suffering, to her damage in the sum of \$800. The appellant urges that inasmuch as the injury was caused by the collision, and as the court does not expressly find that the collision was caused by reason of the negligent act and conduct of the defendant, its liability for the injury is not shown.

It is a well-settled rule that the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon. It is the province of the trial court to make any inference of fact which may be drawn from the evidence before it, or from the facts found by it, and if, from the facts which it has found, other facts may be inferred which will support the judgment, it will be assumed that the trial court made such inferences. If different inferences may be drawn from those facts, this court will not, upon an appeal from the judgment, draw an inference contrary to that drawn by the trial court, or

which will have the effect to defeat the judgment of that court. *Breeze v. Brooks*, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; *Gould v. Eaton*, 111 Cal. 644, 44 Pac. 319, 52 Am. St. Rep. 201; *People's Home Savings Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

If the car was running, at a point 200 feet west of the crossing, at the rate of 25 miles an hour, and the motorman made no effort to slacken its speed until he reached the west side of the crossing, and it struck the buggy violently and hurled its occupants to the ground, it is a reasonable, if not an almost irresistible, inference that the collision was the result of this mode of operating the car; and, in the absence of any other fact from which the collision could have been caused, the finding of the court that the defendant was guilty of negligence in the operating and managing of said car, and in running at said rate of speed, reasonably involves the inference that the collision was the result of this negligence. The judgment is as fully sustained by the finding as if such finding had been expressly made. The injury to the plaintiff resulted directly from the collision of the car with the buggy, and, if this collision was caused by the negligence of the defendant, the finding that she was injured by reason of its negligent act and conduct, as well as its liability therefor, is not impaired by the additional statement in the finding that she also sustained such injury by reason of the collision.

The suggestions in the appellant's brief that because the court does not find the exact distance from the crossing at which the car was running at that rate of speed, or the rate of speed at which it was running when the motorman first saw the buggy, or at the time it reached the west side of the crossing, or how great was the width of G street, or how far the car was from the buggy, are without merit. Findings of fact are to be liberally construed in support of the judgment, and not with the strictness appropriate to the consideration of a complaint which is attacked by a special demurrer. In the absence of any bill of exceptions, it will be assumed that the evidence before the court was ample to sustain its findings. If the appellant would question its sufficiency for this purpose, or would claim that the evidence upon the facts above suggested in its brief would have impaired the correctness of the findings, it should have presented the same in a bill of exceptions, or moved for a new trial. Not having done so, the findings are not only to be regarded as fully supported by the evidence, but it is also to be assumed that there was no evidence before the court which in any respect qualified or limited their effect or the ordinary construction to be given to the language in which they are expressed.

The further objection to the judgment, that, because the court has found that only the plaintiff Texas M. Paine sustained dam-

age by reason of the injury, the court had no authority to render judgment in favor of both of the plaintiffs, is likewise overruled. The objection here made was presented and directly overruled in *Neale v. Depot Railway Co.*, 94 Cal. 425, 29 Pac. 954, and again in *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380. The damages resulting from a personal injury to the wife are a part of the community property, and the husband is a necessary party to an action for their recovery. *McFadden v. Santa Ana R. R. Co.*, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56. The averment in the complaint that the plaintiffs have been damaged by reason of the injuries to the wife was in accordance with this rule, as was also the entry of the judgment in favor of both of the plaintiffs.

The judgment appealed from should be affirmed.

We concur: COOPER, C.; SMITH, C.

For the foregoing reasons the judgment appealed from is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

143 Cal. 634

In re O'NEILL. (Cr. 1,145.)

(Supreme Court of California. June 18, 1904.)

HABEAS CORPUS—SENTENCE FOR INSUFFICIENT TERM—VALIDITY.

1. Under Pen. Code, § 220, providing that an assault with intent to rob is punishable by imprisonment in the state prison "not less than one nor more than fourteen years," and section 668, providing that when a person, having been previously convicted of petit larceny, subsequently commits a crime punishable by imprisonment in the state prison for a term exceeding 10 years, such person is punishable by imprisonment in the state prison not less than 10 years, a sentence for less than 10 years on conviction for an assault with intent to rob, of a person who has been formerly convicted of petit larceny, though perhaps erroneous, does not render the judgment void, and hence habeas corpus will not lie to release the person so sentenced.

In Bank. Application by Hugh O'Neill for writ of habeas corpus, for and on behalf of Joseph Reed, against J. W. Tompkins as warden of the state prison, to secure the discharge of said Reed from custody. Petition denied, and prisoner remanded.

Hugh O'Neill, for petitioner. J. W. Tompkins, in pro. per.

McFARLAND, J. Joseph Reed, whose discharge from the custody of the warden of the state prison at San Quentin is prayed for in the petition herein, was charged in the superior court with robbery and a former conviction of petit larceny. He confessed the prior conviction and pleaded "not guilty" to the charge of robbery. On October 22, 1903, he was convicted of an assault with in-



tent to commit robbery, and on November 11, 1903, judgment was entered sentencing him to the state prison for the term of seven years.

It is contended that the judgment above noticed is void for these reasons: Section 220 of the Penal Code provides that a person guilty of an assault with intent to commit robbery is punishable by imprisonment in the state prison "not less than one nor more than fourteen years," and section 666 provides that when a person, having previously been convicted of petit larceny, subsequently commits a crime punishable by imprisonment in the state prison for a term exceeding ten years, such person is punishable by imprisonment in the state prison "not less than ten years"; and it is contended that on account of these provisions the court had no jurisdiction to sentence Reed for a term less than ten years, and that the judgment is therefore void. But this contention is not maintainable. It is not necessary to consider whether, upon appeal by the state, the judgment would be held to be erroneous, and the trial court directed to render a judgment of imprisonment for at least ten years. It is not enough, on this proceeding of habeas corpus, to show that the judgment is erroneous. It must be shown that it is void for want of jurisdiction to render it, and that is not shown here. The judgment does not impose any kind of punishment different from that prescribed by the Code, and, as was said in the concurring opinion in *Ex parte Soto*, 88 Cal. 629, 26 Pac. 530, "it is within, and not in excess of, the authority of the statute." If the judgment had been for ten years, it would have been a judgment for seven years and three years more, and, so far as the mere naked question of jurisdiction is involved, the power to sentence for the longer term includes the power to sentence for the shorter. The judgment is not, therefore, wholly void; and, even if this were a proceeding in which the judgment could be questioned for error, as such error, if any, would have been in favor of Reed, he would not be aggrieved thereby. Moreover, if we could hold here that the judgment is invalid, it is difficult to see what course could be pursued other than to order the trial court to enter the proper judgment for a term not less than ten years, which judgment would be greatly prejudicial to the petitioner, and, of course, not desired by him. See *People v. Riley*, 48 Cal. 549.

Petitioner relies on *Ex parte Bernert*, 62 Cal. 524. That case may possibly be distinguished from the case at bar, as the right of a municipality to pass the ordinance for the violation of which the petitioner there was held, and a conflict between such ordinance and the statute of the state, were largely discussed; but, if what was decided in that case is irreconcilably inconsistent with the conclusion hereinbefore stated, it must be considered as, to that extent, overruled.

The prayer of the petition is denied, and

the said Reed remanded to the custody of the said warden, and the writ is discharged.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

143 Cal. 689

POOL v. BROTHERHOOD OF RAILROAD TRAINMEN. (S. F. 3,521.)

(Supreme Court of California. June 21, 1904.)

ACCIDENT INSURANCE—TOTAL DISABILITY—POLICY—CONSTRUCTION.

1. The constitution of a mutual benefit association, of which plaintiff was a member, permitted a certain amount on claims for total disability resulting from certain physical injuries. The following section provided that all claims for disability not coming within the preceding section should be held to be addressed to the systematic benevolence of the order, and should in no case be made the basis of any legal liability on its part; that every such claim should be referred to a beneficiary board, and, if approved, the claimant should be paid an amount equal to the amount of his certificate; that the approval of the board should be required as a condition precedent to the right of any such claimant; and that this section might be pleaded in bar of any suit or action begun to enforce the payment of any such claim. Held, that plaintiff could not maintain an action for a claim for total disability for an injury other than that stated in the first section.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by A. Pool against the Brotherhood of Railroad Trainmen. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Rinehart, for appellant. Edward A. Holman, for respondent.

COOPER, C. At the close of plaintiff's testimony the court granted a nonsuit, and judgment was entered for defendant. This appeal is from the judgment.

The action was brought to recover \$1,200 claimed to be due plaintiff on a benefit certificate issued by defendant, an unincorporated fraternal and mutual benefit association, of which plaintiff was a member, for a total and permanent disability, caused by an injury to plaintiff's spine received in the course of his employment. Plaintiff's right to recover must be measured by his contract, which must be read with the constitution and by-laws of defendant, as such constitution and by-laws are deemed to have been agreed to by every member thereof, and therefore by this plaintiff. Section 45 of the defendant's constitution provides: "Disability Claims. Any member in good standing suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled, and shall receive the full amount of his beneficiary certificate, and not otherwise."

Plaintiff did not lose a hand, or a foot, or suffer the loss of the sight of both eyes, and therefore is not entitled to recover under the said section defining total and permanent disability; and his counsel frankly admits that he makes no such claim. But he bases his claim upon section 46, which reads as follows: "Benevolent Claims. All claims for disability not coming within the provisions of section 45 shall be held to be addressed to the systematic benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to a beneficiary board, composed of the grand master, first vice grand master, and grand secretary and treasurer, and, if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate; provided, that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefits hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law or in equity which may be commenced in any court to enforce the payment of any such claim. No appeal shall be allowed from the action of said board in any case; but the grand secretary and treasurer shall report all disapproved claims made under this section to the succeeding biennial convention for such disposition as said convention shall deem just and proper." Plaintiff notified defendant of his said disability, and furnished proofs in due form; but defendant, through its beneficiary board, has refused to pay plaintiff or to allow his claim in any sum whatever.

The nonsuit was properly granted. Plaintiff agreed that his claim should be "addressed to the systematic benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood." We must apply the ordinary rules governing contracts to the agreement made by the defendant with plaintiff in this case. He was guaranteed to be paid a certain sum in case of total disability from the causes set forth in section 45 of the constitution. He paid for and was insured against the loss of a hand or a foot or of both eyes. His contract was absolute in case his disability had been permanent and caused in the manner defined in the last-cited section. In other cases the claim was of a purely benevolent nature. The beneficiary board had the power to allow it or reject it, but no duty was imposed upon such board to allow it. If the board reject such claim, the claimant may have it acted upon by the next biennial convention, and the convention may make such disposition of it as may be deemed just and proper. We know of no reason why such contract may not be made. The plaintiff was not compelled to become a member of defendant, but, having become such member, he

must show a legal liability within the terms of his contract before he can recover in court. In *Bacon on Benefit Societies*, § 94, the author refers to the leading cases and says: "In all the cases it has been held that the same principles govern as those applying to arbitrators, and when the prescribed forms have been observed, without fraud and in good faith, the decision of the committee or society is final." It was said by this court, speaking through Temple, J., in *Robinson v. Templar Lodge, I. O. O. F.*, 117 Cal. 375, 49 Pac. 171, 59 Am. St. Rep. 193. "When a suit has been brought, it is, however, a defense to his claim to show that he has agreed to submit his demand to the tribunals of the lodge under the prescribed procedure. The defendant is not engaged in business for profit. It is a semicharitable institution. It collects dues from its members merely to distribute to members in need according to a plan agreed to by all. It would seriously interfere with the usefulness of these mutual aid societies if their funds could be tied up by endless litigation." See further *Bacon on Benefit Societies*, § 400a; *Levy v. Magnolia Lodge, I. O. O. F.*, 110 Cal. 297, 42 Pac. 887; *Hass v. Mutual Relief Ass'n*, 118 Cal. 6, 49 Pac. 1056; *Hogan v. Pac. Endowment League*, 99 Cal. 249, 33 Pac. 924; *Rood v. Railway Passengers, etc., M. B. Ass'n (C. C.)* 31 Fed. 62; *Van Poucke v. Netherland, etc., Soc.*, 63 Mich. 378, 29 N. W. 863; *Anacosta Tribe v. Murbach*, 13 Md. 91, 71 Am. Dec. 625.

This is not a case of an arbitrary adjudication of the officers of a benevolent association, declaring a forfeiture of property or of vested rights. It is simply the rejection of a claim that the lodge might in its charity have allowed, but it was agreed that such claim should be in the discretion of the lodge and not the basis of legal liability. Plaintiff may have been unfortunate in becoming a member of a brotherhood that is not benevolent, but the court cannot undo his actions in this regard.

It is advised that the judgment be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 3

JAMESON v. SIMONDS SAW CO. et al.  
(S. F. 3,810)\*

(Supreme Court of California. June 28, 1904.)

APPEAL—FINAL JUDGMENT—DEFAULTS.

1. A default judgment, whether legal, within Code Civ. Proc. § 414, prescribing the procedure where some of several defendants are not served, and section 585, providing for judgments for failure to answer, or illegal and void, is a final judgment from which an appeal lies, although, if void, defendant might also move to set the same aside.

\*Rehearing denied July 21, 1904.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by W. D. Jameson against the Simonds Saw Company and the Simonds Manufacturing Company. From a judgment for plaintiff, the last-named defendant appeals. On motion to dismiss. Denied.

C. E. Naylor and Wm. P. Hubbard, for appellant. William J. Herrin, for respondent.

**HENSHAW, J.** This action was by plaintiff against the defendants jointly to recover a sum of money as damages for defendants' breach of contract in the employment of plaintiff as a salesman. The defendant Simonds Saw Company was served with summons and appeared. The Simonds Manufacturing Company was also served, and appeared specially for the purpose of quashing the service of summons. The court denied the motion, and defendant Simonds Manufacturing Company declined to plead. The clerk then entered judgment against that defendant, and from that judgment it appeals.

Plaintiff moves to dismiss the appeal, contending that the judgment so rendered is not a final judgment, and that, if its entry by the clerk was irregular and improper, defendant's only redress is by a motion in the trial court to set it aside. No doubt may be entertained but that such a motion may properly be made, but this is not the only form of redress open to defendant. Nor is it necessary upon this motion to determine whether or not the action of the clerk in entering judgment by default was legal or void. If legal within the contemplation of sections 414 and 585 of the Code of Civil Procedure, then clearly the judgment as to the defaulting defendant is a final judgment, and from such final judgment he has his right of appeal. Upon the other hand, if the action of the clerk should eventually be declared illegal and void, nevertheless there is against the defendant a judgment in form equally final and conclusive against him, and his right to appeal is not abridged by reason of the fact that he might also move the trial court to vacate it and set it aside.

The motion to dismiss is denied.

We concur: **McFARLAND, J.; LORIGAN, J.**

143 Cal. 658

**FRENCH v. DAVIDSON et al.** (L. A. 1,427.) (Supreme Court of California. June 22, 1904.)

**VACCINATION OF SCHOOL CHILDREN—CONSTITUTIONAL LAW—STATUTE—TITLE OF ACT—UNIFORMITY OF OPERATION—POLICE POWER—PUBLIC POLICY—SPECIAL LEGISLATION.**

1. St. 1889, p. 32, provides for the vaccination of all school children, and is entitled "An act to encourage and provide for a general vaccination in the state of California." *Held*, that the title of the act is in substantial com-

pliance with the requirements of the Constitution.

2. St. 1889, p. 32, providing for the vaccination of all school children, is not repugnant to the Constitution, as not being uniform in its operation.

3. St. 1889, p. 32, providing for the vaccination of all school children, is within the police power of the Legislature of the state.

4. St. 1889, p. 32, providing for the vaccination of all school children, is not repugnant to any constitutional provision against special legislation.

5. The courts have no jurisdiction to interfere with enactments, which are within the police power of the Legislature, as being against public policy or otherwise, so that an objection that St. 1889, p. 32, providing for the vaccination of all school children, is against public policy, is without merit.

6. St. 1889, p. 32, providing for the vaccination of all school children, is not repugnant to the fourteenth amendment of the federal Constitution.

**Commissioners' Decision.** Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Petition for writ of mandate against F. P. Davidson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dadmun & Escobar, for appellant. Casius Carter, Dist. Atty., and W. R. Andrews, Dep. Dist. Atty., for respondents.

**GRAY, C.** The children of plaintiff were denied admission to the public schools of the city of San Diego, for the reason that they had not been vaccinated. The plaintiff seeks a writ of mandate to compel the admission of his children to the said schools without being so vaccinated. The writ was denied, and the plaintiff appeals.

As the case involves nothing but the constitutionality of the "Act to encourage and provide for a general vaccination in the state of California," St. 1889, p. 32, and as this question has already been settled in a well-considered case by this court, the plaintiff's appeal from the judgment herein may be briefly disposed of.

The appellant urges that the act is unconstitutional for the following reasons: (1) The title to the act is misleading, and therefore void. (2) It is not uniform in operation. (3) It is special legislation. (4) Against public policy. (5) In derogation of the Constitution and laws of the United States, or, in other words, against the fourteenth amendment.

All these points except the last are taken up and fully disposed of in *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383. The title to the act is there shown to be in substantial compliance with the requirements of the Constitution, and many authorities are cited illustrating its sufficiency. The uniform operation of the act upon a natural class of persons, to wit, school children, is asserted, and its compliance with the Constitution in that behalf is declared. That the vaccination act comes within the police power of the Legislature of the state, and that it is for the pub-

lic good, is clearly maintained by the opinion. It is also shown that the act in no way impairs any constitutional provision against special legislation. Upon the questions treated of in that decision, little need be here added. Its soundness has never been questioned, so far as we are able to ascertain. The case has been frequently cited, and the principle of it approved, both in this and other states. As showing the requirement of the vaccination of children attending the public schools to be a proper exercise of the police power of the state, it is cited with approval in the following cases: *Bissell v. Davison*, 85 Conn. 191, 32 Atl. 348, 29 L. R. A. 251; *In re Rebenack*, 62 Mo. App. 10.

The act applies equally to all children of school age desiring to attend the common school, and is uniform as to all of them so far as the requirement of vaccination is concerned. Section 5 of the act, requiring a report to the State Board of Health of the number between the ages of 5 and 17 who are vaccinated, has nothing to do with the controversy before us, and need not be here construed.

The Legislature, no doubt, were of opinion that the proper place to commence in the attempt to prevent the spread of a contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day. It needs no argument to show that, when it comes to preventing the spread of contagious diseases, children attending school occupy a natural class by themselves, more liable to contagion, perhaps, than any other class that we can think of. This effort to prevent the spread of contagion in a direction where it might do the most good was for the benefit and protection of all the people, and there is in it no element of class legislation. It in no way interferes with the right of the child to attend school, provided the child complies with its provisions. Police regulations generally interfere with the liberty of the citizen in one sense. To arrest a man for a breach of the peace is an interference with his liberty. It is no valid objection to a police regulation that it prevents a person from doing something that he wants to do, or that he might do if it were not for the regulation. When we have determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the lawmaking power. It is for that power to say whether vaccination shall be had as to all school children who have not been vaccinated all the time, or whether it shall be resorted to only when smallpox is more than ordinarily prevalent and dangerous. *Bissell v. Davison*, supra.

Nor does the fourteenth amendment or any other part of the federal Constitution interfere with the power of the state to prescribe regulations to promote the health and general welfare of the people. "Special burdens are often necessary for general benefits."

"Class legislation, discriminating against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

We advise that the judgment be affirmed.

We concur: SMITH, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

143 Cal. 683

DIETERLE et al. v. BEKIN. (L. A. 1,200.) (Supreme Court of California. June 25, 1904.)

BAILMENTS—WAREHOUSEMEN—LOSS BY FIRE—LIABILITY—CONTRACT EXEMPTIONS—NEGLIGENCE—BURDEN OF PROOF—TRIAL—FINDINGS—NECESSITY.

1. In an action against a warehouseman for conversion of personal property stored in the warehouse, where the complaint alleged merely ownership, right to possession, demand, and refusal, and the answer alleged that before demand the property "was, without fault or negligence of this defendant, destroyed by fire," and there was evidence to show negligence of defendant in exposing the property to loss by fire, and its destruction by fire of an unknown origin under such circumstances as to suggest that the fire came from the more than ordinary risk under which the property was negligently placed by defendant, the burden was on defendant to show that the fire was not caused by his negligence.

2. In an action against a warehouseman for conversion, where the defense was that the property was, without negligence of defendant, destroyed by fire, the issue thus raised as to defendant's negligence was not determinable alone by a consideration of the questions whether the origin of the fire was unknown or whether it occurred without defendant's knowledge, but on this issue the character of the building provided by defendant for the storage of the property, the character of a business for which he permitted a portion of the building to be used, and the precautions taken by him for the prevention of fire and for its extinguishment, were also elements for consideration.

3. In an action against a warehouseman for conversion, evidence showing that defendant did not exercise the ordinary care required of him as a warehouseman was sufficient to cast upon him the burden of showing that the loss, which was by fire, was not by reason of his negligence, but was the result of some agency disconnected with himself.

4. Where evidence is introduced on a material issue, the court should make a finding thereon, and, until such finding is made, judgment may not be properly rendered.

5. Where there is no evidence introduced on an issue, the finding must be against the party on whom the burden of proof rests.

6. A contract exempting a warehouseman from liability for loss by fire does not excuse him from the exercise of ordinary care to protect the property from fire.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Minnie Dieterle and another against M. Bekin. From a judgment for de-

fendant, and from an order denying plaintiffs' motion to vacate said judgment, plaintiffs appeal. Reversed.

E. W. Freeman, for appellants. W. R. Bacon, for respondent.

GRAY, C. This is an action for damages for the conversion of certain personal property belonging to plaintiffs, and in the complaint alleged to have been delivered to defendant in the ordinary course of business, for storage in his warehouse, in the city of Los Angeles. The complaint alleges that, subsequent to the storage, plaintiffs, being still the owners of said property and entitled to its possession, demanded possession thereof, and defendant refused to comply with the demand. The answer, in addition to numerous denials, sets up as a separate defense that the property was deposited for storage with defendant, and that thereafter, and before any demand was made upon the defendant, the said personal property "was, without fault or negligence of this defendant, destroyed by fire." The defendant also pleaded as a separate defense that he received the property under a written agreement to the effect that the "defendant should be under no liability for loss of said personal property by fire." The findings substantiate the allegations of the complaint, except as to the value of the property, which is found to be \$1,500. It is also found that the defendant gave plaintiffs a written receipt, signed by defendant, which receipt contains this sentence: "No liability for fire," etc. It is further found that the goods were stored in a certain building in said city, and then the findings proceed as follows: "Which said building was constructed with brick on the outside, and with lumber on the inside. That said building consisted, before and at the time of its destruction by fire, of three stories or floors, and the first floor was at the time of said fire used by J. D. Hooker & Co. as a depository in storing wood and hardware supplies, and the second floor was at said time used by said defendant as a depository in storing said goods of said plaintiffs and of others, and the third floor at said time was used for a paper box factory, and in the manufacture of said paper boxes there were used large kerosene lamps, with double wicks, each wick about six inches long, and in each lamp kerosene was used, and said lamps were used for the purpose of heating glue for the manufacture of paper boxes. That large quantities of paper were stored on said third floor, to be used in the manufacture of paper boxes, and said boxes, when made, were also stored on said third floor. That defendant, at the time he stored said goods in said building, and at the time of the fire, knew that said paper box factory was on the third floor, and was being conducted and carried on from day to day as aforesaid, and that there was danger of said goods being destroy-

ed by fire on account of said factory being carried on as aforesaid on said third floor. That during all the time said goods were stored on said second floor there was danger of said goods being consumed by fire. The said warehouse was not a reasonably safe place in which to conduct said business, because of the dangers of fire from said box factory. The court further finds that said defendant was grossly negligent in keeping and storing said goods on said second floor of said building, and that defendant knew at said time that he stored said goods in said building and, during all the time that he kept them in said building, that there was risk and danger from fire on account of said paper box factory being then and there carried on in said third story of said building as aforesaid, and that said goods at any time while being stored in said building were in danger of being consumed by fire, and that said risk and danger from fire was more than an ordinary risk. That during the night of on or about the 18th day of October, 1896, and prior to the commencement of this action, and before any demand was made upon said defendant by said plaintiffs, or either of them, or by any person at all, said property of plaintiffs was, while contained in said building as aforesaid, destroyed by fire, but the origin and cause of said fire is unknown. It is not known in what part of said building the fire originated, nor from what cause. It is not known whether or not the fire originated in the box factory, or was caused thereby."

Upon these findings the defendant had judgment for costs. The plaintiffs appeal from said judgment, and from the order thereafter made denying their motion to vacate said judgment, and enter a different judgment in plaintiffs' favor for \$1,500.

We think the judgment should be reversed. The plaintiffs made out their case when they established to the satisfaction of the court the allegations of their complaint. It was then for the defendant to establish the allegations of his affirmative defense, if he could do so. The court has found that he was grossly negligent in the matter of exposing the property to loss by fire, and that the property was destroyed by fire of an unknown origin. The facts found suggest at least a probability that the fire came from the same source from which emanated the "more than ordinary risk" under which the property was so negligently placed by the defendant. Under the circumstances disclosed by the findings, the burden which the defendant had assumed in his affirmative defense was upon him to satisfy the court that the fire did not come from this source.

It is not necessary to hold that the burden of proof was upon the defendant solely for the reason that he had assumed it in his answer. Irrespective of any consideration upon whom the burden of proof lay, the issue before the court was to determine wheth-

er the defendant had exercised the ordinary care required of him as a warehouseman, and whether his negligence in that respect had contributed to the loss of the plaintiffs' property, and upon this issue the court has not made any finding. Whether the fire occurred without his knowledge, or whether the origin of the fire was unknown, were not, in themselves, conclusive of this question. The character of the building provided by him for the storage of the property, and the character of the business for which he had permitted a portion of the building to be used, and, in view thereof, the precautions taken by him for the prevention of fire and for its extinguishment, were also elements proper to be considered in determining this issue. See *Russel Manufacturing Co. v. M. H. Steamboat Co.*, 50 N. Y. 121; *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. If the trial of the cause had been before a jury, it would have been error for the court to withdraw these matters from their consideration, and to submit the question of his negligence, to be determined by his knowledge or ignorance of the origin of the fire.

It is evident from the findings above quoted that there was evidence before the court tending to show that the defendant did not exercise the ordinary care required of him as a warehouseman. This was sufficient to cast upon him the burden of showing that the loss was not by reason of his negligence, but was the result of some agency with which he was entirely disconnected. See *Wilson v. Cal. R. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685, and cases there cited. As this was a material issue in the case, and there was evidence relative thereto, the court should have made a finding thereon, and, until such finding was made, no judgment could be properly rendered. *Swift v. Canavan*, 52 Cal. 417. The trial of a cause is not completed until the court has made its finding upon all the material issues. If there is no evidence upon an issue, the finding must be against the party on whom was the burden of proof. *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239.

Nor are these questions in any way affected by the contract against liability for loss by fire. Such a contract cannot be construed so as to excuse a bailee from the exercise of ordinary care to protect the property from fire. *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. 47; *Cussen v. So. Cal. Savings Bank*, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250.

The case of *Wilson v. Southern Pacific R. R.*, 62 Cal. 164, is cited by respondent to the point that the burden of proof was on the plaintiff here to show that the loss was attributable to defendant's negligence. We

have no quarrel with the decision of that case, as applied to the facts involved therein, but the facts as well as the issues were different from the facts and issues here. There the plaintiff assumed the burden of showing the negligence of defendant in his complaint, and the question of whether defendant was negligent at all seems to have been in grave doubt. Here the defendant has assumed the burden of showing that the loss was not the result of his negligence in his answer; and that he did not use due care in storing the property, we have already seen. As giving further scope to this distinction, see the comment on that case by this court in the case of *Wilson v. California C. R. R. Co.*, 94 Cal., at page 172, 29 Pac. 861, 17 L. R. A. 685.

A judgment cannot be ordered for plaintiffs on the findings as they stand, because of the absence of any finding as to whether the loss was the result of defendant's negligence. We advise that the judgment be reversed, with directions to the lower court to make a finding upon the evidence already before it, and such other evidence as the parties may present upon this issue, as to defendant's negligence, and to render judgment accordingly.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the lower court to make a finding upon the evidence already before it, and such other evidence as the parties may present upon this issue, as to defendant's negligence, and to render judgment accordingly. HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

143 Cal. 636

PEOPLE v. MILES et al. (Cr. 1,144.)

(Supreme Court of California. June 20, 1904.)

FISH — WRONGFUL TAKING — STATUTES — CONSTRUCTION — TRIAL — REMARKS OF COURT — PRESUMPTIONS OF INNOCENCE — INSTRUCTIONS.

1. The remarks of the court to the jury, on sending them out for further consideration of the case after they had returned into court and the foreman had informed the court that he did not think that an agreement was possible, and other jurors had stated that there might be a change, to the effect that if there was a mistrial a great expense would be incurred because of a retrial, and if the jury thought there would be an agreement and thus save the expense of a retrial they should again retire, and that they must arrive at a verdict solely from the evidence and the instructions, did not constitute prejudicial error.

2. Where on a trial for crime the court charged that the burden of proof was on the prosecution, and that defendant was presumed to be innocent until his guilt was established, and that he was entitled to the benefit of any reasonable doubt, and could not be convicted unless the jury were convinced by the evidence beyond all reasonable doubt, the refusal to charge that the presumption of innocence at-

tached at the commencement of the trial and remained till its close was not prejudicial.

3. Code Civ. Proc. § 1847, providing that the jury, in judging of the credibility of a witness, may consider the manner in which he testified, the character of his testimony, the evidence affecting his character for truth, his motives, or contradictory evidence, does not render it improper for the court to charge the jury to consider also the degree of intelligence of the witness.

4. Pen. Code, § 636, providing that every person who shall set any set net for catching fish in the waters of the state—"and every net shall be considered a set net that is secured in any way and not free to drift with the current or tide"—is guilty of a misdemeanor, prohibits the using of a set net in the waters coming within the regulating power of the state concerning fish therein; and whether a stream at the time one had his net across it was subject to movement by current or tide is immaterial, the words quoted being merely descriptive of the condition of the net.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Thomas J. Miles and another were convicted of illegal fishing, and they appeal. Affirmed.

A. L. Shinn, T. H. Christianson, and A. H. Hewitt, for appellants. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

CHIPMAN, C. Defendants were convicted on an information charging that on August 22, 1903, they were guilty "of the crime of setting and using a set net in the waters of the state for the purpose of catching fish [a misdemeanor], committed as follows: That said [naming the defendants and the date] did then and there willfully, unlawfully, and feloniously, in the waters of the state of California, to wit, in the Sacramento slough, in the said county of Sutter, \* \* \* set and use a certain set net, that is, a net which was then and there secured and was not free to drift with the current and with the tide, for the purpose of catching fish, \* \* \* contrary to the form," etc. The trial court denied defendants' motion for a new trial, and entered judgment on the verdict. Defendants appeal from the judgment and order.

1. The jury retired to consider their verdict some time in the forenoon. They came into court for further instructions as to the form of the verdict they might return. Again, a second time, they came into court and stated that they had come to an agreement as to one of the defendants, and passed up the verdict to the court. Counsel for defendant objected to the reading of the verdict unless it was as to both defendants. The trial judge told the jury that he could receive the verdict, but he thought they should attempt to arrive at a verdict in both cases if they could do so, inasmuch as they had not been out long. The instructions were again read to the jury, and they retired. This was just before noon. The jury came in a third

time at 10 minutes past 3 and informed the court that they had changed their mind as to the partial verdict and had then not agreed on any verdict. A jurymen informed the court of the number of ballots taken, and how the last vote stood. The court said to them that he thought they "would be able to arrive at some kind of a verdict." The sheriff was instructed to provide supper for them, as they had no dinner, and they again retired. A fourth time they returned into court, but at what time does not appear, except that it was before 6 o'clock. The foreman informed the court that there had been no agreement, and he did not think it possible that they would agree. Another jurymen thought it doubtful. Another jurymen said the last ballot showed a change. Another jurymen said there was some disagreement as to the testimony of one of the witnesses, and it was read to the jury. Another juror said there might be a change after a while. Another said: "I think we had better try it once more." The Court: "I think so, too. It seems there has not been a full discussion of the matter, from what has been said and from the changes that have been made." The court told the jury: "That it costs several hundred dollars to get a jury together to try a criminal case. It is an expensive matter. If there is a mistrial in a criminal case, the district attorney may bring it on for trial again, and a great expense attached to the trial of such cases.

\* \* \* If you think there is any possibility of arriving at a verdict and thus saving the county the expense of a retrial, I am willing to read the instructions to you again. \* \* \* It will save a good deal of expense if this case can be finally determined by this jury, but, as I said before, I have no desire to force you to retire again to the jury room if there is no possibility of your arriving at a verdict. \* \* \* You are all taxpayers—you would not be in the jury box if you were not all on the assessment roll of the county—and it should be your desire more than that of any others that the county should be saved as much expense as possible." A jurymen offered to show the trial judge the different votes taken. The Court: "I do not wish to see it. All I want to know is whether there is a probability of your arriving at a verdict as to both of the defendants or as to one of them. You must arrive at a verdict, if you do at all, solely from the evidence and the instructions given you, not from any convenience to any of you, or any inconvenience to any of you by reason of being kept in the jury room." The jury retired, and later (at what hour does not appear) returned a verdict of guilty as to both defendants.

It is claimed that the reasons given in *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852, are equally applicable here. In the *Kindleberger* Case this court held that the remarks of the trial judge indicated that he viewed the evidence as pointing to defendant's guilt. No such inference can be drawn from the re-

marks of the court in the present case. No intimation whatever was given as to how the court regarded the evidence; its whole purpose was to require a reasonable effort on the part of the jury to come to some conclusion one way or another, and not cause a mistrial. In reminding the jury of the expense of the trial, and the desirability to them, as taxpayers, of avoiding a repetition of this expense, he was saying no more to them than they, as taxpayers and intelligent men, must be presumed to have known without being told by the court. In *Niles v. Sprague*, 13 Iowa, 198, the trial court told the jury the case had been twice tried, and that it was important that they should agree. The appellate court said: "To this action or remark we can see no just ground of objection. If improper, it was as much so to defendants as to plaintiffs. But it was so to neither. It was not only right but the duty of the court to remind the jury of the protracted litigation, and of the necessity on their part to labor honestly and faithfully to arrive at a verdict and thus terminate a controversy which time only tended to make more expensive and embittered. There was no intimation as to how they should decide, but a general remark that they ought to agree if they could satisfy their minds." In another case the jury were told that the case had been long pending and had been exhaustively tried, that a new trial would entail large expense, etc., and in view of these facts they were directed to return to their rooms and examine their differences in a spirit of fairness, etc. The court said: "But we fail to discover either error or prejudice in any of it. What the court said was abundantly true and practical, and ought to have occurred to the jury without the necessity of having it said to them by the court." *Frandsen v. C., R. I. & P. R. Co.*, 36 Iowa, 372. These were civil cases, and there was no suggestion to the jurors that the expense of the trial might fall upon them as taxpayers. We cannot see, however, that this fact would change the reason for upholding the admonition of the court. The point is that it was proper for the court to urge the importance of reaching a verdict, and, as it intimated no opinion of its own or suggested how the verdict should go, the defendants were not prejudiced. Indeed, the jury were quite as likely to find for the defendants as for the people under such an admonition. Nor can we say but that the jury were influenced by the re-reading of some of the testimony, and not by the remarks of the court. See the question discussed and cases cited: *Blashfield's Instructions to Jurors*, vol. 1, p. 454 et seq.

2. Defendants asked an instruction as to the presumption of innocence, and that this presumption attached at the commencement of the trial and remained until its close. The court had given an instruction that the burden of proof was on the prosecution, and that "the defendants are presumed to be innocent

until their guilt is established by proof," and that they are "entitled to the benefit of any and all reasonable doubts, and cannot be convicted of any crime unless the jury are convinced by the evidence in the case beyond all reasonable doubt," etc. Defendants' proposed instruction was refused on the ground that it had been substantially given. It is urged that defendants were entitled to have the jury instructed that the presumption of innocence remained with them to the close of the trial. If the instruction given by the court left any doubt in the minds of the jury, or was open to the inference that this presumption of innocence did not abide with defendants throughout the trial, we think prejudice would appear in refusing the instruction asked. Indeed, we think the court should have given it in the form requested. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390, and other cases. At the same time, as reasonable men of ordinary intelligence, the jurors must have known that the presumption of defendants' innocence mentioned by the court had reference to the entire trial and to all the evidence there adduced. Defendants were therefore not injured by the ruling of the court.

3. Instruction 8 is an extension somewhat of the points relating to the testimony of witnesses suggested in section 1847, Code Civ. Proc., as to which the jury may be instructed. In enumerating the circumstances or facts that may surround a witness in testifying, the court stated that the jury might scrutinize not only his manner while on the stand, his relation to the case, and other facts, but also "his degree of intelligence." The court was not limited to the circumstances enumerated in section 1847. *People v. Amaya*, 134 Cal. 531, 540, 66 Pac. 794. The intelligence of witnesses may well be taken into consideration as having some bearing upon the amount of credence to be given this testimony. To what extent the relative amount of intelligence among witnesses should influence the minds of the jury as to any particular fact testified to is for them to determine.

4. Defendants asked an instruction to the effect that there could be no conviction if the Sacramento slough, mentioned in the information, at the time charged had neither current nor tide. The court refused the instruction, and defendants now urge this as error. The information is laid under section 636, Pen. Code, which provides in part as follows: "Every person who shall set, use, or continue, or shall assist in setting, using, or continuing any pound, weir, set-net, trap, or any other fixed or permanent contrivance for catching fish in the waters of this state—and every net shall be considered a set-net that is ~~used~~ <sup>is</sup> in any way and not free to drift with the current or tide—is guilty of a misdemeanor," etc. It is contended that the jury should have been told that unless there was a current or tide there could be no offense under



this section. There was evidence that this slough empties into the Sacramento river about a half mile above the mouth of Feather river, is 3 or 4 miles in length, about 100 feet wide at its mouth and 12 feet deep, and about 80 feet wide where defendants' net was set. Except in midsummer this slough drains the back-country lands into the river, but in August the water of the slough has no perceptible current. Fish may and do pass freely up and down the slough from the river. The ownership of the lands bordering on the slough does not appear. Defendants offered to prove the ownership, but the court held the evidence to be immaterial, and no objection was made or exception taken to the ruling. Upon the authority of *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183: "The dominion of the state for the purpose of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, \* \* \* extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishing"—citing cases. Whether or not the water of this slough, at the particular time defendants had their net set across it, was subject to movement by current or tide, is immaterial. They were forbidden by the law to use a set net "in the waters of this state," i. e., in any of the waters coming within the regulating power of the state concerning the fish therein. The parenthetical words "free to drift with the current or tide," are but descriptive of the condition of a net; it must be free to drift, and not be set or permanent.

It is advised that the judgment and order be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

McFARLAND, J. I desire to say further that while upon the record in this case it appears that appellants were not prejudiced by the guarded expressions of the court to the jury on the subject of their efforts to agree, still such expressions are hazardous, and it would be better for the court to say nothing on that subject. There might be cases where such remarks would be construed by the jury as urging an agreement to convict.

143 Cal. 609

AIGELTINGER v. EINSTEIN et al. (S. F. 2,530.)

(Supreme Court of California. June 18, 1904.)

FRAUDULENT CONVEYANCES—ATTACHMENT—CREDITORS' BILL—SUFFICIENCY.

1. An attachment of real estate alleged to have been fraudulently conveyed by a debtor cannot be sustained, under a creditors' bill, where the claim asserted has not been reduced to judgment.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Bill by Edward H. Aigeltinger against Jacob Einstein and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Wal. J. Tuska, for appellant. Meyer Jacobs and Arthur J. Dannenbaum, for respondents.

CHIPMAN, C. Creditors' bill. Defendants had judgment on demurrer to the sufficiency of the complaint, from which plaintiff appeals. The complaint alleges that defendants are husband and wife; that in March, 1899, Jacob conveyed to his wife, Delphine, without any consideration paid therefor, the land in question, for the purpose of avoiding the then existing claims of his creditors, among them the plaintiff, of which purpose his wife had full knowledge when she took the deed; that the money loaned by plaintiff to Jacob was used by the latter, and also was used for the benefit of a certain partnership of which Jacob was a member, and of which, at the commencement of the suit, he was the sole surviving member; that said copartnership was indebted in a large sum to divers creditors, and was unable to pay its liabilities, and was insolvent; that Jacob had no property that was exempt from execution other than the land in question. Subsequently, January 30, 1900, plaintiff brought his action in the superior court against defendant Jacob, and regularly sued out a writ of attachment, which was on February 2, 1900, duly levied on the said land as the property of Jacob, but as standing in the name of said defendant Delphine, and said levy is now in full force and effect. Plaintiff's prayer is that the conveyance referred to be declared void, that it be adjudged that he has a good and substantial lien upon the real property described in the complaint, and that he have such further relief as is proper in the premises. The only ground on which defendants claim that the demurrer was rightly sustained is that, on the case made in the complaint, judgment was a necessary prerequisite to the action to set aside the alleged fraudulent transfer. No other question is presented by the briefs.

Mr. Pomeroy says: "It is a necessary result, from the whole theory of the creditors' suits, that jurisdiction in equity will not be

entertained where there is a remedy at law. The general rule is therefore that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he had obtained his judgment." 8 Pom. Eq. Juris. § 1415. The courts, however, all agree and have held that there are exceptions to the general rule stated above. Whether the case of an attaching creditor who has by his writ secured a lien on the property, but as yet has no judgment, comes within the exception, is a question about which the decisions are not harmonious. Our statute reads as follows: "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcements by legal process of his right to take the property affected by the transfer or obligation." Appellant claims that it has been decided by this court that an attaching creditor could before judgment have his bill in equity to set aside the fraudulent conveyance of the attached property without waiting judgment, citing *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Scales v. Scott*, 13 Cal. 76; *Conroy v. Woods*, 13 Cal. 633, 73 Am. Dec. 605; *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Castle v. Bader*, 23 Cal. 76. It becomes necessary to examine these decisions of this court.

In *Heyneman v. Dannenberg*, the action was by an attaching creditor to enjoin the sheriff from selling property on execution under a judgment alleged to have been fraudulently obtained by *Dannenberg* against the debtor (*Morris*) a few days before the filing of the bill. Plaintiff's attachment was subsequent to the execution. All the facts alleged in the bill, except the fraud, were admitted in the answer. The court, after stating the general rule to be as we have shown, said: "The modern decisions of some courts of the United States seem, however, to have relaxed the severity of the English rule, and in some cases it has been held that a creditor who has acquired a lien under the attachment laws of a state may apply to a court of chancery without first proceeding to judgment. Without expressing any preference for the modern doctrine, we are satisfied that the facts and circumstances of this case take it out of the ancient rule." The reason given was that, unless the sale could be stayed, "the property which they [plaintiffs] have attached in the meantime would have passed into the hands of bona fide purchasers under color of a judicial sale, and be lost to them forever." The court further said that the jurisdiction could not be refused in a case like the present, where the sole issue was one of fraud, and where by such refusal the fraud complained of would be most successfully consummated. *Scales v. Scott* was a similar case, and *Heyneman v. Dan-*

*nenberg* was followed. In both cases personal property was attached, as we infer. In *Conroy v. Woods*, the court said: "The authorities do not place the right to go into equity upon the ground that plaintiffs must show themselves to be creditors by judgment, but they go on the ground that they must show a lien on the property, and this lien exists as well by the levy of an attachment as by execution." These observations must be read in the light of the facts disclosed, and they show that the court did not question the general rule, but found sufficient circumstances, not unlike those in the cases last above noted, to bring the case within the exceptions to the rule. *Conroy v. Woods* does not support the doctrine on which appellant relies. Besides, it appears that the plaintiff and interveners in that action had not only attachment liens, but also had judgments. The point decided in *Bickerstaff v. Doub* was that where the property is in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce not only the writ, but the judgment which authorizes its issuance. And the court then states the rule as we have given it supra, adding, "or has some process regularly issued, as in the case of an attachment authorizing a seizure of the property"; citing *Thornburgh v. Hand*, 7 Cal. 554. In the latter case the vendee of certain personal property of the debtor brought replevin against the sheriff, who sought to justify under a writ of attachment by which he had seized the property. The question involved was whether the officer could justify by simply producing the writ and proving the existence of the debt, or whether he must not also show all the proceedings on which the writ was based, and the court held that he must show the regularity of all the proceedings which were the basis of the writ. As this was not shown, the justification failed. It is, however, fairly inferable from the opinion that it would have been held sufficient had the sheriff shown the proceedings to be regular and that the writ was properly issued. Without affirming or denying this view of the question, where an officer seeks to justify his seizure and possession of property, we do not think the doctrine supported by reason or the weight of authority when applied to a creditor at large who attacks the transfer armed alone with a writ of attachment duly served, and an alleged indebtedness not yet brought to judgment, and in the absence of any circumstances showing a necessity for equitable interposition, in order to preserve the property from transfer to innocent third persons. In the concluding paragraph of the opinion in *Bickerstaff v. Doub*, the court said: "Unless the transfer were made to hinder, delay, or defraud creditors, the sheriff could not question its validity, and not even

then without first producing the judgment under which the execution he held was issued." The remaining case relied on by appellant—*Castle v. Bader*—was decided on the ground that the facts constituting the fraud were not sufficiently alleged or found. It was also said by the court that the complaint was insufficient in that it does not aver that plaintiffs have acquired any lien on the property they seek to have applied in satisfaction of their debts, or that they have obtained judgment on their debts on which execution has been issued and returned no property found.

Upon a careful examination of these early cases, we do not find that they necessarily involved or decided the question we now have before us. In *McMinn v. Whelan*, 27 Cal. 300, the defendants sought, among other defenses, to attack the conveyance in question. They had a judgment, which, however, was held by the court to be void, and they then claimed the right to attack the conveyance by reason of an attachment levied on the property. The court said: "If the defendant O'Connor had a lien on the premises by reason of the attachment, that lien could not be rendered effectual for the purpose of impeaching the conveyance to the plaintiff until judgment be obtained in the suit of *Gleason v. Maume*, and it is possible that no such judgment will ever be obtained. If the defendant O'Connor, as the assignee of *Gleason*, was, at the commencement of this action, and when it was tried, the creditor of *Matthew Maume*, he was simply a creditor at large without a judgment, and hence not in a position to maintain an action by answer in the nature of a cross-bill in equity to set aside the conveyance made to plaintiff." The case of *Blanc v. Paymaster Mining Co.*, 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149, furnishes an exception to the general rule, and, on the peculiar facts alleged and shown, a fraudulent conveyance was set aside without judgment first obtained against the fraudulent vendor—debtor. In *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485, the debtor had commenced proceedings in insolvency, which prevented plaintiffs from obtaining judgments against him. The action to set aside the alleged fraudulent conveyance to his wife, brought on behalf of all the creditors, and asking that when the assignee in insolvency should be appointed that he be made a party, was sustained. *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 628, 56 Am. St. Rep. 97, was also by its peculiar facts taken out of the operation of the general rule.

Section 1589, Code Civ. Proc., gives an executor or administrator authority to bring an action to set aside the fraudulent conveyance of his testate or intestate, for the benefit of creditors, "when there is a deficiency of assets in the hands of the executor or administrator." It has been held under this section that it must appear (1) that there are creditors to be paid, (2) that there is an insufficiency of assets in the hands of the adminis-

trator to meet their demands, and (3) the claims of the creditors must be evidenced by a judgment obtained in this state, or they must have been allowed by the administrator or executor, which is the equivalent of a judgment. *Forde v. Exempt Fire Co.*, 50 Cal. 299; *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; *Field v. Andrada*, 106 Cal. 107, 89 Pac. 323. It may be said that these cases do not reach the precise point now before us. But if general creditors of an estate, as well as the administrator, may not bring their action against the fraudulent vendee of the deceased debtor without first having their claims allowed, the principle involved would seem to have some application. The question will be found discussed, and the authorities on both sides collated, in *Wait on Fraudulent Conveyances*, § 81; *Bump on Fraudulent Conveyances*, § 538; *Pomeroy's Eq. Juris.* § 2185; and volume 5, *Ency. of Pl. & Pr.* p. 525. Among the decisions supporting the view taken by the lower court, we find the reasoning of Mr. Justice Brewer in *Tennent v. Battey*, 18 Kan. 324, entirely satisfactory. Briefly summarized, the reasons given were: Though the attachment is a specific lien, it is a lien of very uncertain tenure. It may be defeated by dissolution on motion, or by a judgment in favor of defendants on the merits of the claim. Suits by attachment are common, and the writ issues without any order of the court, and on the affidavit of the creditor alone, alleging any one of the statutory grounds. No advantage would inure to the creditor, except in the mere matter of time, by sustaining the equitable action. The seizure of the officer preserves the lien as against all changes and transfers, and everything the debtor or his assignee could do subsequent thereto. Except as to perishable property and property whose keeping is expensive, no sale can be ordered until after judgment, and for such property there would be no advantage to sustain an action like this. It might happen that the attention of the court would be occupied in useless litigation, because the attachment might be dissolved before judgment, which would end the lien and also the action to set aside the conveyance. The claim of the creditor should be certain before he can concern himself with the debtor's frauds, and it cannot be made certain except by judgment. A claim that is merely asserted ought not to be sufficient. It may be conceded that an officer has the right to defend his possession of the attached property, and often the defendant's acts may be inquired into; but it does not seem to follow that, because an officer may do this, the plaintiff may prosecute an independent action, not to preserve the possession, but to clear up the title. When the claim has become certain, he may inquire into the title. Possession may be preserved to preserve the attachment lien, but nothing more is necessary

until the claim is made certain. It seems to us that there is no satisfactory answer to this view of the question. It does not appear from the complaint that there is any danger of plaintiff's lien being lost. Plaintiff has no right under his attachment beyond that of using such measures as may be necessary to preserve his security until he can reduce his claim to judgment; the attachment is but a provisional remedy, that can avail nothing beyond fixing a lien on the property pending the inquiry into the merits of the claim. We do not think the plaintiff should have the right to harass third parties with litigation that may prove fruitless, in efforts to remove obstructions to the sale of the property, until he has first established his right to have a sale. There is no hardship in enforcing such a rule, while great hardship and needless annoyance might ensue upon the adoption of the rule for which plaintiff contends.

Turning on our statute *supra*, can it be said in the present case that the alleged fraud "obstructs the enforcement, by legal process, of his [the creditor's] right to take the property affected by the transfer"? Plaintiff has his lien on the land secured against the whole world, and he is entitled to no other legal process until he has his judgment. When he has judgment, he then has his execution; but as the transfer would obstruct the sale under the execution or "legal process," he may then have the obstruction removed, should there be no other property of the debtor sufficient to meet the demand, which latter fact may appear by return of the execution *nulla bona*, or may appear by the admission of the allegation in the complaint that the debtor has no property subject to execution except the property in question, or that he is insolvent.

It is advised that the judgment be affirmed.

We concur: HARRISON, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

143 Cal. 617

GRISWOLD v. GRISWOLD. (L. A. 1,266.)  
(Supreme Court of California. June 18, 1904.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—ADMISSIBILITY—CONFINEMENT AS INSANE PERSON—CONSULTATION WITH PHYSICIAN—BURDEN OF PROOF—MALICE.

1. Where plaintiff sued her brother for malicious prosecution in effecting her confinement as an insane person, and his defense was that he in good faith believed her to be insane at the time of imprisonment, evidence that defendant had consulted the family physician, who from the description of plaintiff's actions was of the opinion that she was insane, was admissible on the questions of malice and probable cause.

2. Though, in an action for malicious prosecution in effecting plaintiff's confinement as an

insane person, defendant admitted that plaintiff was not insane at the time he had her arrested, there was no presumption that he acted with malice and without probable cause, but the burden of proof was on the plaintiff on such issues.

3. In an action for malicious prosecution, the want of probable cause does not raise the presumption of malice, though it may be inferred therefrom.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by May Griswold against William R. Griswold. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

S. V. Landt and Lynn Helm, for appellant. Jones & Weller, for respondent.

**PER CURIAM.** Plaintiff and defendant are brother and sister. The action was brought to recover damages for malicious prosecution. The complaint alleges that the defendant maliciously and without probable cause made an affidavit and petition charging plaintiff with being insane, and upon such affidavit and petition procured the plaintiff's arrest and imprisonment in the insane ward of the county hospital of the county of Los Angeles; that plaintiff was not insane at the time she was so arrested, and that she was duly discharged from said arrest and imprisonment; that she was greatly injured in body, mind, and reputation by reason of said arrest and imprisonment, to her damage in the sum of \$50,000. Defendant, in his answer, did not deny the allegation "that plaintiff was not insane" at the time she was so arrested. He denied that he acted maliciously or without probable cause, and affirmatively alleged that for a long time prior to her arrest the plaintiff resided in the city of Los Angeles with the mother of plaintiff and defendant, together with a sister and nephew; that prior to her arrest she had frequent fits of violence and excitement, and committed divers irrational acts, and made divers threats and attempts to do bodily harm to members of the family and other persons without provocation; that she threatened to kill her sister, concealed, damaged, and destroyed property, and did other irrational things; that defendant fully and fairly reported all said facts to a physician, who was and had been the regular family physician of the family and of plaintiff, and said physician expressed the opinion that plaintiff was insane, and advised that proceedings be taken for her examination; that defendant in good faith, without malice, and believing, and having cause to believe, that plaintiff was insane, and deeming it for the best interests of plaintiff, and for the protection of others, believing it to be his duty, he made the affidavit and procured the arrest of plaintiff; that he acted in good faith, and without malice or ill will toward plaintiff. The case was tried before a jury, and a verdict rendered in favor of plaintiff for \$6,000, upon which judgment

was entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

Respondent has not filed any points or authorities, and hence our labor has been greater than it would have been, had we received the assistance of counsel. Many witnesses were examined and much evidence introduced on the issues as to malice and want of probable cause. It is not necessary to narrate the evidence as to the many acts of violence and peculiar conduct of plaintiff. It may be conceded (for the purposes of this case) that there is sufficient evidence to sustain the verdict of the jury both as to malice and want of probable cause; but we have concluded that the case must be reversed on the ground of errors of the trial court in giving improper instructions to the jury. Defendant, when on the stand, testified fully as to stating all the facts and circumstances concerning plaintiff's violence, threats, and conduct to Dr. E. R. Smith, the family physician, and that the doctor upon such statement told defendant that plaintiff was unbalanced, and in his opinion that she was insane. Dr. Smith testified fully, without objection, to all the statements made to him by defendant, that he was consulted by defendant, and that he believed the plaintiff was insane, and so advised defendant. The court (apparently of its own volition) instructed the jury as follows: "I charge you that, even though you should find that the defendant, before the 17th of November, 1900, fully and fairly stated all the facts and circumstances within his knowledge connected with the conduct, deportment, and manner of the plaintiff to a physician, and that he was by said physician advised that she was insane, this advice would not of itself amount to a reasonable and probable cause to believe her insane; and I charge you that, notwithstanding the court has heretofore permitted testimony to the jury of a statement by the defendant of certain facts and circumstances within his knowledge to Dr. E. R. Smith, and has permitted Dr. Smith to testify as to what statements were made to him by defendant, and both parties have testified to you as to the statement and opinion given by Dr. Smith to the defendant at the time in relation to plaintiff's mental condition, you should disregard all of such testimony; the court upon more mature reflection being satisfied that such testimony should not have been submitted to you."

We are at a loss to know upon what theory the instruction was given. It was incumbent upon plaintiff to prove both want of probable cause and malice. 2 Greenleaf on Evidence (16th Ed.) § 449. On the other hand, the defendant had the right to prove that he acted in good faith, without malice, and upon probable cause; that is, upon such facts and information as would induce a reasonably prudent man to believe that the plaintiff was

insane. Probable cause has reference to the common standard of human judgment and conduct, and malice refers to the mind and judgment of the defendant in the particular act charged as a malicious prosecution. Malice need not indicate anger or vindictiveness, but it imports bad faith in a malicious prosecution, or the want of sincere belief that the facts and circumstances justify the prosecution. As said by Chief Justice Redfield in *Barron v. Mason*, 31 Vt. 197: "For it is found, in almost every book upon the subject, that if defendant, however causelessly, did really act in good faith and without malice in preferring the charge, he cannot be made liable for a malicious prosecution." It is held, in cases where a person is charged with a crime, that if the prosecutor fully and fairly states all the facts in the case to counsel learned in the law, and is by such counsel advised and verily believes that a crime has been committed, that such advice amounts to probable cause. The court must have had the rule in mind in making the above charge to the jury.

But it was not necessary that the statement to and advice of Dr. Smith should have been sufficient to constitute probable cause as a matter of law to make it admissible. He was the family physician. He was supposed to be skilled in his profession, and to know more about the mental condition of plaintiff than any attorney at law could have known. If defendant had not consulted the family physician, but had gone to an attorney at law, it would certainly seem that he had much less ground for the prosecution than by pursuing the course he did. He was accused of acting maliciously. Did it not tend to disprove malice if he went to the family physician and fully and fairly stated the facts? It was said by Judge Redfield, in *Barron v. Mason*, supra: "But upon the question of malice the law is more tender towards the inexperience or the infirmities or the idiosyncrasies of parties. Malice is judged with reference to the party, and whatever fairly tends to show that he acted with good faith and without malice must be received. \* \* \* But if the party fail in showing such ground of action as would have induced prudent and careful men to have believed in the plaintiff's guilt, and to have instituted the prosecution, he may nevertheless, if he choose, show that in fact he did act upon what he at the time regarded as good cause, either from common report or remote circumstances, such as excited suspicions in his mind to the extent of creating belief of guilt, although short of probable cause." In *Murphy v. Larson*, 77 Ill. 176, where the defendant consulted one who was not a licensed attorney, but who was supposed to be such by defendant, it was held error to exclude such fact. The court said: "As the ground of this action is malice and want of probable cause, any fact tending to disprove

either is proper evidence. It was indispensable, to maintain the action, it should appear affirmatively that defendant, in instituting the prosecution against plaintiff on the charge of larceny, acted maliciously and without probable cause, and both must concur. The fact he obtained counsel of one he supposed was learned in the law and competent to give advice, and was advised by him, upon a disclosure of the facts and circumstances, to commence the criminal prosecution, while it constitutes no defense, was certainly competent evidence on the question of malice. If he acted in good faith—and that was a question for the jury—it would negative, in a high degree, the idea of malice; and that fact ought to go in mitigation of exemplary damages." To the same effect see *Harpham et al. v. Whitney*, 77 Ill. 32; *Hirsch v. Feeney*, 83 Ill. 549; *White v. Tucker*, 16 Ohio St. 468.

In the case at bar the plaintiff relied upon want of probable cause and other facts as a basis upon which the jury might infer malice. To deprive the defendant of evidence tending to show his honest belief, and reasonable grounds for such belief, as a basis for his actions in swearing to the affidavit, could not but have injured his defense before the jury. It is the policy of the law to encourage prosecutions when there are facts and circumstances that would induce the belief in the mind of a reasonably cautious man of the guilt of the party accused. And so in case a party is insane and dangerous to be at large. It would not do to hold honest parties in heavy damages for an error of judgment. If so, it would be difficult to get responsible parties to make complaints. All that the law requires as a defense to this kind of an action is the existence of such facts and circumstances as would induce the belief in the mind of a reasonably cautious man that the party was insane at the time the charge was made. If such facts and circumstances existed, the plaintiff ought not to recover.

In instruction No. 12 the court charged the jury as follows: "And, it being admitted by the defendant in his answer that plaintiff was not insane at the time he had her arrested, you are instructed that the law presumes that in procuring her arrest defendant acted without probable cause and maliciously, and the burden of proof is on the defendant to show probable cause and want of malice on his part." This was clearly error. The question before the court and the jury was not as to the sanity or insanity of the plaintiff at the time of her arrest, but as to whether or not there was probable cause for her arrest, as that term is understood by judges and the legal profession. *Jones v. Jones*, 71 Cal. 91, 11 Pac. 817; *Good v. French*, 115 Mass. 203. And the burden is always on the plaintiff to show that the suit or proceeding was instituted without prob-

able cause and maliciously. *Greenleaf on Evidence*, § 449 et seq.; *Newell on Malicious Prosecution*, p. 7, 473; *Harkrader v. Moore*, 44 Cal. 152. In the latter case it was held that an instruction "that the plaintiff's discharge by the examining magistrate is prima facie evidence of the want of probable cause for the charge, and the burden is upon the defendant to prove to the satisfaction of the jury the existence of probable cause," was error.

Instruction No. 10 was as follows: "You are instructed that malice is a question of fact for you to determine, but that it may be inferred by you from the circumstances proved, and may be presumed to exist from the want of probable cause." This instruction is somewhat ambiguous. If it means that the legal presumption of malice follows proof of want of probable cause, it is erroneous. A jury may infer malice from want of probable cause, but the former is not a necessary legal presumption from the latter. The law on the subject is correctly stated in *Levy v. Brannan*, 39 Cal. 485, as follows: "Malice is a fact to be found by the jury in an action for malicious prosecution. It may be proven by the acts or declarations of the defendant in respect to the prosecution, or the matter which was made the subject of the criminal charge against the plaintiff, or it may be inferred by the jury from the want of probable cause. The want of probable cause does not raise a legal presumption of malice; but it may be inferred therefrom—though it is not necessarily inferred—by the jury, as it may be inferred from other circumstances. But, by whatever mode it may be proven, it is proven as a fact." See, also, *Harkrader v. Moore*, 44 Cal. 153. As the case must be reversed for the other reasons given above, it is not necessary to determine what the meaning of the instruction is, or how the jury probably understood it; but upon another trial language which might be construed as holding that malice is legally presumed from want of probable cause should be avoided.

There are no other points necessary to be discussed. The judgment and order appealed from are reversed.

143 Cal. 623

In re CAMPBELL'S ESTATE et al. (S. F. 3,293.)

(Supreme Court of California. Nov. 27, 1903.)  
ESTATES OF DECEDENTS—COLLATERAL INHERITANCE TAX—CONSTITUTIONALITY OF STATUTE—TITLE OF ACT—AMENDMENT—CLASS LEGISLATION—REASONABLE DISCRIMINATION.

1. The title of St. 1899, p. 101, c. 85, amending the collateral inheritance tax law, is as follows: "An act to amend an act entitled, 'An act to amend an act entitled, 'An act to establish a tax on collateral inheritances, bequests and devises. \* \* \* approved March 23, 1893,' approved March 9, 1897." The introductory portion of the first section of the act is as follows: "Section one of the act entitled

'An act to establish a tax on collateral inheritances, bequests, and devises, \* \* \* approved March 23, 1893,' approved March 9, 1897, is hereby amended so as to read as follows." *Held*, that a contention that the body of the act of 1899 does not conform to the title, in that, while the title designates it as an act to amend the act of 1897 (St. 1897, p. 77, c. 83), the body of the act in fact amends the act of 1893 (St. 1893, p. 193, c. 168), was untenable, it being apparent that there was a clerical error in the first clause of section 1 of the act of 1899, in omitting from the title of the act of 1897 the words "An act to amend an act entitled," etc.

2. Const. art. 4, § 24, provides that an act revised or a section amended must be re-enacted and published at length as revised or amended. *Held*, that St. 1899, p. 101, c. 85, amending section 1 of the act of 1897 amending the collateral inheritance tax law, and which republishes the section amended at length, sufficiently complies with the Constitution, although the title of the act indicates that it is an amendment to the entire act of 1897.

3. The collateral inheritance tax law imposes an inheritance tax on all the collateral relations of the deceased, but exempts the father, mother, husband, wife, lawful issue, adopted children, any lineal descendant of deceased, the wife of a son, the widow of a son, and the husband of a daughter. *Held*, that the statute is not unconstitutional because of the fact that it exempts the wife of a son, widow of a son, and the husband of a daughter; the distinction as to inheritance between those of the direct line and collateral relations being a natural distinction, and the class composed of sons-in-law, etc., being so closely related by affinity that it cannot be said that such distinction is unnatural.

4. The designation in the title of the collateral inheritance tax law is "collateral inheritances, bequests, and devises," and it imposes a tax on devises to persons not of kin to testator. *Held*, that the act is not unconstitutional on the theory that, while it imposes a tax on bequests and devises to persons not of kin to the testator, such classes are not embraced within the terms of the title, because the word "collateral" is to be applied as a qualifying adjective to the words "bequests, devises"; the word "collateral" being, in favor of constitutionality, susceptible of application to a devise to any person not in the direct line of relationship, though the person was not of kin to the testator.

5. The collateral inheritance tax law is not unconstitutional because it contains a provision imposing a tax on property transferred by deed, etc., to take effect after the death of the decedent, which class is not expressed in the title of the act, where the designation is "collateral inheritances, bequests, and devises"; it being apparent that such provision, even if it were unconstitutional, is not so important as to make the entire section of the statute in which such provision is contained unconstitutional.

6. The collateral inheritance tax law imposing an inheritance tax on all collateral relations of the deceased, but exempting the father, mother, husband, wife, lawful issue, adopted children, any lineal descendants of deceased, the wife of a son, the widow of a son, and the husband of a daughter, is not violative of the fourteenth amendment to the federal Constitution.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial proceedings on the settlement of the estate of Cornelia E. Campbell, deceased. From a portion of the decree of distribution providing for the payment of the inheritance taxes, George O. Campbell and others appeal. Affirmed.

Frohman & Jacobs (Garoutte & Goodwin, of counsel), for appellants. Lewis F. Byington, Dist. Atty., and L. Harris, Asst. Dist. Atty., for respondent. Dorn, Dorn & Savage and Charles B. Younger, Jr., amici curiae.

SHAW, J. This is an appeal from that portion of the decree of distribution in the above-entitled estate providing for the payment of inheritance taxes. The estate was distributed to the brothers and sisters of the deceased, and upon the appeal the sole question is whether or not the amendment of 1899 to the collateral inheritance tax law is constitutional. St. 1899, p. 101, c. 85.

The first point made by the appellants is that the body of the act does not conform to the title in this: that, while the title of the act designates it as an act to amend the act of 1897, the body of the act in fact amends an act of 1893. The title is as follows: "An act to amend an act entitled, 'An act to amend an act entitled, "An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection, and to direct the disposition of its proceeds," approved March 23, 1893,' approved March 9, 1897." The introductory portion of the first section of the act is as follows: "Section one of an act entitled, 'An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection, and to direct the disposition of its proceeds, approved March 23, 1893,' approved March 9, 1897, is hereby amended so as to read as follows." Section one of the act of 1893 (St. 1893, p. 193, c. 168) was amended in 1897 (St. 1897, p. 77, c. 83) and the title of the amending act of 1897 is correctly quoted in the title to the act of 1899; but it will be observed that in the introductory clause of section 1 of the act of 1899, above quoted, it attempts to quote the title of the act of 1897, but omits the first clause thereof, to wit, the words, "An act to amend an act entitled," and begins with the second clause, as follows: "An act to establish a tax," etc. It is manifest that this is a mere clerical error. The defect is not in the title, but in the body of the act. If the act can be given a construction which is reasonable, and which will make it constitutional, that construction must prevail. Looking to the entire body of the amendatory act, it cannot reasonably be construed otherwise than as an amendment of the act of 1897. The clerical error must therefore be disregarded, and the act held valid.

Another objection is that the act is unconstitutional because it does not comply with that portion of section 24 of article 4 requiring the act revised or section amended to be re-enacted and published at length as revised or amended. The only portion of the act of 1897 which is amended is section 1 thereof, and the whole of that section is republished at length in the amending act of 1899. This is all that is required by the Constitution. Where the title of an act indicates that it is

an amendment to the entire act, but in fact the amendment made is all comprised in a single section thereof, it is not necessary to republish the entire act. It is a sufficient compliance with the constitutional requirement if the section which is amended is republished at length as amended.

The most urgent contention of the appellants is that the act is unconstitutional because it makes an unlawful discrimination between brothers and sisters and other parties mentioned therein, or, to state the proposition exactly, because it imposes a tax upon the brothers and sisters of deceased persons, while at the same time exempting from taxation the wife of a son, the widow of a son, and the husband of a daughter. There have been many decisions in this court upon the general question involved. The leading case upon the subject is the *City of Pasadena v. Stimson*, 91 Cal. 249, 27 Pac. 604, in which case the general principle was laid down that a law is general and constitutional when it applies equally to all persons embraced in a class, founded upon some natural or intrinsic or constitutional distinction. A further qualification has been made in the case of *Darcy v. Mayor*, 104 Cal. 642, 38 Pac. 500, to the effect that the classification must not be arbitrary, for the mere purpose of classification, in order that legislation really local or special may seem to be general, but that it must be for the purpose of meeting different conditions naturally requiring different legislation. We are of the opinion that this case comes within the first rule, and not within the qualification last stated. The statute in question imposes an inheritance tax upon all the collateral relations of the deceased, and exempts from taxation the father, mother, husband, wife, lawful issue, and adopted children, and any lineal descendant of the deceased born in lawful wedlock. The distinction as to inheritances between those of the direct line and collateral relations is a natural distinction, and is sufficient to justify the Legislature in imposing a different rule on this subject with respect to each. *Estate of Wilmerding*, 117 Cal. 281, 49 Pac. 181. It also exempts the wife or widow of a son, and the husband of a daughter, who are strangers to the blood, and who, under our statute of succession, do not inherit. Consequently the exemption in these latter cases can apply only to bequests and devises. The class composed of sons-in-law and daughters-in-law, though not of the blood of the testator, are very closely related by affinity, and we cannot interfere with the legislative discretion, and say that the distinction is not natural. It is sufficient, in our opinion, to justify the Legislature in exempting these persons from the tax.

It is claimed that the act is unconstitutional because it imposes a tax upon bequests and devises to persons not of kin to the testator (that is, upon all strangers to the blood, other than the wife or widow of the son or

husband of the daughter), and that these classes of persons upon whom the tax is thus imposed are not embraced within the terms of the title of the act. This defect in the act would, of course, not affect the appellants here directly, they not being strangers to the blood. But the further contention is that the unconstitutionality of the act in this respect is so material to the effect of the act as a whole that it is not to be presumed that the Legislature would have enacted the entire act if they had understood that this part of it was unconstitutional, and therefore that the rule applies which declares that where a part of an act which is unconstitutional is so intermingled with the act as a whole, and so important to its effect, as to give rise to the presumption that the Legislature would not have enacted the remainder of it without the unconstitutional part, the whole act must be declared unconstitutional. This contention of the appellants is based upon the proposition that the designation in the title, to wit, "Collateral inheritances, bequests, and devises," must be so read that the word "collateral" shall be applied as a qualifying adjective to the words "bequests" and "devises," and consequently it is argued that the act does not include bequests and devises to strangers to the blood, but only bequests and devises to collateral kindred. The word "collateral," however, has not necessarily the narrow meaning here contended for, or, at any rate, we should not give it that meaning if the effect of such construction is to make the law unconstitutional. Here, again, we must apply the rule that, where a law is reasonably susceptible of a construction which will make it constitutional, we must adopt that construction, rather than one which will make it unconstitutional, although the latter may be more reasonable or obvious than the former. "Collateral" means on the side, or at one side, of a subject, and in this sense a bequest to any person not in the direct line of relationship would be properly termed a collateral bequest, although the person was not akin to the testator. Giving the title of the act this construction, it does include bequests and devises to strangers, as well as those to the testator's own kindred, and is not unconstitutional as to either. It is, however, questionable whether the word "collateral" should not be limited in its application to the word "inheritances," and not extended to the words "bequests" and "devises," in which case the objection is baseless.

Another objection is that there is a provision in the act imposing taxes upon property transferred by deed, grant, sale, or gift, made to take effect in possession or enjoyment after the death of the decedent, and that this class of dispositions of property is not expressed in the title of the act, and upon this theory it is again claimed that the whole act must be declared unconstitutional. It is sufficient to say upon this point that, even if the law is unconstitutional with respect to property dis-



posed of in this manner. It is quite apparent that it is not so important to the effect of the act or section as a whole as to make the entire section unconstitutional.

The portion of the decree appealed from is affirmed.

We concur: VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.

BEATTY, C. J. I concur. As to the word "collateral" in the title of the act, I have no doubt that it was intended to qualify inheritances alone. There is no such thing as a collateral devise or bequest.

On Rehearing.

(June 18, 1904.)

PER CURIAM. After further consideration of this case, we are satisfied with the decision hereinbefore made in bank, and with the opinion hereinbefore delivered by Mr. Justice Shaw, which is on file herein, and is published in 77 Pac. 675, and that, for the reasons given in that opinion, the decree of distribution appealed from should be affirmed. It may be well to say, however, that it is not stated in that opinion that there are two different or inconsistent rules in the cases of *City of Pasadena v. Stimson*, 91 Cal. 249, 27 Pac. 604, and *Darcy v. Mayor*, 104 Cal. 642, 38 Pac. 500, as intimated in one of the petitions for rehearing. In the *Pasadena Case*, while it was held that the statutory provision there in question was unconstitutional, the general rule was stated to be that a law "is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction." This clause was quoted in the opinion of Mr. Justice Shaw, and the expression in the latter opinion that "we are of the opinion that this case comes within the first rule, and not within the qualification last stated," clearly means only that the case at bar comes within the general rule stated in *City of Pasadena v. Stimson*, and is not within the principle of the exceptions which are held, both in the *Pasadena Case* and in *Darcy v. Mayor*, to be unconstitutional. It may be further said, in response to the contention that the law in question is violative of the fourteenth amendment to the federal Constitution, that if, as we hold, it is not forbidden by the Constitution of this state, it is, for like reasons, not violative of the federal Constitution. Federal courts have held that provisions of state statutes which make unwarranted distinctions and discriminations contravene the principle of equality declared in the fourteenth amendment, but in *Magoun v. Ill. T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, and *Gulf, etc., v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 606, cited by counsel, the rule as to what is and what is not unwarranted classification is

substantially the same as that heretofore declared by this court.

The part of the decree of distribution appealed from is affirmed.

JOHNSON et ux. v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. July 14, 1904.)

CARRIERS—CARE REQUIRED.

1. A carrier is not bound to do everything that can be done to insure the safety of its passengers, but need exercise only the highest degree of care consistent with the practical conduct of its business.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by C. G. Johnson and wife against the Seattle Electric Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Struve, Hughes & McMicken, for appellant. Root, Palmer & Brown, for respondents.

PER CURIAM. The appellant is a street car company operating a line of street cars in the city of Seattle. The respondent Betse Johnson was a passenger on one of the appellant's cars, and was injured while alighting therefrom. The injury is alleged to have been caused by the negligence of the appellant's servants in suddenly starting the car while the respondent was in the act of alighting, and one of the principal issues in the case was whether or not the appellant's servants were guilty in the manner so alleged. On the question of the degree of care necessary to be exercised by a carrier of passengers the court gave to the jury the following instruction: "Now, in arriving at a solution of the question whether the plaintiff was injured through the negligence of the defendant corporation you must consider what was the duty of the corporation in that regard at the time, under the circumstances. A corporation engaged in the transportation of passengers is held by the law to the exercise of the highest degree of care in the equipment of its road and the manner of operation of its road. A transportation company is not an insurer of the lives or limbs of its passengers, but the law calls upon it to do whatever can be done to insure their protection while they are being transported." This instruction is complained of, we think, justly. While the jury are told that a common carrier is not an insurer of the lives and limbs of its passengers, yet they are told that it is liable if it has not done everything that could have been done to insure their safety. The rule is not so onerous as this. There are many things that a carrier could do which would conduce to the safety of its passengers, but which it is not required to do, simply be-

cause the practical prosecution of the business will not permit of it. The carrier could, for example, by simply increasing its force of attendants, reduce to a minimum the happening of accidents like the one complained of here; but this, simple as the remedy may seem, might so increase the costs of operation as to compel the abandonment of the business. Hence the carrier cannot be held bound to do everything that can be done to insure the safety of its passengers, but only to the highest degree of care consistent with the practical conduct of its business. The measure of duty as laid down by the trial court was more than the law requires of the carrier, and for that reason erroneous.

It is said by the respondents that this instruction, even though it may be erroneous when considered by itself, is not so when taken with the other instruction given. But a careful perusal of the entire charge shows that this is the only place where the court undertook to define the measure of the appellant's duty to its passengers, and the jury could not have understood from expressions made use of elsewhere that they were intended as modifications of the language used here. Nor do we think the instruction is supported by the cases of *Northern Pacific R. R. Co. v. Hess*, 2 Wash. St. 383, 26 Pac. 866, and *Clukey v. Seattle Electric Co.*, 27 Wash. 76, 67 Pac. 379. While the first states the rule of liability in strong language, and the second upholds an instruction that goes to the utmost extent of the rule, in neither of them was it said that the carrier, to escape liability for negligence, must do everything that can be done to prevent accidents.

Other objections are urged against the regularity of the trial, but, as these will not recur on a retrial, it would be unprofitable to discuss them now.

The judgment is reversed, and a new trial awarded.

O'CONNELL et ux. v. BAKER et al., County Com'rs.

(Supreme Court of Washington. July 14, 1904.)

DRAINS—ESTABLISHMENT—PETITION—HEARING  
—POWER OF COMMISSIONERS—INTEREST OF COUNTY.

1. County commissioners are not precluded from hearing a petition for the establishment of a drainage district, under the maxim that no one can be judge in his own cause, merely because the county owns land in the proposed district, and the chairman of the board as such had signed a petition for the establishment of the district.

Appeal from Superior Court, King County; Wm. H. Brinker, Judge pro tem.

Action by Richard O'Connell and wife against Charles Baker and others, as the board of county commissioners of King county. From a judgment for plaintiffs, and an order forever enjoining defendants from entertaining a petition for the establishment of

a proposed drainage district, defendants appeal. Reversed.

Ballinger, Ronald & Battle, for appellants. Geo. McKay and Preston, Carr & Gilman, for respondents.

FULLERTON, C. J. On April 30, 1903, after due notice given as required by statute, Allen Clark and others presented a petition to the board of county commissioners of King county praying for the organization into a drainage district of certain territory particularly described in the petition. Among the signatures to the petition was the following: "Charles Baker, chairman of board of commissioners, owner of 4½ acres in proposed district." The petition, however, was signed by persons owning a majority of the acreage of the proposed district without including the 4½ acres here mentioned. On the day fixed for the presentation of the petition to the board the respondents appeared before that body, and moved a dismissal of the petition on the grounds, as stated in the motion, that the board had no jurisdiction to hear the petition, and was interested in the result, and therefore disqualified to hear the same. This motion was overruled by the board, whereupon the respondents brought this action to enjoin the board from proceeding further with the matter. The complaint sets out the proceedings had up to that time, copying the petition for the establishment of the drainage district in full, showing the signature of Charles Baker thereto, and avers: "That the said board is a party petitioner in the said petition, and is a party interested in the granting of the said petition, and has, as such board, requested and petitioned itself to grant the prayer of such petition, and the said Charles H. Baker, as chairman of said board, and by direction of said board, and on behalf of said board, signed the said petition." The complaint concluded with pertinent allegations showing the interest of the complainants in the subject-matter of the petition. A general demurrer was interposed to the complaint by the appellants, and overruled by the court, a judge pro tempore presiding. The appellants then refused to plead further, whereupon the court entered a judgment forever restraining and enjoining them from proceeding further with the organization of the drainage district, or from taking any further steps or proceedings thereon.

Immediately after the entry of the judgment another petition for the establishment of a drainage district was prepared, and presented to the board of county commissioners. This petition was precisely like the first one, with the exception that it was not signed by Charles Baker. The board was proceeding to take action thereon, when the respondents instituted proceedings against them to restrain them from so doing before the attorney sitting as judge of the court, who presided as judge pro tempore in the original

action. Objection was made to the attorney hearing the cause as judge. This motion was overruled, and afterwards an order was entered holding the members of the board to be acting in violation of the original injunction. This appeal is from both the original judgment and the order adjudging the commissioners to have violated the same.

From the foregoing statement it will be observed that the complaint does not make it clear just what matter it was thought disqualified the board of county commissioners from entertaining the petition for the establishment of the drainage district, but the parties in their briefs have interpreted it to mean that the county of King owned the  $4\frac{1}{2}$  acres of land mentioned in connection with the signature of Charles Baker, and that Baker, as chairman of the board, was petitioning on behalf of the county; and it is in this manner we shall interpret the complaint. The question presented, then, is this: Is a board of county commissioners forever disqualified from entertaining a petition for the establishment of a drainage district because the county of which they are commissioners owns land in the proposed drainage district, and the chairman of such board, on behalf of such county, has signed a petition praying for the establishment of the district? It would seem that to state the proposition was to refute it. The only possible ground upon which the disqualification could be urged against the existing board is that they, by the signature of their chairman, became parties to the proceedings, and to subsequently sit in judgment on the petition would be to become judges in their own cause. But if it were conceded that this fact disqualified the present board, it could hardly be successfully contended that this taint would follow the office, and forever disqualify any subsequent board from entertaining such a petition. The judgment appealed from would, therefore, have to be reversed, because too sweeping in its terms, if for no other reason. But we think it wrong, as applied to the present board and the present petition. The allegations of the complaint, when given their broadest significance, simply present a case where the board of county commissioners, as officers, may be said to be charged with conflicting duties. As county commissioners they are charged with the conduct of the business of the county, and are the conservators of its property, and it is their duty to act in reference thereto so as to best subserve and protect the interests confided to their charge. As county commissioners the law has vested in them certain powers, and put upon them certain duties, with reference to the establishment of drainage districts, among which is the pow-

er and duty to determine whether the proposed drainage system "will be conducive to the public health, welfare, and convenience, increase the public revenue, and be of special benefit to the majority of the lands included within the boundaries of said proposed district"; and it is their duty to act in that behalf also so as to best subserve the interests intrusted to them. In a case, therefore, where the county owns real estate in a proposed drainage district, it might be to the best interests of the county, considered with reference to such property, to establish the district, while its establishment might not be conducive to the public health, welfare, or convenience, or subserve any public interest whatsoever, and in the sense that the commissioners have the power to pass upon both of the questions their duties are conflicting. But this is not a sufficient reason for denying them the right to act. The power to act in each instance is conferred upon them by express legislative enactment, and to deny them the right is to deny to the Legislature the power to confer on them the right. We think the power of the Legislature in this respect is not to be questioned, and, this being so, it is not within the province of the court to interfere with their exercise of it.

The case of *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, cited and relied upon by the respondents, is not in conflict with these principles. In that case a certain member of the board who proposed to sit as judge of the cause had a personal interest in its result, and had publicly announced in advance of the trial what his judgment was going to be. In the case before us there is no allegation that the members of the board, as individuals, have a personal interest in the result, and they cannot, in any sense, be said to be judges of their own cause. It is not their own cause they are adjudicating, but the cause of the public, and the maxim that no one can be a judge in his own cause does not apply.

It was strenuously argued that the judge pro tempore in the original case had no right, because of the fact, to sit in judgment of the subsequent proceedings; but as the conclusion reached in the main case must dispose of the subsequent proceedings, even if a valid order, we expressly refrain from deciding the point.

The judgment and order appealed from are reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint.

HADLEY, ANDERS, and MOUNT, JJ., concur.

**McKENZIE et al. v. ROYAL DAIRY et al.**  
(Supreme Court of Washington. July 15, 1904.)

**MALICIOUS PROSECUTION—COMPLAINT—DEMUR-  
RER—SUFFICIENCY—APPEAL—BRIEF—COSTS  
—DAIRY COMMISSIONER—CONNIVANCE AT  
SALE OF IMPURE MILK—LIABILITY.**

1. Where, on appeal, no formal assignment of error appeared in appellants' brief, but at the conclusion of his statement of the case it was recited that from the order sustaining a demurrer appellants appealed, and the argument was wholly directed to the ruling on demurrer, a motion to strike the brief on the ground that it did not point out the errors relied on, as required by rule, will be denied.

2. A complaint alleged that defendant was state dairy commissioner; that he connived with a specified dairy in the sale of impure milk to plaintiff, who conducted a restaurant; that thereafter he caused the arrest of plaintiff on the charge of selling such milk, and that plaintiff was convicted. *Held* that, treating the complaint as one for malicious prosecution, it was insufficient as against a demurrer, since, if defendant knew that plaintiff was selling impure milk there was not only probable cause, but it was his duty to cause plaintiff's arrest under the express provisions of Sess. Laws 1901, p. 194, c. 94.

3. On a general demurrer the only question is whether sufficient facts are stated to constitute a cause of action on any theory.

4. A complaint alleged that defendant, who was state dairy commissioner, was interested in a corporation conducting a dairy, and that he was engaged in selling dairy supplies, the dairy in which he was interested being one of his principal customers; and that he knew that such corporation was selling impure milk; and that, while he did not interfere with such conduct on the part of the dairy, he caused plaintiff, who purchased such milk for his restaurant, to be prosecuted and convicted for selling the same. *Held* that, as against a demurrer, the complaint stated a good cause of action.

5. Where, on appeal, appellant assigned no error to the action of the trial court in entering a judgment in favor of one of the parties and against appellant, and made no argument to the effect that such action was error, and the only error pointed out in the brief was the ruling on the demurrer of a third party, a motion of the party in whose favor judgment was rendered to dismiss the appeal as to it will be granted.

6. Where an appeal is joint as to two respondents, and appellant prevails as to one only, appellant is entitled to recover of the unsuccessful respondent but one-half of the costs on appeal.

Appeal from Superior Court, King County;  
Geo. E. Morris, Judge.

Action by Daniel McKenzie and others, doing business under the name of Fashion Café, against the Royal Dairy and E. A. McDonald. From a judgment for defendants, plaintiffs appeal. Reversed as to defendant McDonald, and affirmed as to the other defendant.

P. C. Dormitzer, for appellants. D. B. Trefethen, for respondent Royal Dairy. Shank & Smith, for respondent McDonald.

HADLEY, J. Appellants, as copartners under the firm name and style of Fashion Café, brought this suit against respondents to recover damages. It is alleged that the re-

spondent Royal Dairy is a corporation under the laws of Washington, and that respondent McDonald has been the duly and regularly appointed dairy commissioner of the state of Washington; that, while assuming to discharge the duties of said office, said McDonald has, in connivance and collusion with his co-respondent, aided, abetted, and protected said corporation in the sale of milk to appellants which contained a poisonous ingredient known as "formaldehyde," well knowing that the milk so sold contained said poisonous ingredient; that appellants purchased said milk from said Royal Dairy for the purpose of mixing the same as a cooking ingredient, and that they also served the milk in its raw state as an accommodation to their patrons; that all milk so served by appellants was served to their patrons in the exact state that it was when purchased from the Royal Dairy, and that respondent McDonald had knowledge thereof. It is averred that said McDonald was a stockholder in said Royal Dairy, and was also engaged in the business of selling dairy supplies to dairy firms, and particularly to said Royal Dairy, which corporation was the largest consumer and purchaser of said McDonald's merchandise; that he shielded said corporation to further his own interests in the sale of dairy equipment; and that he at all times had full knowledge that said corporation was placing said ingredient in its product for the purpose of selling it, and with the intent to defraud and deceive the consumers, particularly the appellants. It is also alleged that appellants at no time had actual knowledge of the presence of said ingredient in the milk, and that they rested in the assurance of said corporation that the milk sold to them was pure, of standard quality, and free from all poisonous ingredients; that the placing of said ingredient in the milk was a fraud and deception upon appellants, of which fraud said McDonald, as dairy commissioner, at all times had knowledge, and that, with knowledge of all the foregoing facts, he did, while in the pretended exercise of his duties as dairy commissioner, by virtue of a sworn complaint filed by him, cause the arrest of both appellants on the charge of selling milk containing said poisonous ingredient; that each of said appellants was found by the court to be technically, though not intentionally, guilty, and each was fined \$25, the minimum fine required by law; that in so doing said McDonald was in connivance and collusion with said corporation, and acted maliciously, and without probable cause; that the acts and conduct on the part of respondents advertised and branded appellants' place of business as being a place which supplied its patrons with poisonous, unwholesome, and impure food and milk; that appellants and their said business were thereby brought into contempt and disrepute. The damages are laid in the aggregate at \$10,000. Respondent McDonald separately demurred

to the complaint on the general ground that it does not state facts sufficient to constitute a cause of action against him. The demurrer was sustained. The record before us does not disclose any appearance or pleading on the part of respondent Royal Dairy, except as shown in the final order of the court. In that order, after reciting that the demurrer of McDonald is sustained, the following appears: "And, it further appearing that defendant corporation, Royal Dairy, have herein also interposed a motion for themselves and in their own behalf to strike certain parts of plaintiffs' amended complaint herein, and argument having been heretofore had upon defendant E. A. McDonald's demurrer, and said demurrer having been sustained, it is hereby ordered and adjudged that further argument be not had upon defendant Royal Dairy's motion, or that further pleading on the part of defendant Royal Dairy be had upon said amended complaint. And it further appearing by the statement of P. C. Dormitzer, Esq., as attorney and counsel for plaintiffs herein, that he elects to stand upon his amended complaint filed in this cause, and that he refuses to plead further in this cause, it is hereby further ordered and adjudged that said action be, and the same is hereby, dismissed, at plaintiffs' costs, as to both and each of the defendants herein." The plaintiffs have appealed from the judgment.

Respondent McDonald moves, for several reasons, to strike appellants' brief. We think it unnecessary to refer to more than one of the grounds urged, viz., that the brief does not point out the errors relied upon, as provided by the rules of this court. It is true no so-called and formal assignment of error appears in the brief, but at the conclusion of appellant's statement of the case is the following: "From the order sustaining defendant E. A. McDonald's demurrer, plaintiffs appeal." To the above subject the argument is wholly directed, and it seems to be sufficiently clear that the only error urged is as to the ruling sustaining the demurrer of McDonald. The motion to strike the brief is therefore denied.

We shall now consider the ruling upon the demurrer to the complaint. If the complaint be treated as one for malicious prosecution, the ruling of the court upon the demurrer was manifestly right, for no recovery of damages can be predicated upon the action of McDonald in causing the arrest of appellants on a charge under which they were admittedly convicted. If he knew they were conducting a restaurant, and as the proprietors thereof were selling milk to their customers which contained the poisonous substance, there was not only probable cause, but it was his duty, as dairy commissioner, to cause their arrest, under the provisions of chapter 94, p. 194, of the Session Laws of 1901. In such case sufficient probable cause existed to excuse McDonald from liability.

The remaining question is whether there are sufficient allegations as against demurrer to render McDonald liable on any other theory than that of malicious prosecution. On motion, doubtless, appellants would have been required to elect upon what theory they would proceed. But upon general demurrer the only question is whether sufficient facts are stated to constitute a cause of action upon any theory. We are inclined to think that the broad allegations of this complaint do state a cause of action against McDonald. While it is not alleged (except by way of mere information and belief, and which we do not regard of any force, since it is not actually alleged) that he directly contributed to bring about the condition of the milk, yet it is repeatedly averred that he for some time had knowledge thereof, and that for purposes of personal benefit he declined to interfere in an official way, and prevent the dairy company from selling appellants the poisoned milk. We think such a state of facts would make him a joint tortfeasor with the dairy company. His counsel argue that in his official capacity he acts quasi judicially, and is not, therefore, liable in damages. The acts, as charged in this complaint, cannot well be classified as being of a judicial nature, since they cannot be other than basely wrong and tortious toward appellants. We think such a cause of action appears that respondent McDonald cannot be relieved upon mere demurrer, and that the persons making such serious charges as to the conduct of a public official should be required to prove them, or go out of court by failure to establish them.

The respondent Royal Dairy moves to dismiss the appeal as to it for the reason that appellants have not assigned as error the action of the lower court in entering a judgment in favor of it and against appellants. Also for the further reason that they, in their opening brief, have made no argument to the effect that the lower court was in error in rendering a judgment in favor of the Royal Dairy and against appellants. It is also true that in appellants' reply brief no claim whatever is made that the court erred in its judgment in favor of the dairy company. The only error in any way pointed out or argued in the briefs is that of the ruling upon the separate demurrer of McDonald, hereinbefore discussed. The motion of the dairy company must, therefore, be granted. We must assume from the briefs that appellants do not wish to disturb the judgment as to said company. There being no other questions before us for decision at this time, the appeal as to respondent Royal Dairy is dismissed, and the judgment as to it is affirmed, and it shall also recover its costs on appeal, it having filed a separate brief. As to respondent McDonald the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint interposed by said respondent, and,

inasmuch as the appeal is joint as to both respondents, and whereas appellants have prevailed as to one only, they shall recover of respondent McDonald but one-half of their costs on appeal.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

COOKE v. CAIN et al.

(Supreme Court of Washington. July 13, 1904.)

CONTRACT — BREACH — RESCISSION — SUBSTITUTION — EVIDENCE — SUFFICIENCY — ANSWER — AMENDMENT — STATUTE — APPEAL.

1. Under 2 Ballinger's Ann. Codes & St. § 4953, providing that the court may, in furtherance of justice, allow amendments correcting mistakes on such terms as may be proper, and "likewise on affidavit showing good cause therefor, after notice to the adverse party, allow, on such terms as may be just, an amendment to any pleading," where the sworn testimony of defendants on the trial shows that a mistake had occurred in their answer, no other notice or affidavit than the sworn testimony is necessary in order to entitle them to amend the answer.

2. Under 2 Ballinger's Ann. Codes & St. § 4953, the allowance, after plaintiff had rested his case, of an amendment of the answer which did not change the issues, is not cause for reversal, where plaintiff asked no continuance on the ground of surprise, and made no claim of being able, under any circumstances, to produce other testimony than that which was introduced by him.

3. When, in the opinion of the Supreme Court, there is sufficient competent testimony to support the findings of the trial court, the findings will not be disturbed because immaterial or incompetent evidence may have been admitted on the trial.

4. The uncorroborated oral evidence of a party, to be sufficient proof that a written contract has been orally rescinded, must be clear, cogent, and convincing as against the party who denies it, and who seeks to sustain the writing.

5. In an action for breach of a written contract to pay a certain percentage of profits and commissions for the sale of specified lands, evidence examined, and held sufficient to show that the written agreement had been rescinded, and an oral agreement of different terms substituted therefor.

Appeal from Superior Court, Clallam County; Geo. C. Hatch, Judge.

Action by Fred A. Cooke against John Cain and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Trumbull & Trumbull, for appellant. William Ritchie and G. M. Emory, for respondents.

HADLEY, J. Appellant brought this action against respondents, and alleged that at the times mentioned the latter composed a copartnership doing business as dealers in real estate under the firm name of Cain Investment Company, with their principal place of business in the city of Port Angeles, Wash.; that on the 23d day of January, 1900, and for many years prior thereto, appellant

was a resident of the city of Boston, Mass.; that on said date respondent Cain was in said city of Boston, representing said firm in the business of selling real estate situate in the city of Port Angeles and vicinity, and was endeavoring to effect sales in Boston; that on said date appellant entered into a written agreement with said firm, the essential part of the memorandum of which is as follows:

"Port Angeles, Wash., January 23rd, 1900.

"Memorandum of Agreement by and between John Cain of Port Angeles, Washington, and Dr. Fred A. Cooke, of Boston, Mass.

"It is agreed between the parties hereto that John Cain will pay to Dr. Fred A. Cooke fifty per cent. of all profits and commissions of such sales of Port Angeles real estate as said Dr. Cooke is instrumental in bringing about or assists said Cain in consummating.

"John Cain."

The complaint then enumerates numerous sales alleged to have been effected through the assistance of appellant, stating the amounts for which the respective lots and parcels were sold. It is also alleged that the respondents represented certain amounts as the cost prices at Port Angeles and vicinity of the various lots and tracts, which amounts are set forth in the complaint, and that appellant has been paid one-half the difference between the said several amounts and the selling prices of the respective tracts. It is further averred that respondents falsely represented to appellant the actual cost of said real estate; that in each instance such actual cost was less than the represented amount; and that such false representations were made for the purpose of defrauding appellant out of his just share of the profits arising from the sales under said contract. It is averred that prior to the making of said sales appellant had never been in Port Angeles, or the state of Washington, and knew nothing of real estate values in said city and vicinity, except as stated to him by respondents; that all of said sales were made prior to the 1st day of February, 1901, and that appellant did not discover the false representations as to the cost of said property until after he came to Port Angeles in October, 1901; that about July 1, 1902, he demanded of respondents an accounting of the profits and commissions actually arising from said sales, but that they have refused and neglected to so account. The complaint concludes with a prayer for an accounting to determine the amount due appellant under said contract, and that he be given judgment against respondents for the amount so found to be due. The respondents first answered the complaint separately, each denying all allegations of the complaint, and respondent Cain further answered affirmatively that on or about said 23d day of January, 1900, at Boston, he entered into an agreement with appellant, whereby he agreed to pay him 50 per cent. of all net profits upon sales of real estate situate within the city of Port Angeles which

appellant might assist in consummating. A list of lands and lots sold located within the city of Port Angeles is then set out, together with the alleged cost thereof to said Cain, the selling price, and the amount of the difference; one-half of which it is alleged has been paid to appellant, and accepted by him in full satisfaction of all demands. A further affirmative defense of said Cain's first answer is to the effect that the sales of lands outside of the city of Port Angeles were not included in said contract, and that appellant has been fully paid on account of all sales of outside lands. Appellant demurred to the said affirmative defenses of respondent Cain's first answer, and the demurrer was sustained. The purpose of mentioning these pleadings will more fully appear hereinafter. Respondents did not further plead affirmatively at that time, and the cause then went to trial before the court, without a jury, upon the issues formed by the complaint and the general denials of the separate answers. At the conclusion of the plaintiff's testimony, the court denied a motion for nonsuit, and stated that, as the evidence then stood, the plaintiff was entitled to recover. This occurred on the 16th day of May, 1903, and by reason of an approaching jury session the court at this juncture postponed the further trial of the cause until June 5, 1903, at which time the trial was resumed. Before proceeding with the trial, however, respondents on the said day asked and obtained leave to file an amended answer. The permission was granted over the urgent protest of appellant. The amended answer was jointly made by the respondents, and admitted that respondent Cain did, on or about January 23, 1900, subscribe and deliver the writing set forth in the complaint, but averred that said memorandum of agreement was never acted upon by any of the parties, and that no sales were made thereunder; that said agreement was in the month of October, 1900, by the parties thereto, mutually abandoned; that subsequent to said abandonment the respondents entered into an oral agreement with appellant whereby he agreed to assist them in selling various parcels of real estate in Clallam county, Wash.; that it was agreed that the specific parcels of property should be furnished to appellant at certain and definite prices, from which fixed prices appellant's commissions should be ascertained; that it was agreed that appellant should receive as commissions one-half of the difference between the selling prices and the prices specifically agreed upon at which the parcels of land should be furnished; that the prices agreed upon were in each instance the same as those alleged in the complaint to have been represented as the cost prices; that the prices for which the lands sold were the same as the amounts alleged in the complaint as the prices for which they were sold, and that appellant has been fully paid all his share of commissions under the terms of said agreement. The trial

thereafter proceeded under the issues formed by the complaint and amended answer. Respondents introduced evidence to support the new answer, and appellant introduced rebuttal testimony. The court made findings of facts substantially in accord with the amended answer, and concluded that the agreement under the written memorandum was abandoned and rescinded by the alleged subsequent oral agreement, and that all commissions under the new oral agreement had been paid. Judgment was entered dismissing the action, and the plaintiff has appealed.

Appellant assigns as error that the court permitted the amended answer to be filed after the plaintiff had rested his case. This point is urged at great length in the briefs, and counsel manifest much earnestness in the argument. It is urged that the court had no authority to allow an amendment of this character without notice to appellant, and without a showing by affidavit, and we are referred to section 4953, 2 Ballinger's Ann. Codes & St., in support of this position. Counsel maintain that the proposed amendment could not come within the first part of the section, relating to the correction of mistakes, and that an affidavit showing good cause after notice to the adverse party became necessary to establish any right to the amendment under the latter part of the section. This section has ordinarily received a very liberal construction. The first part relates not only to amendments with reference to correcting names, but also to "mistake in any other respect," when it may be "in furtherance of justice." During the introduction of testimony on behalf of appellant both respondents were placed upon the witness stand by appellant, and Mr. Cain testified at that time that the real estate was sold under another and oral agreement made about nine months after the written memorandum was made. It thus became manifest at that early stage of the trial, from an examination conducted by appellant's own counsel, that respondents' position was that the written agreement had been rescinded and superseded by another and oral one. It will be remembered that in respondent Cain's first affirmative defense an agreement was pleaded to the effect that the commissions were to be based upon an equal division of "net profits." The court sustained a demurrer to that defense, apparently, from what the record discloses, upon the theory that the agreement named in it was the same as that set out in the complaint, inasmuch as the date laid for it was the same as that alleged in the complaint. It seems to us, however, that the legal effect of the two is not necessarily the same. That alleged in the complaint is based merely upon "profits," which is susceptible of the construction placed upon it by appellant, viz., that the profits meant should include the difference between the actual cost and selling prices; whereas the contract alleged in the answer is based upon "net

profits," which may be construed to mean what is left after deducting from the selling price the actual cost price, together with all expenses incidental to the procurement of the property in the first instance and to its sale thereafter. It is contended by respondents that their expenses were large, including the expenses of an almost continuous sojourn of Mr. Cain in Boston for the purpose of effecting sales. They claim that appellant's assistance was rendered chiefly by way of introducing persons to Mr. Cain, but that the conclusive work of making the sales was done by the latter, and such, in effect, is admitted by appellant. It therefore appears to us that the court may have overlooked the above-mentioned difference between the two alleged contracts in ruling upon the demurrer to the first affirmative answer of Mr. Cain, and may have been misled to the conclusion that the two contracts were the same by the fact that the same date was laid for both. We make these observations by way of trying to make it clear that the first verified answer is not, in its legal effect, necessarily inconsistent with the last answer, wherein it is specifically averred that the agreement evidenced by the written memorandum was rescinded by a subsequent oral agreement. That being true, and it having already appeared in the testimony that respondents claimed that such rescission had been made about nine months after the date of the written memorandum, whereas the date alleged for it in the pleading was the same as that of the former, it is evident that some mistake existed with reference to the pleading, and we think the court did not err in permitting it to be corrected by amendment. Evidence was afterwards introduced with reference to the inception of the mistake. It is true this was not before the court at the time of the ruling upon the application for leave to amend, but it served to emphasize the view that a mistake existed, and that the court did not err in allowing its correction from what already appeared in the record without affidavit, and without notice to appellant. The latter was already advised of respondents' position by what had appeared in the testimony brought out by his own examination of Mr. Cain. The testimony concerning the mistake in its inception to which we refer was given by the two respondents and by two of their counsel, Judge McClinton and Mr. Ritchie, who represented respondents at the beginning of the litigation. Each of these witnesses testified that the respondents at all times, including their first interview with counsel, stated the facts about the subsequent oral agreement, and their claim that all the property was sold under it. Just how the error in date and the failure to more specifically state the terms of the new contract occurred counsel were unable to say, but all agreed that counsel had drawn the answer under some misapprehension, and that a mistake had manifestly been

made. Mr. Cain stated that he did not observe the error in the date, and, not knowing the legal effect of the answer, relied upon counsel therefor, and verified the pleading. In view of the existence of all these circumstances, we think good cause appeared in the record by way of sworn testimony which was as forcible as a formal affidavit could have been, and that under the latter part of section 4953, *supra*, the amendment was authorized, even if we should not take into account the authority to correct a mistake given by the first part of the section. Appellant cites cases to the effect that at so late a stage in the progress of a cause amendments will not be permitted which radically change the theory of the former pleadings. From what we have already said we think the legal effect of the amended pleading was not fundamentally different from the first in its bearing upon the written contract, and that this case does not come within the rule invoked, particularly since respondents themselves asserted to their counsel from the beginning the position stated in the amended answer, and relied upon them for its maintenance by the necessary pleading in the premises. Appellant at no time, not even after all the testimony concerning the mistake was introduced, asked for a continuance on the ground of surprise, and it is not contended that he would, under any circumstances, have been able to produce other testimony than that which was introduced by him. Hard and fast rules concerning amendments in furtherance of justice during the progress of a trial cannot well be established. The trial court must be vested with much discretion, and exercise of that discretion will not be disturbed unless it appears that the adverse party has been prejudiced and surprised, and makes timely objection for relief on such grounds. The above rule has not only been sustained by this court in repeated decisions, but among many others which might be cited we refer to the following in support of the rule: *Aultman & Taylor Co. v. Shelton* (Iowa) 57 N. W. 857; *Burns v. Fox* (Ind. Sup.) 14 N. E. 541; *Osborne & Co. v. Williams* (Minn.) 35 N. W. 371; *Hedges v. Roach* (Neb.) 21 N. W. 404; *McPherson v. Weston* (Cal.) 24 Pac. 733; *Excelsior Mfg. Co. v. Boyle* (Kan.) 26 Pac. 408.

We have given much space to the discussion of the subject of the amendment for the reason that the attendant circumstances urged by appellant as the basis of error could not well be made clear without it, and for the further reason that counsel have so earnestly and extensively pursued that subject both in the opening and reply briefs.

Errors are assigned upon the rejection and introduction of certain testimony. We do not believe the rejection of testimony became prejudicial in view of evidence that was admitted, and we think no good purpose will be served by a detailed discussion of it. Referring to testimony which it is claimed was er-



erroneously admitted, it is sufficient to say that this court has often held that in a trial de novo it will not disturb findings of the trial court merely because immaterial or incompetent testimony may have been admitted, when, in its opinion, there is sufficient competent testimony to support the findings.

It is next vigorously urged that certain of the material findings are not supported by the evidence. Both respondents testified in support of the facts alleged in the amended answer to the effect that an oral agreement to rescind the written one was made in October, 1900; that a new oral one was then made, and that the sales were all made under the new agreement. Appellant denied that such new agreement was made. If the testimony of respondents is to be accepted as the truth, then appellant's commissions have been fully paid by the \$7,000 and more already received by him. If, however, appellant's testimony is correct, then he is entitled to recover about \$6,000 more. There seems to be no way of harmonizing the testimony. It is that of two parties upon one side against one upon the other, and all are vitally interested in the result of the litigation. Appellant urges that the uncorroborated oral evidence of a party should not be held to be sufficient proof that a written contract has been orally rescinded. We find that a few of the cases practically go so far as to announce such a rule, but the language of most of the opinions is restricted to the statement, in effect, that the oral evidence necessary must be "clear, cogent, and convincing" as against the party who denies it and who seeks to sustain the writing. In *Quinn v. Parke & Lacy Machine Co.*, 9 Wash. 136, 37 Pac. 288, this court, in a majority opinion, used somewhat strong language declaratory of the rule contended for by appellant. The application of the rule so broadly stated seems not to have been required in that case, since the opinion states that there was no evidence to sustain the allegations concerning a rescission, but the mere assertion of one that the machinery was not delivered under the written agreement, there being actually no testimony by even a party that an agreement to rescind was made. Appellant also cites the opinion of this court in *Western Loan & Savings Co. v. Walsman*, 32 Wash. 644, 73 Pac. 703, where we refused to hold that a certificate of acknowledgment had been impeached by the uncorroborated testimony of two mortgagors. We, however, based the decision upon the view that a certificate of acknowledgment is a record of an official act of such dignity and importance that it ought not, for reasons of public security, to be held that it may be overcome by the mere uncorroborated testimony of an interested party. Were we now confronted with a case with no corroboration whatever to support the testimony of parties, we should hesitate to say that rescission is not established for the mere reason alone that such corroboration may be lacking. It

seems to us that the application of an inflexible rule of that kind might in some cases preclude the doing of what the courts may be firmly convinced should be done, and that the deciding mind should in each case be free to accept that which is "clear, cogent, and convincing," even though it be the testimony of a party only. It is none the less true, however, that such testimony should be scrutinized with great care and caution, and its convincing force must depend upon the character of the witnesses and the circumstances of each case. Indeed, in most of the cases there are probably attending circumstances which may of themselves be either corroborative of the testimony of the party or may weigh against it. In the case at bar there is one circumstance which to our minds tends to corroborate respondents. It is this: Both respondents testify that in October, 1900—about nine months after the date of the written memorandum—they met the appellant in the Adams Hotel in Boston; that respondent Hartt and appellant had never met before, and during the first conversation between the two in the hotel office appellant disclosed to Mr. Hartt that he understood his commissions were to be based upon an equal division of the difference between actual original cost prices at Port Angeles and the selling prices in Boston; that Mr. Hartt had not before known of the written contract or its terms, it having been made by Mr. Cain; that Hartt at once in vigorous language and in a bolsterous manner declared he would not abide by such an arrangement; that Cain, hearing the two, and wishing to avoid a further scene in the hotel office, got them in the elevator, and took them to his room; that there Cain took up the conversation, and said to appellant that they could not work under the agreement he had made with him in the previous January, for the reason that their expenses were so heavy in procuring property at Port Angeles, and his own traveling and hotel expenses in Boston, together with expenses of entertaining customers in order to effect sales, were so great, that they would have to add a sum to the original cost price in each instance, at least sufficient to cover these expenses, and put the property to appellant at definite and agreed prices which he should accept, and that he should receive one-half the difference between the prices thus fixed and the selling prices; that appellant, after some further conversation, agreed to accept the new proposition, and all three then agreed upon said terms. Now, appellant admits the above details of the first interview between himself and Hartt, and that Cain, after he got the two to his room, took up the conversation; but he says that Cain was endeavoring to convince Hartt that the written agreement was all right. He does not say, however, that Hart ever acquiesced in such view, and from the admitted temper of his mind at that time it seems extremely improbable that he did so. In view of the fact

that the commissions were earned after that time, and inasmuch as appellant admits that this vigorous and seemingly unyielding protest was made by Hartt before the sales were made, it seems the more reasonable to us that respondents' version of the result of that interview is the true one. We shall therefore not disturb the findings of the trial court, who had these parties before him, and, in addition to the spoken testimony and circumstances we have mentioned, had also the demeanor of the parties for a guide to such impressions as may be instinctively gathered from the manner of a witness, and which an appellate court cannot observe.

The conclusions of law and judgment follow from the findings. We believe no prejudicial error appears, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

**ALEXANDER v. CITY OF TACOMA et al.**  
(Supreme Court of Washington. July 14, 1904.)

**MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—STATUTE—REASSESSMENT—EXCESSIVENESS—WAIVER—CITY OFFICERS—PROMISE—PUBLIC POLICY—COLLATERAL ATTACK.**

1. Where a property owner files objections to the assessment of his property by a city for street improvements, and succeeds in vacating the assessment, whereupon a reassessment is made in pursuance of the statute (Acts 1893, p. 226, c. 95) providing therefor, to which the property owner again enters objection, and the proceedings are thereupon continued on promise by certain of the city officers that he will be personally notified of any subsequent proceedings, subsequent proceedings by way of a reassessment de novo are not within the promise.

2. Where notice of a reassessment of property is given by city authorities pursuant to statute (Acts 1893, p. 226, c. 95), the validity of the proceedings is not affected because certain city officers had promised to give an objecting property owner personal notice of any subsequent proceedings, which was not done; the promise being void as against public policy.

3. The statute (Acts 1893, p. 226, c. 95) governing reassessment proceedings, giving to the order of a city council confirming such proceedings the conclusiveness of a judgment of a court, is valid.

4. The mere fact that lots abutting on a street are assessed alike, and for the precise amount they were assessed for when an apportionment was made according to the front-foot plan, without reference to benefits, does not affect the validity of a reassessment under Acts 1893, p. 226, c. 95, as against a collateral attack on the reassessment.

5. Where a property owner fails to appear and object to a reassessment of his property for street improvements after notice being given pursuant to statute (Acts 1893, p. 226, c. 95), he thereby waives the question of excessiveness of the amount of the reassessment.

6. Including the cost of keeping a street in repair for a period of five years from the time an improvement thereon is completed is insufficient to affect the validity of a reassessment proceeding under Acts 1893, p. 226, c. 95 when collaterally attacked.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Lucien H. Alexander against the city of Tacoma and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Ellis & Fletcher and Arthur Remington, for appellant. Emmett N. Parker, Harvey L. Johnson, and E. R. York, for respondents.

FULLERTON, C. J. On May 14, 1892, the city council of the city of Tacoma passed a resolution declaring it to be its intention to improve that part of Tacoma avenue between the center of North Fourth street and the center of North Fifth street by "paving the roadway fifty-four (54) feet wide with bituminous rock, upon six (6) inch concrete foundations." Thereupon the city engineer made a survey of the contemplated improvement, prepared a diagram of and specifications for the same, and made an estimate of the cost thereof; including within his survey, diagram, specifications, and estimate of cost, 640 lineal feet of eight-foot walk and 677 lineal feet of concrete curb, not mentioned in the resolution of the city council. Bids for the work according to the diagrams and specifications of the city engineer were advertised for, and a contract let to the lowest bidder thereon, being for the sum of \$5,795. Included in this contract was a clause by which the contractor guaranteed to keep the pavement in repair for a period of five years. The contractor entered immediately upon the performance of the work, and completed the same about the middle of September, 1892. Thereupon the city council levied an assessment upon the property benefited to pay the cost of the work, in the sum of \$5,800, or \$5 in excess of the contract price. On January 28, 1893, and after the city officers had commenced proceedings to enforce collection of the assessment, one J. D. McAllister brought an action against the city to restrain collection of the assessment, and to cancel the same. Issue was taken on the allegations of the complaint, a trial had, and a judgment entered dismissing the action. This judgment was reversed on appeal to this court (9 Wash. 272, 37 Pac. 447), and the cause remanded, with instructions to enter a judgment canceling the assessment. On February 15, 1896, the city council attempted a reassessment of the property under Acts 1893, p. 226, c. 95, by passing an ordinance authorizing such a reassessment. Under this ordinance a reassessment was made by the assessing officers according to benefits; the officers finding that the several lots were benefited equally, and to an amount equal to the original assessment. After the assessment roll had been returned, notice was given of the filing of the same, and a time fixed when objections thereto would be heard. The appellant, within the time required, filed objections to the assessment, and, at the time fixed, appeared to contest the same, when the hearing was postponed by the committee of the council having the matter in charge

to a day certain, and on the latter day to no fixed date, but with the understanding that it might be called up after notice to the parties interested. Nothing further was done in the matter until July 11, 1896, when the city council, without notice to the appellant, dismissed the proceedings by repealing the ordinance authorizing the assessment. At this same date a new ordinance was introduced, providing for a reassessment of the property, which passed the council on July 18, 1896. This last ordinance was in turn repealed on July 15, 1897; and on July 18, 1897, the council passed Ordinance No. 1214, being the fourth ordinance providing for an assessment of the property benefited, and the ordinance under which the assessment now in question was made. This last ordinance recited, among other things, the making of the original improvement, and the original assessment to pay the cost of the same; the fact that the original assessment was approved and confirmed by the city council, but was thereafter declared void by the courts, and that it was intended by the ordinance in question to reassess the property to pay the cost of the original improvements; reciting further that the cost of the improvement was \$5,800. The ordinance directed that an assessment be made by the commissioner of public works on the lots benefited by the improvement in an equitable manner, according to benefits, to an amount equal to the cost of the improvement, as recited in the ordinance, and interest thereon from November 30, 1902, at the legal rate. The officer named in the ordinance made a new assessment in accordance therewith, valuing the benefits to the several lots equally, and at sums the aggregate of which equaled the amount of the original costs and interest, as directed in the ordinance. On the filing of the assessment roll with the city clerk, that officer caused to be published the required notice of the time and place when and where objections thereto could be heard. On the day fixed for the hearing, no objection having been filed, the city council examined the roll, and by ordinance approved and confirmed the assessment as made by the commissioner, and directed that the city treasurer proceed to collect the same. No notice, other than that required by statute, was given the appellant of any of these subsequent proceedings; and he had no actual notice thereof until after the proceedings had been confirmed by the city council, and his right of appeal therefrom to the superior court had expired.

The appellant owns a lot abutting upon the improved street, which is among the lots assessed to pay for the improvement, and he brings this action, asking the court to direct that the city council reopen the assessment proceedings, and, after permitting the appellant to file his objections thereto, reconsider and rehear the matter in the light of such objections, the same as if they had been presented in due time at an original hearing, and

in the meantime enjoin a sale of the property. He contends that because he once appeared before the city council in opposition to the reassessment, and was promised by the city officers that his council should be personally notified of the subsequent proceedings taken in the matters then pending, he was entitled to be personally notified of the last attempt at reassessment, and that the failure of the city officers to so notify him or his counsel of such attempt was so far arbitrary and in fraud of his rights as to require a vacation of the order confirming the assessment, notwithstanding the city proceeded with reference to giving notice in accordance with the statute, and actually gave such notice as is therein required. The appellant also contends that the superior court is the proper forum in which to urge this objection, and that that court, as a court possessing powers of an equitable nature, has the right to grant the relief demanded.

Whether or not the proposition last mentioned is sound, in law, we shall not now stop to inquire, as it is manifest that such a power will not be exercised until the applicant has made a reasonably clear case calling for its exercise, and it seems plain to us that the record here does not present such a case. The appellant's claim that he was prevented from having a hearing on his objections to the reassessment before the city council by the arbitrary action of the city authorities is rested solely on the oral promise that his counsel should be notified personally of any subsequent proceedings, made by certain of the city officers at the time the hearing on the first attempt to reassess was continued indefinitely. It seems to us, from an examination of the evidence, that the promise related only to the proceedings then pending, and meant that notice would be given the appellant before any action looking to the completion of those proceedings should be taken. It could hardly have meant that notice would be given of an abandonment of the proceedings. To defeat the proceedings was the purpose of the objections made by the appellant, and, when the city confessed the soundness of the objections by dismissing and abandoning its attempt to perfect the proceedings, notice of such abandonment could have been of no benefit to the appellant. The thing he desired was accomplished. Hence, it would seem that, if the promise was one which bound the city, there was no breach thereof. But there is another and broader ground on which the contention must be denied. The promise was not one on which the appellant had a right to rely. The conduct of public officers is governed by fixed rules prescribed by public statutes, beyond which the officers cannot go and bind the public interests, and their promises outside of their prescribed duties are no more binding on the public than are the promises of strangers, and one relying thereon does so at his peril. He may possibly have a remedy against the individual

making the promise, but he cannot successfully claim the right to arrest the performance of a public duty, which is being performed in the statutory way, because the officers have promised him that some other or additional conditions, not required by the statute, will be complied with before such performance will be attempted. Public policy forbids such a rule, and requires that statutory duties be performed in the statutory way.

The appellant stands, therefore, as one making a collateral attack upon the assessment proceedings, and his rights are governed by the rules applicable to that form of attack. The statute governing reassessment proceedings gives to the order of the city council confirming such proceedings the conclusiveness of a judgment of a court, and we have repeatedly held the statute valid in that regard. In *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393, we said: "This court has repeatedly held that all questions affecting the assessment proceedings, not going to the jurisdiction of the municipality to make the assessment, must be taken before the city council on the hearing pending the confirmation of the assessment proceedings by that body, and appealed therefrom to the courts, before the courts have authority to inquire as to mere error therein." And see *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181, 51 Pac. 360; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Tacoma, etc., Paving Co. v. Sternberg*, 26 Wash. 84, 66 Pac. 121. It remains, then, to inquire whether the matters complained of as affecting the assessment are such as go to the jurisdiction of the city council, or whether such matters are, if errors at all, errors committed in the exercise of acknowledged jurisdiction.

The objections made in the brief against the validity of the assessment are these: (1) That it was made without regard to benefits; (2) that it was for more than the actual cost of the improvements; (3) that it includes the cost of future repairs for five years; (4) that the amount imposed upon the appellant's lot exceeds the benefits conferred on that lot; and (5) that the appellant is about to be deprived of his property without due process of law, because the notice given of the assessment was not such as is contemplated by law, and insufficient, under the peculiar circumstances of this particular case.

With regard to the first objection, it is not disputed that the assessment is purported to have been made according to benefits, and that the city council found that it was so made; but it is said that this finding is merely colorable and perfunctory, because it appears that all of the lots were assessed alike, and for the precise amount they were assess-

ed for when the apportionment was made according to the front-foot plan, and concededly without reference to benefits. It seems to us, however, that these facts argue nothing. Surely it cannot be denied that a possible condition could exist where an improvement of a street would benefit all of the lots thereon precisely alike, yet it must be so denied in order to overturn this assessment in this proceeding. The assessment to be overturned in this proceeding must be void on its face, and it could only be void for the reason here given on the theory that under no conceivable conditions could lots abutting upon an improvement be equally benefited thereby. But so far from this being impossible, it would seem that it would be found to actually exist in many instances. To pave and curb a street which has already been brought to grade, and the abutting property built upon with reference thereto, would seem rather to benefit each part of it alike than otherwise, especially where, as in this case, no unusual or special conditions are shown to exist.

It appears by the terms of the contract that the actual cost of the improvement was \$5,795, while the reassessment was for \$5,800, or \$5 more than the original cost. On this discrepancy the second objection is founded. In tax sales, where the proceedings were wholly ex parte, courts have set aside titles acquired thereunder apparently for some not very substantial reasons, and cases can be found where differences even less than are shown here have been held to avoid the proceedings. The reasoning on which such judgments are justified, however, has no application to proceedings such as our statutes prescribe. They were rendered in cases where the proceedings were such that no opportunity was given to make the objection until after the sale. Such is not the fact here. The appellant had the right to appear before the city council and make this objection. Had he done so, doubtless it would have been corrected. But having failed to appear and make the objection, he must be deemed to have waived it. *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

The third objection is that the reassessment included the cost of keeping the street in repair for a period of five years from the time the work was completed. It was held in *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, that the city could not contract for such a result originally and create a lien for such cost, because its charter did not authorize it to do so. But it was pointed out in that case (see opinion on petition for rehearing) that the statute under which this reassessment was made was passed to cure defects of this very character. And we have since held that the act of 1893 was passed for the purpose of permitting a reassessment of property benefited by a street improvement, the original assessment for which might be invalid under the existing laws, no matter what might

have been the defect in the law which caused the invalidity of the original assessment. *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 398. To include in the assessment items not proper to be included therein does not render the assessment void, or subject it to collateral attack. As the city had power to make the reassessment, the objection that it was made for too much, must, to be available, be taken before the city council when it sits to hear objections to the assessment. *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

The fourth objection is without merit for the reason last stated. If it be true that the assessment exceeded the benefits conferred on the appellant's property by the improvement, the objection should have been urged before the city council. It is not a matter for a collateral attack on the assessment proceedings.

The last objection, namely, that the appellant is being deprived of his property without due process of law, we think is also without merit. It is not contended that the notice provided by the statute is not sufficient in itself to constitute due process of law, nor is it contended that such notice was not given. It is argued that the notice was insufficient in this particular case, because the appellant was lulled into security by the promise of the city officers, and was not, for that reason, as diligent as he might otherwise have been. We have heretofore in this opinion attempted to show that this promise was one on which the appellant had no right to rely, and, if it be true that he had no right to rely on the promise, no question of due process of law is involved in the failure of the city officers to give it.

We conclude, therefore, that however pertinent the objections urged might be, were we permitted to review the proceedings for mere error, they are insufficient to render them void; and, as they are not void, they cannot be overturned in this form of attack. The judgment appealed from is affirmed.

HADLEY, ANDERS, and MOUNT, JJ.,  
concur.

#### STEWART v. HOFFMAN.

(Supreme Court of Montana. July 15, 1904.)

BANKRUPTCY — PREFERENCE — CHATTEL MORTGAGE — VALIDITY — STATUTE.

1. Under Civ. Code, § 4491, providing that a transfer of personal property, when made by a person having the possession or control thereof, and not accompanied by an immediate delivery and followed by an actual, continued change of possession, is conclusively presumed to be fraudulent against creditors and against any person on whom his estate devolves in trust for the benefit of others than himself, a mortgage of personalty and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than 14 months prior to the transfer.

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2. In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to defendant, where it appeared that the transfer was made within four months of the time the debtor was adjudged to be a bankrupt, and under a chattel mortgage having no validity under the laws of the state where the transfer was made, the trustee was entitled to judgment under Bankr. Act July 1, 1898, c. 541, § 60, cl. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], providing that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of the transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class, and clause "b," providing that, if a bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person; it appearing that the transfer was not to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of which was to enable the defendant to obtain a greater proportion of his debt than any other creditor of the bankrupt.

Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

Action by W. R. C. Stewart, trustee in bankruptcy of Frank Rennie, against C. W. Hoffman. From a judgment for defendant, plaintiff appeals. Reversed.

John A. Luce and M. S. Gunn, for appellant. E. B. Hoffman, for respondent.

MILBURN, J. This is an appeal from a judgment entered in favor of the defendant. The plaintiff, at the time of the bringing of the action, was the duly appointed, qualified, and acting trustee of the estate of one Frank Rennie, a bankrupt. Rennie, prior to August 11, 1899, and continuously from that date until the 14th day of March, 1901, was engaged in the business of a liquor dealer in the county of Gallatin. On that day he made, executed, and delivered to the Bozeman National Bank his promissory note for \$1,800, on which he made certain payments, leaving a balance of about \$800. On February 6, 1901, he, being unable to pay his debts to numerous creditors, made a chattel mortgage of his saloon property, including a large number of articles, running to the defendant, C. W. Hoffman, to secure him, he having guarantied in writing the payment of said note to the bank. This mortgage was duly executed, and filed in the office of the county clerk. But on the 11th day of August, 1899, a certain agreement in writing was made between Rennie and Hoffman, whereby it was attempted to secure the latter for such sum or sums of money as he might advance to pay the debts of Rennie. Rennie gave therein to Hoffman the right at any time prior to the full payment of the sums of money mentioned, or any other money advanced by Hoffman for him (Rennie), to take immediate possession without notice and without legal pro-

ceedings of all of said personal property, and sell and dispose of the same at such time or times and in such manner as to him might seem advisable, the proceeds of the sale first to be applied to payment of Hoffman for all moneys advanced to Rennie and for costs and expenses of taking, keeping, and selling the property, the residue to be paid to Rennie. It is noticeable that the defendant in his answer sets up that this agreement, which was made without formality, and was not filed in the office of the county clerk, was a chattel mortgage to secure him against loss or liability by reason of the written guaranty, whereas the writing itself discloses the fact, as above stated, that it was to secure him (Hoffman) for such sums of money as he might advance to pay the debts of Rennie. The defendant avers that this mortgage of the 6th of February was made "for the purpose and with the intent of extending said chattel mortgage of August 11, 1899, and the lien thereof, and putting the same in such form as to entitle it to record, so that notice of its existence might be given to all of the aforesaid creditors of said Frank Rennie." On the 14th day of May, 1901, Rennie was, by order of the United States Court for the District of Montana, adjudged a bankrupt. It is alleged in the complaint that on the 14th day of March, 1901, Hoffman seized and took possession of all of said property of Rennie under and by virtue of the chattel mortgage—meaning the instrument of February 6, 1901. Defendant denied that the property was taken by him under or by virtue of the chattel mortgage last above mentioned, but avers that he took and seized the same on the 14th day of March, 1901, under and by virtue of the authority conferred upon him in the instrument of August 11, 1899, for the purpose of securing himself against any loss by reason of his said personal guaranty, and not otherwise. It is admitted that there is still due by Rennie to the bank on the original agreement made with the bank a sum exceeding \$800. Possession of the property remained in Rennie until the 14th day of March, 1901, when it was taken by Hoffman, as above stated, except one or two articles of small value. Plaintiff prayed for a decree that the chattel mortgage of February 6, 1901, be declared null and void as against the creditors of Rennie and against the plaintiff, and that Hoffman be required to surrender and deliver up to plaintiff all the property by him seized, and that, if any of said property could not be delivered, plaintiff have judgment for the value thereof, and that plaintiff have attorney's fees. The case was tried to the court without a jury, and the court found, among other things, that on February 6, 1901, Rennie having reduced his indebtedness on the note to the bank which Hoffman had guaranteed to \$800, with a small amount of interest, and being again

pressed by creditors, gave to the defendant "another chattel mortgage," regular in form, for which no new consideration was passed, and that said instrument was intended as a continuation of the security given on August 11, 1899, and that Hoffman, on March 14, 1901, deeming himself insecure, took possession of the property under and by virtue of the instrument of August 11, 1899. The court found further that in April, 1901, proceedings were commenced against Rennie in the United States court, and that he was regularly adjudged a bankrupt, and plaintiff was appointed by the United States court as alleged; and that defendant turned over to plaintiff a portion of the goods in his possession, retaining sufficient to indemnify himself. As conclusions of law the court found, among other things, that the instrument of August 11, 1899, was a valid chattel mortgage as between the parties to it and as against all persons except such as had brought themselves into privity with the property by acquiring a lien upon the specific property therein described; that defendant's taking possession of the property under his chattel mortgage of August 11, 1899, before any of Rennie's creditors had established a lien on the property, cured any defect which may have existed in the chattel mortgage; that the chattel mortgage of February 6, 1901, was a continuation of the security given defendant in the chattel mortgage of August 11, 1899; that the service of certain garnishment proceedings in suits by Rennie's creditors did not give them a lien on the property in controversy, and did not entitle them, or any of them, or the plaintiff, to contest the validity of the chattel mortgage of August 11, 1899; and that the plaintiff was not entitled to recover. Judgment was entered accordingly for the defendant. Plaintiff appeals.

Ten specifications of error are relied upon, but it is not necessary to consider more than one of them. Was the court correct in holding that the plaintiff was not entitled to recover a judgment? The property was seized by the defendant, according to his own statement, under and by virtue of the power contained in the instrument of August 11, 1899, it having remained in the possession of Rennie from the time of the making of the instrument until the time of its seizure. There was not any new consideration for the mortgage of February 6, 1901. Possession of the property was taken less than four months prior to the time that Rennie was declared a bankrupt under the bankruptcy act. At the time of the taking of said property it conclusively appears that Rennie was insolvent. The instrument of August 11th was not such as entitled it to filing under the laws of the state of Montana as a chattel mortgage. The insolvent, Rennie, owed considerable sums of money to other parties before the 14th day of March, 1901. There was not

any fixed time mentioned in the "mortgage" of August 11, 1899. More than 14 months had expired after August 11, 1899, before possession was taken under the instrument of that date, and the agreement was not executed and had not been executed up to the time of the commencement of this action. The property of Rennie was turned over to the defendant less than four months before the bankruptcy. It was not a transfer to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of the transfer being to enable one creditor to obtain a greater percentage of his debt (to wit, all of it) than any other. This is illegal, under section 60 of the national bankruptcy act of 1898 (Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and the property may be recovered.

Section 60 of said act is as follows: "(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. \* \* \*

Section 4491 of the Civil Code of this state is as follows: "Sec. 4491. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers and incumbrancers in good faith subsequent to the transfer."

It thus appears that the instrument of August 11, 1899, and the transfer made on the 14th day of March, 1901, were not such as are allowed by the law of the state of Montana, and were such as attempted to give an unlawful preference to the defendant. Our

conclusion, therefore, is that the judgment of the court below is wrong, and must be reversed.

Reversed and remanded.

BRANTLY, C. J., concurs. HOLLOWAY, J., being disqualified, takes no part in the foregoing decision.

## RICHARDSON v. CITY OF JUNCTION CITY.

(Supreme Court of Kansas. July 7, 1904.)

ARREST—BAIL—DEPOSIT IN LIEU THEREOF.

1. A city council of a city of the second class has no power by ordinance or otherwise to authorize policemen, upon making an arrest for the violation of a city ordinance, to accept a deposit of money for the appearance of the party arrested in the police court.

(Syllabus by the Court.)

Error from District Court, Geary County; O. L. Moore, Judge.

Action by Rufus Richardson, trustee, against the city of Junction City. Judgment for defendant, and plaintiff brings error. Reversed.

Garver & Larimer and W. I. Jamison, for plaintiff in error. Jas. V. Humphrey, for defendant in error.

GREENE, J. This is a proceeding in error to reverse a judgment in favor of the city in an action brought by Rufus Richardson, trustee of the estate of Salina Williams. The petition alleges: That, prior to the beginning of this action, two of the city's policemen threatened to arrest Salina Williams, Agnes Gerry, Blanche Wheeler, Viola Thomas, and Mabel —, and threatened to and were about to incarcerate plaintiff and said four other persons in the city jail. That the policemen informed plaintiff that if she would pay to H. W. Pratt, the police judge of said city, \$107.50, she and the four other persons would not be arrested. To avoid being arrested and incarcerated in the city prison, she gave her check for the amount of \$107.50 to said policemen, payable to H. W. Pratt, police judge. That said check was delivered to said Pratt as police judge, and by him collected. It appears that Salina Williams was the keeper of a bawdy-house, and that the other persons named were inmates; that the two policemen raided the house in the nighttime, and arrested and threatened to take these persons to the city prison until morning; that the check was given for their appearance before the police court on the next morning. They failed to appear, and the check was cashed. The city justified under an ordinance which fully authorized the policemen to accept money to secure the appearance of persons arrested after business hours.

We think, however, that that part of the

ordinance which authorized the policemen to let persons to bail, and accept money deposit in lieu of bond, is void. It is void because the city had no power to confer such authority upon a marshal or policeman. Section 1034, Gen. St. 1901, prescribes the procedure which must be followed in all cases of arrests for the violation of a city ordinance. This section reads: "When any person shall be arrested and brought before the police judge, it shall be his duty to hear and determine the complaint alleged against the defendant forthwith, unless for good cause the trial be postponed to a time certain; in which case he shall require the defendant to enter into a recognizance with sufficient surety, conditioned that he will appear before the said judge at the time and place appointed, then and there to answer the complaint alleged against him, and if he fail or refuse to enter into such recognizance, the defendant shall be committed to prison and held to answer said complaint as aforesaid." It was held in *Applegate v. Young*, 62 Kan. 100, 61 Pac. 402, that a justice of the peace could not accept a deposit of money in lieu of bail, or as a substitute for a recognizance. A city council cannot confer authority by ordinance on the police judge to accept a deposit of money in lieu of a recognizance or bail. No such authority is granted it. Such an ordinance would be inconsistent with the statute above quoted. "The council shall have power to enact and make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state as may be expedient." Section 1008, Gen. St. 1901.

That part of the ordinance under which the policemen were acting was void for the reasons stated. Therefore the judgment of the court below is reversed, and the cause remanded. All the Justices concurring.

#### BOARD OF COM'RS OF RUSSELL COUNTY v. MAHONEY.

(Supreme Court of Kansas. July 7, 1904.)

##### SCHOOL LANDS—TAX SALE—FORFEITURE TO STATE—LIEN FOR TAXES.

1. Where school lands are purchased from the state on deferred payments, they become taxable, and may be sold for unpaid taxes, but the one who buys such lands at a tax sale takes only the interest of the original purchaser, subject to a possible forfeiture for a nonpayment of the balance due, or the interest on the same; and, if a forfeiture occurs, it effectually terminates the interest of the original purchaser and those holding under him, including the tax certificate holder, and the full title to the lands then reverts to the state, free from any lien or claim for taxes.

(Syllabus by the Court.)

Error from District Court, Russell County; J. H. Reeder, Judge.

Action by the board of county commissioners of the county of Russell against Ed-

ward J. Mahoney. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. C. Ruppenthal, for plaintiffs in error.  
W. G. Eastland, for defendant in error.

JOHNSTON, C. J. The board of county commissioners of Russell county directed the county attorney to institute proceedings under section 7718, Gen. St. 1901, to have delinquent taxes on lands which were bid in by the county declared to be liens thereon, and the lands sold in satisfaction thereof. Included in the list of lands so in default were several tracts of school lands which had been sold by the state on deferred payments. After the sale of the school lands, and while they were held under contracts of purchase, taxes were levied against them, which were not paid, and at tax sales the county bid in the tracts in question. After these tax proceedings the purchasers of the school lands defaulted in the payment of the annual interest and the balance of the purchase price of the lands, and, in accordance with statutory directions, forfeitures of the rights of purchasers were declared. Later the lands were reappraised and sold substantially as if there had been no previous sale. In this proceeding the second purchasers are resisting the enforcement of the collection of the delinquent taxes which were levied before the forfeiture of the first contracts of purchase. The trial court, in effect, held that the tax liens fell with the forfeitures, and that the purchasers at the second sale took the lands free from any incumbrance by reason of the preceding purchase, or the taxes previously levied against them.

The question was rightly decided. The purchaser of school lands on deferred payments acquires an interest in the lands, which is subject to forfeiture for nonpayment of interest or purchase money when the same become due. When such a sale is made, the property is subject to taxation, but the rights and liens of those who may purchase such lands at a tax sale are exceptional and conditional. The statute provides that when the taxes levied on school lands are not paid, and the same are sold for taxes, the purchaser at a tax sale is subject to the conditions of the contract between the state and the school-land purchaser, one of which is that there may be a forfeiture to the state. Gen. St. 1901, § 6354. In *Prescott v. Beebe*, 17 Kan. 320, it was said that the holder of a tax title "simply takes the interest of the purchaser"; and the statute itself is a warning to a tax purchaser that his interest is contingent, and may be lost by the default of the one who purchased from the state. It tells him that his interest is subject to compliance with a contract involving forfeiture, and the provision which gives him 60 days' notice of a proposed forfeiture warns him that, if the amount due



to the state is not paid within the 60 days, the interest of all persons under the sale by the state will be absolutely forfeited. Gen. St. 1901, § 6356. The right acquired by a tax purchaser of school lands is contingent and somewhat insecure, but the Legislature provided a measure of protection by permitting him to make the payments due under the contract with the state, and substituting him to the rights of the original purchaser. Gen. St. 1901, §§ 6356, 7642; *Larabee v. Prather*, 51 Kan. 743, 33 Pac. 608. When a forfeiture occurs, however, the rights and interests of every one under a purchase from the state, including the tax purchaser, are absolutely forfeited. This was, in effect, the decision in *Larabee v. Prather*, 51 Kan. 743, 33 Pac. 608, where it was said: "The sixty-day notice which is required by that section to be served is for the purpose of cutting off the rights of both original and tax-sale purchasers in case the installments due the school fund are not paid. The section provides not only for service on the original purchaser, but also contains this provision, 'and in case such land or any part thereof has been sold for taxes, a copy of such notice shall be delivered to such purchaser at tax sale, if a resident of the county.' If the installments in default are not paid within sixty days after the service of the notice, the rights of the tax certificate holder, as well as of the original purchaser, are terminated, and the state then resumes full title, freed from all claim." See, also, *Filnt v. Commissioners of Jackson County*, 43 Kan. 656, 23 Pac. 1048; *Menger v. Commissioners of Douglas County*, 48 Kan. 553, 29 Pac. 588.

The forfeitures in question appear to have been valid, and the effect was to absolutely terminate and cut off the interests of all taxholders, including Russell county. The lands then passed to the state cleared of every lien or claim, and could then be re-appraised and sold as they were in the first instance. The county whose officers gave the notice and conducted the forfeiture cannot complain of a want of notice, and, since the forfeiture is effective, it is immaterial to the county that the state may have subsequently sold the same lands to a former purchaser who had made default. Even if such a sale should be treated as an irregularity, it would not invalidate the forfeiture, nor restore the rights of tax-title holders.

The judgment of the district court will be affirmed. All the Justices concurring.

(69 Kan. 655)

PHERSON v. YOUNG, Mayor, et al.

(Supreme Court of Kansas. July 7, 1904.)

MANDAMUS—JUDGMENT AGAINST CITY—LEVY OF TAX.

1. The failure of a city to levy a tax for the payment of a judgment at the first opportunity after its rendition will not necessarily

give occasion for the issuance of a peremptory writ of mandamus to compel such levy, where proceedings in error are brought in good faith, and without unnecessary delay, to review the judgment, even although no stay bond is given. (Syllabus by the Court.)

Application by Louisa Pherson for writ of mandamus to G. W. Young, mayor, and others. Writ denied.

C. S. Bowman, for plaintiff. B. H. Turner, for defendants.

MASON, J. This is an original proceeding in mandamus brought to compel the levy of a tax to pay a judgment against the city of Newton, a city of the second class, for damages occasioned by a defective sidewalk. The judgment was rendered March 26, 1903. Without any unreasonable delay, the city prosecuted error to this court, where a decision of affirmance has just been given. 77 Pac. 1134. The questions presented upon review, however, were substantial, and not such as to suggest that the plaintiff in error was merely seeking delay. No undertaking was given by the city to stay the execution of the judgment, and the plaintiff demanded that provision for its payment be made at the time of the tax levy of 1903. The demand being refused, this proceeding was begun.

It is true that the filing of a petition in error by the city—no stay bond being given—did not suspend the enforcement of the judgment. Such is the ordinary rule, and the statute makes no exception in favor of cities of the second class. Therefore plaintiff may be said to have had a legal right to immediate provision for the payment of her judgment. But the allowance of a peremptory writ of mandamus is largely a matter of discretion, even where, as in this case, it is sought as a substitute for an execution to enforce a judgment. *Phelps v. Lodge*, 60 Kan. 122, 55 Pac. 840. There is not the same reason for requiring a supersedeas bond from a municipality as in the case of other litigants. Ordinarily the plaintiff is reasonably sure of being able in time to collect a judgment against the public corporation, if it is sustained. At all events, the security is not likely to be impaired by the debtor's property being conveyed away or dissipated. And there are obvious practical difficulties in the way of the municipality's procuring sureties on such a bond. These considerations, of course, do not affect the plaintiff's right to require that security be given if the enforcement of the judgment is to be suspended; but they may be taken into account by the court in determining whether, in the exercise of a sound discretion, a peremptory writ should be allowed at this time in aid of plaintiff's undeniable legal right. In *Tillson v. Commissioners of Putnam County*, 19 Ohio, 415, a peremptory writ of mandamus to compel the

levy of a tax to pay a judgment against a county was refused for the reason that the judgment had not been in existence a sufficient length of time to satisfy the court that the county commissioners had "any desire to withhold payment unreasonably and improperly." The syllabus reads: "A peremptory mandamus will not be awarded to compel the commissioners of a county to levy a tax for the satisfaction of a judgment, where there has been no unreasonable or vexatious delay."

Other matters are set out in the answer in excuse of the failure of the city to make the levy. These have been examined and found insufficient. But on account of the pendency until now of the original cause on review in this court, no peremptory writ will be allowed upon the present application.

All the Justices concurring.

### ROTH v. BOARD OF COM'RS OF NESS COUNTY.

(Supreme Court of Kansas. July 7, 1904.)

#### COUNTIES—LIABILITY FOR CLERK HIRE.

1. Under the provisions of section 3024, Gen. St. 1901, a county is not liable for clerk hire in the office of its treasurer, unless the board of county commissioners make an allowance therefor in such a sum, within the statutory limit, as it may deem necessary.

(Syllabus by the Court.)

Error from District Court, Ness County; Chas. E. Lobdell, Judge.

Application of Roy J. Roth to the board of county commissioners of Ness county for compensation for services. From an order rejecting the same he appealed to the district court, and on affirmance he brings error. Affirmed.

N. H. Stidger, for plaintiff in error.  
Foulks & Wilson, for defendant in error.

BURCH, J. The county treasurer of Ness county employed a deputy to assist him in the performance of the duties of his office. The board of county commissioners neither authorized the employment nor contracted to pay for the services rendered. A bill to the county by the deputy for his wages was rejected. On appeal the district court found that it was necessary for the treasurer to have a deputy during the period covered by the bill, and that the charges made were reasonable, but denied relief on the ground that it was entirely discretionary with the board of county commissioners to allow clerk hire, and that they had not done so.

The judgment of the district court was correct. So much of the controlling statute as is applicable to the case reads as follows: "The county treasurers of the several counties of the state shall be allowed by the

board of county commissioners of their respective counties, as full compensation for their services for the county, the following salaries to be paid out of the county treasury in quarterly installments: \* \* \* provided, that the county commissioners of the several counties may allow the following sum, or as much thereof as they may deem necessary, for clerk hire: In counties having a population of more than 2,500 and not more than 6,000, per annum, \$300." Section 3024, Gen. St. 1901. If the Legislature had intended to force out of the treasury \$300 per annum, or any part of that sum, for clerk hire, it would have said so. Instead of announcing such to be its purpose, it left the matter to the determination of the board of county commissioners. No other tribunal has any power or authority to decide the question, and, until the board deems it necessary and makes an allowance, no money for clerk hire can be drawn. The deputy says the words "may allow" in the statute mean "must allow." Grant that to be a correct interpretation, still only so much of the \$300 per annum as the board deems necessary can be allowed. If it deem no part of that sum to be necessary, nothing can be paid. However, the word "may" in the connection referred to is purely permissive. The general rule adverted to in *Phelps v. Lodge*, 60 Kan. 122, 55 Pac. 840, "Where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance, the word 'may' is interpreted as meaning 'must,'" has no application, because the question of public benefit through an appropriation for clerk hire can be determined by nobody but the board of county commissioners. The opinion of the treasurer, or of the deputy, or of the district court, or of this court, upon that subject is entirely immaterial. See *Youmans v. Board of Com'rs* (Kan.) 74 Pac. 617. And no individual has any right in the matter unless the public necessity has been properly found to require an allowance for clerk hire, and an allowance has been duly made.

The judgment of the district court is affirmed. All the Justices concurring.

### STATE ex rel. COLEMAN, Atty. Gen., v. CITY OF OAKLAND et al.

(Supreme Court of Kansas. July 7, 1904.)

#### MUNICIPAL CORPORATIONS—ORGANIZATION—NOTICE—SUFFICIENCY.

1. In an application by the electors of a town or village to the board of county commissioners to organize a city of the third class, notice of the presentation of the petition for organization must be published in a newspaper, if there is one printed in the town or village. If not, 10 printed notices of such presentation must be conspicuously posted in the town or village, but the names of the signers of the petition to organize are not an essential part of the posted notices.

¶ 1. See *Counties*, vol. 13, Cent. Dig. § 114.

2. Notices printed on a typewriter are sufficient to meet the statutory requirement. (Syllabus by the Court.)

Application by the state, on the relation of C. C. Coleman, Attorney General, for a writ of quo warranto to the city of Oakland and others. Judgment for defendants.

C. C. Coleman, Atty. Gen., Edwin A. Austin, and D. H. Branaman, for plaintiff. Garver & Larimer, for defendants.

JOHNSTON, C. J. This proceeding involves the sufficiency of certain preliminary steps taken in the attempted organization of a city of the third class. On January 18, 1904, and upon the petition of 368 electors of the town of Oakland, constituting a large majority of the electors residing in the town, the board of county commissioners of Shawnee county ordered and declared Oakland to be incorporated as a city of the third class, and designated its boundaries. In pursuance of the order of the board, an election was held within the city on February 3, 1904, at which a mayor, a police judge, and five councilmen were elected, and they qualified, and are now assuming to act as officers of the city. To test the validity of the organization, and the right of the officers so chosen to exercise the functions of city officers of Oakland, is the purpose of this proceeding. The petitioners and the remonstrants appeared before the board by themselves and attorneys, and presented testimony and arguments for and against the proposed organization, and upon this proof the board found that the petition was signed by a majority of the electors as well as of the taxable inhabitants; that a majority of the taxable inhabitants and electors were in favor of the incorporation of the city; that the prayer of the petitioners was reasonable and should be granted, and, as no newspaper was printed within the limits of Oakland, 10 printed notices, each containing a copy of the petition, and stating the time and place of the presentation and hearing of the same, had been posted for more than three consecutive weeks preceding the hearing of the petition, in all respects as required by law.

The first contention is that an insufficient notice of the presentation of the petition and the hearing before the board was given. The statute provides, among other things, that, when the petition for organization is presented, those interested shall at the same time accompany it "with satisfactory proof that such petition has been published in full in some newspaper printed in said town or village at least once in each week for three consecutive weeks," etc. There is a provision that, "if no newspaper be published in said town or village, then ten printed notices shall be posted conspicuously in said town or village in each instance where publication in a newspaper is required by the provisions of this section." Gen. St. 1901, § 1076. The

alleged defect in the notice is that the petition embodied therein did not contain the names of the petitioning electors. It did include all the recitals in the petition, including the essential statements of the metes and bounds of the proposed city, and the number of inhabitants therein, together with the prayer that it be incorporated as a city. In the notice, and preceding the petition, was the following statement:

"To Whom It May Concern: All persons interested are hereby notified that the following is a copy of the petition signed by 368 electors and 225 taxable inhabitants of the territory described therein; said petition being on file in the office of the county clerk of Shawnee County, Kansas, and which will be presented to the board of county commissioners of Shawnee County, Kansas, at their first regular session after the 9th day of January, 1904."

What must the notices contain? Because the provision as to the newspaper notice requires the petition to be printed in full, it is argued that even the names of the petitioners must be printed in the newspaper, and that the notices to be posted, if no newspaper is published in the town or village, must contain all that is required in the newspaper publication. Passing the question whether the names of the petitioners are required in a newspaper publication, we remark that the statute does not provide that the posted notices shall be the same as that published in the newspaper. The essential feature and purpose of the posted notices is to advise the electors of the town or village that a petition for the organization of a city will be presented to the board of county commissioners at a specified time. It should contain a statement of the metes and bounds of the proposed organization, and the number of inhabitants within those limits, so that those who would be affected by the action of the board might have warning, and an opportunity to oppose or favor the incorporation. The application to be made to the board of county commissioners, or, rather, the action to be invoked, was the important thing, and that was fully stated in the notices posted. As the statute does not prescribe a particular form, and as those posted fully subverted the legislative purpose, they are deemed to be sufficient. It might be remarked that the notices appear to have been effectual as nearly all the electors and taxable inhabitants participated in the matter, by either favoring or opposing the proposed organization.

It is also contended that the notices were defective because they were in typewriting, but there is no merit in the point. The statute, it is true, provides that printed notices shall be posted; but those which were posted in this case were, in a sense, printed notices. Of what consequence was it whether the letters in the notices were formed by a typewriting machine or a typesetting machine?

In either case the letters are substantially in the same form, are made from types, and are impressed on paper in lines and columns of varying length. In the Century Dictionary the word "typewriter" is defined as "to print or reproduce by means of a typewriter"; and the word "typewriting" is defined as "the process of printing, letter by letter, by the use of a typewriter." Printing is now accomplished by a great variety of machines, but none are in more common use than the typewriter. There are cases where there is room for a distinction between typewriting and printing, and in these the language used in the rule or statute ordinarily indicates a purpose to differentiate one from the other, but no such purpose is apparent in the statute in question. The notices will accomplish the purpose equally well, whether printed on a typewriter, or some other kind of a printing machine.

Under the agreed statement of facts the incorporation of the city of Oakland is valid, and therefore judgment must go in favor of the defendants. All the Justices concurring.

#### SWENNEY et al. v. HILL et al.

(Supreme Court of Kansas. July 7, 1904.)

ADMISSION OF PARTY—POWER OF COURT—FORECLOSURE—OWNER OF MORTGAGE—REAL PARTY IN INTEREST—EVIDENCE—ADMISSIBILITY—JUDGMENT—APPEAL AND ERROR.

1. Where an action of foreclosure brought by the payees of notes which were secured by mortgage drawn in favor of another was reversed and sent back for a new trial on the ground that the mortgagee was a necessary party, it was within the power of the court to allow an amendment making the mortgagee a party.

2. In an action of foreclosure brought by the payees of notes, which were secured by mortgage drawn in favor of another, plaintiffs were entitled to show the real ownership of the mortgage, and how it came to be drawn in favor of another.

3. Where the judgment in a foreclosure proceeding did not provide for redemption, the error is not available, the petition in error specifically setting out the errors relied on, but making no mention of the omission.

4. The omission to provide for redemption in a judgment of foreclosure is harmless error.

Error from District Court, Greenwood County; G. P. Aikman, Judge.

Action by Samuel G. Hill and others against William Swenney and others. From a judgment for plaintiffs, defendants bring error. Affirmed.

For former opinion, see 70 Pac. 868.

Howard J. Hodgson and Fuller & Jackson, for plaintiffs in error. W. S. Marlin, for defendants in error.

PER CURIAM. On the first proceeding in error it was held that, the notes being given to plaintiffs and the mortgage securing them to another, the mortgagee was a necessary party to an action of foreclosure brought by the payees of the notes. Swenney v. Hill,

65 Kan. 826, 70 Pac. 868. When the case went back for a new trial, the mortgagee was made a party. It was within the power of the court to allow the amendment, and proper to permit plaintiffs to show the real ownership of the mortgage, and how it came to be drawn in favor of another. The objections to testimony in regard to the mistakes of the scrivener are not material. The rights of the plaintiffs were not affected by the foreclosure of the second mortgage, and as it does not appear that plaintiffs exercised the option given them to declare the whole debt due until action was brought, there is nothing to show that it was barred. The testimony offered did not constitute a defense to the action, and the decision of the court in so holding was correct. In the briefs attention is called to the form of the judgment, which did not provide for redemption, as it should have done. The petition in error, which specifically sets out the errors relied on, does not make the omission mentioned a ground of error, and hence it is not open to consideration now. If an attempt is made to exclude defendants from the statutory right, the district court will doubtless upon application afford protection to the defendants.

Judgment affirmed.

#### McCULLOUGH v. FINLEY.

(Supreme Court of Kansas. July 7, 1904.)

PAROL PARTITION—ESTOPPEL—LIFE TENANCY—AGREEMENT BY MINOR.

1. Parties who have acquiesced in a parol partition of real estate, followed by exclusive possession, the payment of taxes, and the permanent improvement of the land, are estopped from questioning it as void under the statute of frauds.

2. The owners of a fee subject to a life estate may make an agreement dividing the land in severalty before the termination of the life estate; upon such partition the former co-tenancy of the fee is at an end, and each one may then take title to the life interest in his own portion and hold the entire estate adversely to the others.

3. An agreement to partition land made by a minor is voidable only, and becomes binding upon a failure to disaffirm within a reasonable time after majority.

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Harriet McCullough against Janet Finley. Judgment for defendant, and plaintiff brings error. Affirmed.

I. O. Pickering, for plaintiff in error. Ogg & Scott, for defendant in error.

BURCH, J. James McClaren died in 1869, leaving a will devising to his widow a life estate in the land in controversy, consisting of an 80-acre tract, with remainder in fee to his daughters, the plaintiff and the defendant. On March 16, 1874, the plaintiff and the defendant verbally agreed to divide the land, the plaintiff taking the south 40 and the de-

fendant the north 40, and on the same day the widow conveyed her interest in the respective tracts to her daughters by separate deeds. The husband of the defendant was also named as grantee in the deed to the defendant of her share of the land. The defendant took possession of her part of the land, and has at all times since been in the actual possession of it, claiming to be the owner, has made lasting and valuable improvements upon it, has paid all taxes assessed against it, and has received all the rents and profits accruing from it since 1874. The plaintiff lived on or near the tract deeded to her for a few years, and then sold it, keeping the proceeds as if the land had been her own. She has known since 1874 that her sister claimed the exclusive right to the north 40, and throughout the years made no claim upon it of any kind until she commenced this suit in February, 1902. The devisee of the life estate died in 1888. The plaintiff now denies that her verbal agreement, and her conduct and the conduct of her sister in reliance upon the agreement, are sufficient to exclude her from title to and possession of the land.

The courts have little forbearance toward claims so destitute of moral and conscientious quality. The statute of frauds was enacted to prevent and not to foster injustice, and the rule is settled in this state that possession, the payment of taxes, and permanent improvement under a parol agreement, with knowledge and acquiescence, remove the contract from the operation of the statute. *Holmden v. Janes*, 42 Kan. 758, 21 Pac. 591; *Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. 571; *Holcomb v. Dowell*, 15 Kan. 378. Upon the same principle, a parol partition acted upon in this case will not be disturbed. *Crimmins v. Morrissey*, 36 Kan. 447, 13 Pac. 748; *Duffey v. Rafferty*, 15 Kan. 13; 21 A. & E. Encycl. of L. (2d Ed.) 1137 et seq.

It is said that the defendant's possession must be referred to the deed from her mother as life tenant, and that she could not hold adversely to her co-tenant of the fee. This proposition ignores the agreement between the parties under which the land was divided between them, and under which the plaintiff surrendered all right to the defendant's portion. The co-tenancy of the fee was then at an end. The plaintiff no longer held any estate in remainder in the defendant's part of the land, and the defendant was at perfect liberty to take title to the life interest in her own portion and hold the entire estate adversely to the plaintiff.

At the time the agreement to divide the land was made, the defendant lacked a month of being of age. The contract, however, was voidable only, and became binding when the defendant failed to disaffirm within a reasonable time after attaining majority. Section 4183, Gen. St. 1901.

The case of *Love v. Blauw*, 61 Kan. 496,

59 Pac. 1059, 48 L. R. A. 257, 73 Am. St. Rep. 334, has no application, because the partition in this case was between owners of the fee, and not between life tenants on one side and remaindermen on the other.

The findings of fact are assailed as unsupported by the evidence. In a few unimportant particulars the court may have embodied in its findings some facts which the record only suggests, but every fact essential to a judgment in favor of the defendant is abundantly sustained.

The facts relied upon as an estoppel to the plaintiff's recovery were sufficiently pleaded, and the judgment of the district court is affirmed. All the Justices concurring.

#### HAYDEN v. STEWART.

(Supreme Court of Kansas. July 7, 1904.)

##### SUPREME COURT—JURISDICTION.

1. Where the only relief sought in a petition is a perpetual injunction, and no damages in money are claimed, and there is no certificate showing the case to come within any excepted class, giving the court jurisdiction regardless of the amount involved, a petition in error will be dismissed.

Error from District Court, Cherokee County; A. H. Skidmore, Judge.

Action by George W. Hayden against Charles Stewart. Judgment for defendant, and plaintiff brings error. Dismissed.

Chas. Stephens, for plaintiff in error.  
Francis M. Brady, for defendant in error.

PER CURIAM. This was a suit to restrain defendant in error from closing a public road. The only relief sought in the petition is a perpetual injunction. No damages in money are claimed. There is no certificate of the judge showing the case to come within any excepted class which would give this court the right of review regardless of the amount involved. We have no jurisdiction. *Moore v. State* (Kan.) 66 Pac. 239.

The petition in error will be dismissed.

(69 Kan. 676)

#### STATE v. DOUGLAS.

(Supreme Court of Kansas. July 7, 1904.)

##### CRIMINAL LAW—ELECTION OF OFFENSES—APPEAL—INTOXICATING LIQUORS.

1. The overruling of a motion to make an election in a criminal case more definite and certain will not be reviewed on appeal, when the ruling was not brought to the attention of the district court by the motion for a new trial.

2. Evidence examined, and found sufficient to sustain a conviction.

(Syllabus by the Court.)

Appeal from District Court, Cherokee County; W. B. Glasse, Judge.

Frank Douglas was convicted of selling intoxicating liquors, and appeals. Affirmed.

C. A. McNeill and Jes. F. Wolfe, for appellant. C. C. Coleman, Atty. Gen., A. F. Williams, and H. C. Finch, for the State.

BURCH, J. The defendant was convicted of selling intoxicating liquor, contrary to law. At the conclusion of the state's evidence it was required to elect upon what transaction disclosed by the evidence it would rely for a conviction. It made an election which the defendant moved to have made more definite and certain. The court overruled the motion, and error is assigned upon that ground. The ruling, however, was not brought to the attention of the district court by any specification of the motion for a new trial, and hence it cannot be reviewed.

The state elected to rely for a conviction upon sales made in the months of November and December, 1902, testified to by one D. McFadden. The defendant was convicted of a sale made December 11, 1902. McFadden testified in a very definite way to purchases of intoxicating liquor from the defendant. While in the defendant's place, which he called a "barroom," and which was fitted up with all the paraphernalia of a saloon, he called for beer, got what he called for of the defendant, paid the defendant for what he got, and drank it there. Some of these transactions the witness said occurred in November, but he declined to be certain as to the month. Indeed, his mind became so unequivocally and unalterably fixed upon the doubt and obscurity which rested like a pall over the matter of date that he admitted to defendant's counsel on cross-examination that he was sure he was not certain. The witness then testified in a very definite way to being at the defendant's place at divers times in the month of December, to calling for beer, to the defendant responding to his calls, and to drinking there at least more than twice in the month of December with a man named Scott. But, after ransacking his recollection, he was hopelessly in doubt about paying for what he drank in December. It seems that when the elements of a sale flashed clear upon McFadden's clouded vision the date vanished, and that, when time and place and beer and boon companion rose up before his mind's eye the vulgar price slunk into oblivion. Scott's memory was sufficiently vivid with respect to transactions barred by the statute of limitations, but it was utterly unequal to the strain of reproducing recent occurrences, and the court sent him to a private room for a time to give him an opportunity to recuperate, and to recall some facts relevant to the case on trial. When placed upon the witness stand a second time, he admitted that he and McFadden had drunk together, but he could not say just where, although he was free to admit he had been in defendant's place, and upon dubious dates had bought both beer and whisky of the defendant. The jury saw and heard these witnesses. No doubt their demeanor while tes-

tifying made the truth apparent beyond any possibility of mistake. Again, the jury may have given credence to McFadden's testimony intended to make it doubtful if the sales which he remembered took place in November, and then reconciled the evidence upon the theory that those sales occurred in December. Other legitimate interpretations of the evidence inconsistent with the defendant's innocence might be made, and the verdict returned by the jury is well sustained by proof.

The defendant's motion for a continuance was properly overruled, because the affidavit in support of it offered nothing by way of evidence but a negative conclusion.

The judgment of the district court is affirmed. All the Justices concurring.

#### McGREW v. KANSAS CITY.

(Supreme Court of Kansas. July 7, 1904.)

MUNICIPAL CORPORATIONS—PAVING STREET—RIGHTS OF ABUTTING OWNER.

1. A city of the first class is not liable in damages to a property owner for paving and curbing a street so that the curbing is less than five feet from the boundary of a lot abutting on the street improved.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by James McGrew against the city of Kansas City. Judgment for defendant, and plaintiff brings error. Affirmed.

McGrew, Watson & Watson, for plaintiff in error. M. J. Reitz and J. W. Dana, for defendant in error.

SMITH, J. This was an action for damages against the city. The mayor and council, in due form of law, contracted for the paving and curbing of a part of Fifth street. This street runs north and south. Plaintiff below owns real estate on the west side of it, and abutting thereon. After the work had been completed, this action was begun. The cause of action against the city was based on the claim that the street was improved in an unlawful manner, for the reason that the width of the street, as laid out from lot line to lot line, is 55 feet. The space improved was 36 feet in width; the east line of the improvement being 17 feet west of the east line of the street, and the west line of the improvement (marked by the curbing) being 3 feet, or less, east of the west line of the street, leaving about 3 feet for sidewalk space in front of plaintiff's property. There was no sidewalk at the place mentioned. The court below sustained a demurrer to the petition.

There is no charge of negligence in the construction of the paving or guttering; the gravamen of plaintiff's claim being that the plan of the improvement was defective, in that the paving was not laid nearer to the center of the street. This question was re-

ferred to in the case of *McGrew v. Kansas City*, 64 Kan. 61, 62, 67 Pac. 438. In passing on the manner in which the improvement was made, the court said: "One of the objections is that the portion of the street paved is not in the center of the same. There is nothing substantial in this objection. It appears to have been due to irregularity in the width of the street, and whether the curb line shall be closer to the lots on one side of the street than on the other is a matter within the discretion of the city officers." There being a legal right vested in the mayor and council to pave and curb the street in the manner it caused the work to be done, a cause of action for damages cannot be based on the exercise of such lawful right for injury to the property situated outside of the street, though abutting thereon. *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496. The governing authority of the city exercised its discretion in paving the street nearer to the lot line on one side than on the other. Such discretion is not subject to judicial control, and in no manner affects the question of power. *Challiss v. Parker, Treasurer*, 11 Kan. 384; *City of Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532. Counsel for plaintiff in error cite section 877, Gen. St. 1901, which confers power on the mayor and council of a city of the first class to require the building of sidewalks in front of any lot or block in the city, provided the outer edge of the sidewalk shall not be less than five feet from the fence or bounds of the lot or lots. The contention is that plaintiff below cannot now construct a lawful sidewalk for the reason that the space left for that purpose between the curb and his lot line is less than five feet. The answer to this is that the city is not attempting to require the construction of a walk. If at any time the city should determine that a sidewalk is necessary along the property of plaintiff, conforming in width to the requirements of the statute above referred to, the power of eminent domain can be invoked, and private property appropriated for the purpose.

The judgment of the court below will be affirmed. All the Justices concurring.

#### WARD v. PIPER et al.

(Supreme Court of Kansas. July 7, 1904.)

#### MANDAMUS—MUNICIPAL OFFICERS—TAXATION—PAYMENT OF INTEREST ON BONDS.

1. The law confides in certain officers the discretion to determine the extent of the levy and the amount of money necessary to meet the current expenses of municipalities, and the courts cannot supervise nor control such discretion.

2. Mandamus will not lie to compel the payment of money raised by township officers for current expenses upon bonded indebtedness, nor upon judgments based on such indebtedness, where it does not appear that the indebtedness arose out of the ordinary expenses of the township, nor that the fund raised for current ex-

penses is more than sufficient for that purpose. 3. The fact that interest coupons on bonds of a municipality are merged in a judgment does not affect the character of the indebtedness, and the holder of such judgment is entitled to have funds raised by taxation to pay interest on bonds applied to the payment of the judgment.

4. In an action to compel municipal officers to pay such judgment from a fund so provided, it is not competent for the officers to defend on the ground that there are other creditors entitled to share in the fund. The court will not attempt to protect or enforce the rights of those who have not intervened in the action, nor otherwise invoked its aid.

(Syllabus by the Court.)

Mandamus by D. M. Ward against J. M. Piper, as trustee, and others. Writ awarded.

J. S. Simmons, for plaintiff. S. S. Ashbaugh, for defendants.

JOHNSTON, C. J. This is a proceeding by D. M. Ward to compel the officers of Isabel township, Scott county, Kan., to pay four judgments held by the plaintiff against the township out of certain funds now in the township treasury. In 1892 the township issued bonds to the amount of \$22,500, which are still outstanding. Default was made in the payment of interest on these bonds, for which a judgment to the amount of \$5,000 was rendered in the federal court. The plaintiff held a number of defaulted coupons in the same series of bonds, and on December 18, 1903, he obtained four judgments, amounting to \$1,166.29, before a justice of the peace. On January 6, 1904, he applied for a writ to compel the payment of these judgments. At that time there was in the township treasury \$357.79, levied and collected in 1903 for the purpose of paying interest on bonds, and also the sum of \$1,003, levied and collected to meet the general current expenses of the township. The plaintiff asks that these funds so levied and collected shall be applied to the payment of his judgments. It is not alleged or shown that the funds raised for current expenses are more than sufficient for that purpose. It does not even appear that the indebtedness on which the judgment was founded was for the ordinary expenses of the township, and to which funds derived from a levy for current expenses could be legally applied. The taxes levied for one purpose cannot be diverted and applied to another. Presumably the township officers are acting in good faith, and have levied and raised a fund which is necessary, as well as sufficient, to meet the ordinary current expenses of an economical administration of the affairs of the township. The township organization must be maintained, and its current expenses met, although creditors of the township may have to wait for payment of their bonds and judgments. As the case stands, it cannot be said that more money was raised than is needed for current expenses, and nothing is shown to warrant the claim that a large and unnecessary cur-

rent expense fund has been raised to avoid the payment of interest on bonds, or of judgments for such interest. The law confides in the officers of the municipality the discretion to determine how much money is required to carry on the affairs of the township—a discretion which the courts cannot supervise or control. In the absence of a showing to the contrary, we must assume that this discretion has been honestly exercised, and that no part of the current expense fund can be properly applied to the payment of plaintiff's judgments.

As to the money raised for the payment of interest on the bonds, a different rule necessarily applies. The judgments of plaintiff were based on interest due on township bonds. The fact that the interest coupons were merged in judgments does not affect the character of the indebtedness. It will not excuse the failure of the township officers to apply moneys raised for such interest on the indebtedness in its new form, nor deprive the holder of the indebtedness of his remedy to compel such application. *Commissioners of Osborne County v. Blake*, 25 Kan. 356; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Harshman v. Knox County*, 122 U. S. 819, 7 Sup. Ct. 1171, 30 L. Ed. 1152; *United States v. King* (C. O.) 74 Fed. 493; *United States v. Buchanan County*, 5 Dill. 285, Fed. Cas. No. 14,679; *State ex rel. v. Royse* (Neb.) 91 N. W. 559; *East St. Louis v. Underwood*, 105 Ill. 308; *Board of Commissioners v. People* (Colo. App.) 64 Pac. 675.

The contention that there are other creditors holding like claims, and that plaintiff should not be given a preference over them, is not good. They are not here demanding payment, nor asking that the fund which plaintiff is seeking to obtain should be distributed equally with them. The defendants are not competent to speak for them, and it will be time enough to consider the rights of other creditors when they intervene or invoke the action of the court. Upon an application for mandamus to compel the payment of a debt out of a particular fund, and where the municipality made a similar objection, the Supreme Court of California remarked: "Nor is the fact, if it exists, that there are other creditors interested in the fund provided for their payment, who have not demanded payment, any answer to the application of the petitioner. Nonaction by others having equal rights with him, in a matter on which his right is founded, cannot prejudice him in the assertion of his right, nor excuse performance of a duty in connection with it specially enjoined by law." *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884. See, also, *City of Galena v. Amy*, 5 Wall. 709, 18 L. Ed. 560; *City of New Orleans v. United States*, 49 Fed. 40, 1 C. C. A. 148; *Voorhies v. City of Houston*, 70 Tex. 331, 7 S. W. 679.

The plaintiff is entitled to a peremptory writ compelling the payment of his judg-

ments out of the fund provided for the payment of interest on bonds, or so much of the same as remains in the township treasury. This will be the judgment of the court. All the Justices concurring.

(39 Kan. 669)

### MARTINDALE v. STOTLER.

(Supreme Court of Kansas. July 7, 1904.)

#### ACTION ON NOTE—FRAUD OF PAYEE—INSTRUCTIONS.

1. Where an action is brought by the holder to recover upon a negotiable promissory note indorsed by the payee in blank, and there is interposed by the maker the defense that the note was obtained through misrepresentation and fraud of the payee, and the further defense that the note, since its execution and delivery, has been materially altered, and there is no evidence connecting plaintiff with the fraud, or knowledge thereof at the time of the purchase of the note, *held* prejudicial error to instruct the jury upon the effect of fraud on the right of plaintiff to a recovery.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Howard F. Martindale against S. A. Stotler. Judgment for defendant, and plaintiff brings error. Reversed.

Graves & Hamer, for plaintiff in error. Kellogg & Madden, for defendant in error.

ATKINSON, J. This was an action in the district court of Lyon county to recover of defendant upon a promissory note for \$878.50, with interest at 5 per cent. per annum from maturity. Judgment for defendant.

The following is a copy of the note upon which suit was brought:

"\$878.50. Madison, Kansas, July 10, 1900.

"January 1st after date, for value received, I promise to pay to the order of Herman Fist Eight hundred and seventy-eight & <sup>50</sup>/<sub>100</sub> dollars

People's State Bank  
lars at the Madison Bank of Madison, Kan-

sas, with interest at the rate of ten per cent. per annum from ~~date~~

maturity. S. A. Stotler."

The note had been sold by the payee, Herman Fist, before maturity, to plaintiff, Howard F. Martindale; the payee at the time having indorsed his name on the back of the note. Fist was an agent of the New York Life Insurance Company. The note was given to represent the first premium on a \$10,000 policy of insurance to be issued by the New York Life Insurance Company on the life of defendant. It was contended by defendant that the note in controversy had been obtained from him by Fist through misrepresentation and fraud; that the conditions and provisions of the policy to be issued to defendant had been misrepresented. It was also contended that since its execution and delivery there had been alterations of the note; that, when the note was executed and delivered, the word "ten," indicating the rate of



interest designated in the blank form of the note, had been stricken out, leaving the note to bear no interest from its date; that the figure "5" had been, since the execution of the note, inserted above where the word "ten" had been stricken out, and the word "date" had been, since the execution of the note, stricken out, and the word "maturity" written beneath the same; that all of these alterations had been made after the note had been executed and delivered to Fist. No policy was issued and delivered to defendant, due to the fact that he neglected and refused to submit to a physical examination. The case was tried before the court and a jury. Upon the trial it was shown that plaintiff had purchased the note of Fist along with other notes, at a discount of 10 per cent. There was only the testimony of Fist and Stotler as to the alleged fraudulent representations made in obtaining the note, and as to when the alterations of the note had been made. The note plainly showed that it had been altered in the particulars mentioned, the only question being when these alterations were made. Fist testified the alterations were made in Stotler's presence before the note was signed and delivered. Stotler testified there were no such alterations on the note when he signed and delivered it, and that they had not been made with his knowledge or consent. A reading of the record fails to disclose any knowledge on the part of plaintiff of fraudulent representations alleged by Stotler to have been made to him by Fist. Notwithstanding this fact, the court instructed the jury upon the question of the legal effect, and the right of plaintiff to a recovery upon the note, if it was found the same had been obtained from the defendant by Fist through misrepresentation and fraud. Complaint is made of the giving of this instruction. The instruction complained of would have been proper, had Fist continued to be the owner of the note, or had there been evidence tending to show that plaintiff, at the time of the purchase of the note in controversy, knew, or by the exercise of ordinary care could have known, that the note was obtained from defendant by misrepresentation and fraud. The court having also instructed the jury that, if plaintiff was found to be a bona fide purchaser of the note for value, he could recover of defendant, notwithstanding the note had been obtained of defendant by Fist through misrepresentation and fraud, it is urged plaintiff could not have been prejudiced by the instruction complained of. The instruction complained of should not have been given. The giving of this instruction would tend to confuse the minds of the jurors, and lead them to believe that they must, in their deliberations, consider and weigh the evidence upon the subject of fraud. True, it was charged in the answer of defendant that plaintiff had knowledge of the fraud used in procuring the note from defendant; but, as above stated, there was no

evidence before the jury that would fairly tend to show any such knowledge on the part of plaintiff at the time he purchased the note. The case should have been submitted to the jury with instructions as to the legal effect of the alterations on the note; there being evidence tending to show that such alterations had been made after the execution and delivery of the note, and without the knowledge and consent of defendant.

For error of the court in giving the instruction complained of, the judgment will be reversed, and a new trial granted. All the Justices concurring.

### STATE v. CRILLY.

(Supreme Court of Kansas. July 7, 1904.)

INDICTMENT — REGULARITY — PRESUMPTION — ASSISTANT ATTORNEY GENERAL — AUTHORITY — CHANGE OF VENUE — PREJUDICE OF JUDGE — TRIAL — FAILURE TO SWEAR BAILIFF — ADJOURNMENT.

1. Where an indictment recites that it is presented by the grand jury, and it is properly signed by the prosecuting attorney, indorsed, "A true bill," by the foreman, and filed by the clerk, it will be presumed, in the absence of a showing to the contrary, that it was duly returned in open court, notwithstanding that no entry of the fact is made upon the minutes or journal of the court.

2. An Assistant Attorney General, appointed under the provisions of section 2476 of the General Statutes of 1901, has authority to sign an indictment charging an unlawful sale of intoxicating liquor, and such signature will be as effective as that of the county attorney.

3. The overruling of a motion for a change of venue will not be held erroneous merely because the judge, before the trial, in addressing the defendant and others charged with the same offense, warned them that in the event of their conviction he would take measures to prevent the evasion of the effect of a sentence, and, in doing so, used language indicating a belief in their guilt.

4. A new trial will not be granted in a criminal action on account of the failure to have the bailiff sworn before his taking charge of the jury, where it appears that the defendant's attorney was cognizant of the omission and made no objection at the time, and that the bailiff properly performed the duties that would have been imposed by the statutory oath.

5. Where the statute (Gen. St. 1901, § 1949) provides that the district court of a county shall hold terms at different places within the county, and that cases shall be tried at the places where they are respectively begun, an adjournment of the regular term of court at one place may be had to a day later than the commencement of a regular term of court at the other.

(Syllabus by the Court.)

Appeal from District Court, Cherokee County; W. B. Glasse, Judge.

Joseph Crilly was convicted of a violation of the prohibitory liquor law, and appeals. Affirmed.

C. A. McNeill and Jes. F. Wolfe, for appellant. C. C. Coleman, Atty. Gen., and C. D. Ashley, for appellee.

MASON, J. Joseph Crilly appeals from a conviction in the district court of Cherokee county upon an indictment charging viola-

tions of the prohibitory liquor law. The facts, so far as need be stated, appear in connection with the discussion of the several assignments of error.

It is contended by appellant that there is nothing in the record showing that the indictment was returned by the grand jury in open court, and that the judgment should be reversed on this account. Such an omission has often been held fatal to the prosecution. See 10 Encyc. of P. & P. 410. But it is said that "an indictment properly indorsed, 'A true bill,' and filed by the clerk, sufficiently appears to have been returned into court by the grand jury." Same, p. 411, note 2. Here the transcript does not show any entry made upon the minutes or journal of the court of the fact of the return of the indictment, but does include a copy of the indictment, showing that it was indorsed by the foreman, "A true bill," and by the clerk, "Presented in presence of grand jury, and filed this 13th day of October, 1903." Within the authority and reason of the cases cited in the note referred to, we think the record affords sufficient evidence of the proper return of the indictment. "The indictment itself being a part of the record proper, and always on file—certainly when it is authenticated, as in this case, by the genuine signatures and indorsements of the prosecuting attorney, foreman of the grand jury, and the circuit clerk—there can be no question, in our opinion, but that the *prima facie* presumption is that it was lodged in that court in the manner and by the means prescribed by law." *State v. Lord*, 118 Mo. 1, 23 S. W. 764. "The objection that the recital in the indictment that 'the jurors, upon their oath, present,' etc., does not sufficiently show that it was presented by the jury in open court, cannot be sustained. The presumption is that it was properly presented, as it is indorsed as a true bill and signed by the foreman." *State v. Weaver*, 104 N. C. 758, 10 S. E. 486. "As it appears that an indictment against defendant was found November 1st, and this indictment appears to have been filed on that day, unless the ordinary presumption in favor of the proceedings of courts is inapplicable here, it would be presumed that it was duly presented; and we see no reason why this is an exception to the ordinary rule. \* \* \* When, therefore, the record of the proceedings of the term at which the indictment was found does not show that it was presented in court as provided by law, we think it should be presumed that the law in that respect was complied with, if, as in this case, the indictment appears to have been found, and properly filed." *State of Minnesota v. Beebe*, 17 Minn. 241, 246 (Gil. 218). "When an indictment has been so returned, it is the duty of the clerk to record the facts upon the journal of the court. Such recitals upon the record are conclusive as to what was done in the premises; but, if an indictment was in fact returned into court as required

by law, the omission of the clerk to record the facts would not invalidate the work of the grand jury, nor defeat the jurisdiction of the court. The facts that the indictment was on file in the clerk's office, and duly recorded in the indictment record, furnish sufficient memorandum upon which the court, on proper application, and in the absence of a showing to the contrary, could order a *nunc pro tunc* entry supplying the omission in the record." *Shivers v. Territory* (Okla.) 74 Pac. 899.

The question was raised in the district court by a motion to quash the indictment for the reason that it "was not presented by the foreman of the grand jury, in their presence, to the court, as required by law." This motion was in effect a plea in abatement, and required to be supported by evidence. Section 5604, Gen. St. 1901. None having been offered, the presumption arising from the indorsement and filing was not overcome, and the motion was properly denied.

The indictment was signed, "C. D. Ashley, Assistant Attorney General for Cherokee County, Kansas." It is objected by the appellant that the only provision of the law for assistants to the Attorney General is found in section 2476 of the General Statutes of 1901, that an officer appointed under that statute has no authority to sign an indictment, and that, as the indictment was not signed by the county attorney, the court acquired no jurisdiction to try the defendant. The part of that section here involved reads: "And whenever the county attorney shall be unable or shall neglect or refuse to enforce the provisions of this act in his county, or for any reason whatever the provisions of this act [the prohibitory liquor law] shall not be enforced in any county, it shall be the duty of the Attorney General to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify and file all such complaints, informations, petitions, and papers as the county attorney is authorized to sign, verify, or file, and to do and perform any act that the county attorney might lawfully do or perform." It is obvious that, if the language quoted is to be construed literally, abundant authority is conferred for the signing of an indictment by the Assistant Attorney General, since he is, in terms, empowered to "sign \* \* \* all such papers as the county attorney is authorized to sign \* \* \* and to do \* \* \* any act that the county attorney might lawfully do." But it is argued that these words of general import are limited by the special terms by which they are preceded, and give authority only for the performance of other acts of the same general nature as those already expressly enumerated. Granting that this is true, the appellant's case is not helped. The signing of an indictment is an act of the

same general character as the signing of an information. An indictment, like an information, is the first pleading in a criminal action. The signature to each by the prosecuting officer serves the same purpose. And authority to sign other papers of the same general character as an information, and to do other acts of like nature, includes authority to sign an indictment. It is further urged that from the context it is apparent that by the language quoted no authority was intended to be granted to the appointee of the Attorney General to act in the place of the county attorney in any matter other than the prosecution of offenders against the law forbidding the sale of intoxicating liquors, which may also be conceded, and that consequently it has no application to such proceedings as the present one, because a county attorney cannot prosecute by indictment, but only by information or complaint. But the county attorney can cause witnesses to be subpoenaed before the grand jury, there interrogate them himself, and give the jury any other information he may have. Sections 83, 84, Cr. Code. Therefore he can institute a prosecution in this manner as well as by the other methods provided by statute. These same powers are given to the Attorney General and his assistants so far as concerns offenses against the prohibitory law. And the signing of an indictment charging the unlawful sale of intoxicating liquor is a step taken in the enforcement of that law. To clothe the Assistant Attorney General with authority to perform this duty in any case where there might be occasion for his services in that connection is apparently one of the very purposes for which the statute was enacted.

An application was made for a change of venue on account of the prejudice of the trial judge against the defendant. Nothing of a material nature was offered in support of the application, except affidavits stating that after the arrest of the defendant, and before his trial, while the court was in session and the matter of giving bail was under consideration, the judge said to this defendant and other defendants who had been arrested upon the same charge, in substance: "I want to say to you, as I have said to the other defendants who have been before me on these same charges, that it has come to me that the joint keepers have said that they will, if convicted, lie in jail at the expense of the county while their bartenders continue their illegal business; and I want to say to you now, if you go back and continue your illegal business as you have been doing, I shall see that every one of your bars and fixtures, even down to the smallest cup, shall be seized and publicly destroyed. You shall not be permitted to continue in your open violation of the law in contempt of this court and its process." Assuming that it was established that the judge used this language, it does not follow that it was error to deny

the application. The defendant complains of it as showing a belief in the defendant's guilt. It is open to that construction, but this consideration is not controlling, if important. "The belief or disbelief of a trial judge in the guilt of a defendant put upon trial before him is not a test of his qualification to preside at such trial. A trial judge may be convinced from his personal knowledge of the case, or what he has heard from others, of the guilt of one put upon trial before him, and yet with the utmost fairness and impartiality conduct the trial and give the defendant a fair and impartial hearing. It is the existence of prejudice or bias in the mind of the trial court against defendant, which must be clearly shown in support of an application for a change of venue from the court presided over by such judge, not the belief of the judge in the guilt of defendant." *State v. Morrison*, 67 Kan. 144, 72 Pac. 554. A full exposition of the circumstances occasioning the remarks objected to might affect the inference to be drawn from them as to the attitude of the judge toward the defendant. But even in the absence of explanation it is apparent that what the judge said with regard to his action to be taken in the future was based upon the contingency that the defendants, in the event of their conviction, should seek to evade the effect of the judgment of the court by the artifice described. It indicates no personal bias against this defendant, but a purpose that the efficacy of any sentence that might be pronounced should not be defeated by subterfuge. At least, it does not so clearly show a prejudice as to require a reversal. *State v. Stark*, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910, 88 Am. St. Rep. 251; *City of Emporia v. Volmer*, 12 Kan. 622; 4 *Encyc. P. & P.* 408.

It appears that no oath was administered to the bailiff who took charge of the jury, and this was urged as a ground for a new trial. It has been said that this is a substantial requirement of the statute, which should not be disregarded. *State v. McCormick*, 57 Kan. 444, 46 Pac. 777, 57 Am. St. Rep. 341. But here the prosecution contends that the error was waived by the failure of the defendant to make timely objection. In *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, it was held that an irregularity in administering the oath to the jury could not be made a ground for a new trial unless the attention of the court was called to it at the time. In the opinion it is said: "If the form of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of an oath." The same principle was applied where there was an omission to administer any oath to the bailiff upon his taking charge of the jury, in *Dreyer v. People*, 188 Ill. 40,

53 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; the reporter's headnote reading: "The requirement of the statute that the jury in a criminal case shall be placed in charge of a sworn officer upon retirement is waived by the failure of the accused to object at the time to the omission of the oath, and the question is thereafter not open to review upon writ of error, although the point is urged as a ground for new trial by motion supported by affidavits." In the opinion a number of decisions are cited supporting the conclusion reached. In the present case the fact that the bailiff was not sworn was proved by several affidavits, including one made by the defendant's attorney, in which it is set out that the affiant was personally present at the time the cause was finally submitted, and when the jury retired to deliberate upon their verdict, and knows the facts to be as stated. There was an affirmative showing by the state that the conduct of the bailiff was in all respects such as is enjoined by the statutory oath. Whether a new trial should ever be granted a defendant for a failure to have the bailiff properly sworn, when no exception is taken to the omission at the time it occurs, need not now be determined. Certainly when, as in this case, there is an express showing that the defendant's attorney was present and cognizant of what was taking place, his silence must be taken as an effectual waiver of the irregularity, where no actual prejudice results.

The last assignment of error which invites separate notice is based upon a claim that the court was not legally in session when the defendant was tried, convicted, and sentenced, in December, 1903. The statute (chapter 156, p. 278, Laws 1901; section 1949, Gen. St. 1901) provides for holding terms of the district court at Columbus on the first Mondays in January, May, and October, and at Galena, in the same county, on the first Mondays in March and September and the second Wednesday in November of each year; that "all actions commenced in said court shall be entitled in said court 'sitting at Columbus,' or 'sitting at Galena,' as the case may be, and all actions shall be filed, process issued from and be returned to and trial had in the court sitting in the place designated in the title." Defendant was indicted at Columbus on October 13, 1903. Before his trial there was a regular term of court at Galena. The contention of defendant is that the court sitting at Columbus had no power to continue the October term to a day beyond the ensuing November term at Galena. Where a judicial district is made up of several counties, the term of court in one county may be adjourned to a day beyond the commencement of a regular term in another county. *State v. Montgomery*, 8 Kan. 351. The reasoning by which that conclusion is reached in the case cited is equally applicable here, and justifies the prolongation of the Columbus term to a day beyond the

commencement of the regular Galena term. Defendant relies upon the statement made in 11 *Cyclopedia of Law & Procedure*, 733, upon the authority of *Jaques v. Bridgeport Horse Railroad Co.*, 43 Conn. 32, that "a court having regular terms, and in which all cases are continued from one term to another in regular succession, has no power to adjourn to a time beyond the commencement of another regular term of the same court in the same county, where both terms are of the same character." But that is not the situation here. The cases filed at Galena which remain untried at the expiration of a term there are not continued to the term at Columbus. The terms are not of the same character, as the expression is used in the case cited. One is held for the trial of cases begun at Columbus, the other for the trial of cases begun at Galena. The language quoted by the clearest implication suggests that under these circumstances the term at either place may by proper order be kept alive until the ensuing regular term at the same place, notwithstanding the intervention of a regular term at the other.

A number of other errors are assigned, but they involve no doubtful question of law, and require no discussion.

The judgment is affirmed. All the Justices concurring.

(69 Kan. 611)

#### DAVIS v. JEWETT.

(Supreme Court of Kansas. July 7, 1904.)

#### MANDAMUS TO SCHOOL DIRECTOR — COMPENSATION OF TEACHERS.

1. A proceeding in mandamus cannot be maintained against the director of a school district to compel him to sign a warrant drawn by the clerk on the school district treasurer for a teacher's salary, when there is a controversy over the right of the teacher to compensation, and when the director has not been ordered by a district meeting or a district board to sign the warrant.

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Petition by Nellie Jewett for a writ of mandamus to John W. Davis. Judgment for petitioner, and defendant brings error. Reversed.

J. W. Parker, for plaintiff in error. L. O. Pickering, for defendant in error.

SMITH, J. Nellie Jewett, defendant in error, entered into a written contract with School District No. 75 in Johnson county to teach for a term of seven months beginning on September 16, 1901, at a monthly salary of \$40. The contract contains this proviso: "In case said teacher fails to give satisfaction to a majority of board at end of any month shall be legally dismissed from school, \* \* \* then said teacher shall not be entitled to compensation from and after such dismissal." John W. Davis, plaintiff in er-

ror, was director of the school district, C. E. Jewett clerk, and Mollie E. Watson treasurer. On January 3, 1902, a written notice was served on Miss Jewett, signed by the director and treasurer, informing her that she had failed to give satisfaction to a majority of the board, and notifying her to quit and vacate the school on January 14, 1902, the end of the school month. On the date last mentioned the schoolhouse was locked with a padlock, but the teacher gained entrance to the building, and continued to teach therein. The controversy is over the nonpayment of salary for three months' teaching following the order of dismissal mentioned. Defendant in error was plaintiff below, and brought this proceeding in mandamus to compel Davis, the director of the school district, to sign two warrants, aggregating \$120 in amount, which had been theretofore drawn on the treasurer by the clerk, in her favor, and signed by the latter. A peremptory writ was awarded in the court below. The director, Davis, has come here by proceedings in error.

The answer and return of defendant below alleges that the teacher's discharge on January 3, 1902, was on account of her inability to govern the pupils, for lack of ability to teach them, and because she failed to give satisfaction to a majority of the board. It sets out the resolution to that effect adopted by the board. We are clear that plaintiff below mistook her remedy. There appears in the proceedings and proof to have been a bona fide question raised by defendant below respecting the liability of the school district for the three months unpaid wages of the teacher. Mandamus is one of the extraordinary remedies. The writ may issue in those cases only "to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station," but "it cannot control judicial discretion." Section 5184, Gen. St. 1901. Again: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Id. § 5185. It seems that the court below tried the question of the liability of the school district under the contract of employment. The plaintiff below had no judgment against the district. Her right to recover was resisted because the board asserted the legal right to terminate the contract at the time it did so by virtue of the conditions contained in it. Plaintiff had a plain and adequate remedy at law by suit on the contract to recover what she claimed was due. In such action the district might demand of right a trial by jury, which it could not in a mandamus proceeding. The following cases deny the right of a party to resort to the extraordinary remedy of mandamus in such cases. *Elsbree, Relator, v. Bridgman*, 8 Kan. 458; *The State ex rel. v. Hannon, Mayor*, 38 Kan. 503, 17 Pac. 185; *State v. Merrell*, 43 Neb. 575, 61

N. W. 754; *Cassatt v. Com'rs of Barber Co.*, 39 Kan. 505, 18 Pac. 517; *Swartz v. Large*, 47 Kan. 304, 27 Pac. 993. It is the duty of a director of a school district to sign all orders drawn by the clerk on the treasurer when they are ordered drawn by a district meeting or a district board. See section. 6162, Gen. St. 1901. No such authority was shown to have been given by the board to the director, Davis, to sign the school warrants in favor of Miss Jewett, and, in the absence of such authorization, it would have been a clear violation of duty on his part to have done so. In *Sharpless v. Buckles*, 65 Kan. 838, 70 Pac. 886, it is held: "The only purpose of a writ of mandamus is to require the person to whom it is issued to perform some act which the law enjoins as a duty. The writ itself confers no power and creates no duty, and its only office is to command the exercise of a power already possessed, or the performance of a duty already imposed." In *High on Extraordinary Legal Remedies*, § 341, it is said: "In conformity with the general rule, it is held that mandamus will not lie to municipal authorities requiring them to pay salaries which are due from the corporation to its officers, a salary being regarded as an indebtedness of the corporation which may be enforced by an action of assumpsit or by an action on the case for neglect of corporate duty, and mandamus is not designed as a remedy for the collection of debts."

The judgment of the court below will be reversed, with directions to proceed further in accordance with this opinion. All the Justices concurring.

#### PEOPLE v. WALKER. (Cr. 1,088.)

(Supreme Court of California. June 28, 1904.)

EMBEZZLEMENT—INFORMATION—ORIGINAL COMPLAINT—DEPARTURE—AGENCY—BAILMENT—LEGAL EFFECT.

1. An information charging defendant with embezzling money of a certain company received by him as its agent and by virtue of his employment is not a departure from the original complaint under which defendant was committed, charging him with embezzling money intrusted to him as bailee.

Department 1. Appeal from Superior Court, El Dorado County; M. P. Bennett, Judge.

Charles B. Walker was prosecuted for embezzlement. From an order setting aside the information, the people appeal. Reversed.

U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen. (C. N. Peters, Dist. Atty., of counsel), for the People. William C. Burgess, for respondent.

SHAW, J. This is an appeal by the plaintiff from an order of the court below setting aside the information. The motion to set

aside the information was made on the grounds that the defendant had not been legally committed, and that the offense charged in the information was not the same as that for which he was committed. The complaint on which he was arrested charged the defendant with the embezzlement of \$53 in money belonging to the Chicago Crayon Company, which had been theretofore by said company intrusted to the defendant "as bailee." Upon this charge the preliminary examination was held, and thereupon the defendant was committed for the crime of embezzlement charged in the said complaint or deposition. Upon this commitment the information in question was filed. It charges that at a certain time and place the defendant, "being then and there an agent of" the said company, did, "by virtue of his said employment, have, receive, and take into his possession" \$53 in money, describing it, which was then and there the property of said company, and did then and there "willfully, unlawfully, and feloniously embezzle and fraudulently convert and appropriate to his own use" the said money. The objection to the information is that it charges the defendant with the embezzlement of \$53 received by him as agent, whereas the original complaint, to which the commitment refers, charged the embezzlement of the same sum of money alleged to have been intrusted to him as bailee, and it is claimed that the relation of bailee is different from that of agent, and hence that this constitutes a different offense, and is a departure not authorized by the Code. Upon this ground the information was set aside.

Conceding the proposition that the information must follow the commitment, and charge the same offense, or one necessarily included therein, the Attorney General contends that the information in question does not violate this rule. In this, we think, he is correct. The offense charged in the information, though stated in slightly different language, is essentially the same as that for which the defendant was committed. Every agent, who, by virtue of his employment, receives into his possession the property of his principal, is, as to that property, the bailee of his principal so long as the title to the property remains in the principal; and every bailee who by the owner of property is intrusted with it is, for the purpose of its safe-keeping, the agent of the owner. It is immaterial whether the bailee receives the property directly from the owner or from third persons on behalf of the owner. In either case he is, in contemplation of law, intrusted with the property of the owner, and is an agent as well as a bailee. The two terms are, with respect to the persons and property, and the particular offense here involved, but different names for the same relation. When, therefore, the information charged the defendant with embezzling money of the company, received by him as its agent, and by

virtue of his said employment, it did, in legal effect, charge him with embezzling money of the company intrusted to him as bailee by the company, which was precisely the crime described in the original complaint, and for which he was committed. The court erred in granting the motion.

The order setting aside the information is reversed, and the cause remanded for further proceedings on the information.

We concur: VAN DYKE, J.; ANGEL-LOTTI, J.

(144 Cal. 5)

ALEXANDER v. WILSON, Sheriff, et al.  
(Sac. 1,066.)

(Supreme Court of California. June 30, 1904.)

BANKRUPTCY—DISCHARGE — ADJUDICATION —  
PROPERTY UNDER LEVY FROM STATE COURT.

1. The county government law (St. 1897, pp. 480, 481, c. 277) provides that, if a sheriff does not return a notice or process without delay, he is liable to the party aggrieved; that, if the sheriff to whom a writ of execution is delivered neglects to levy or sell property of the judgment creditor, he shall be liable to the creditor for the value of the property; and that a sheriff must execute all processes and orders regular on their face, and issued by competent authority. Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that a lien obtained under any proceeding at law or in equity, including attachment, which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall be dissolved by the adjudication in bankruptcy, if it appear that the lien was obtained while the defendant was insolvent, and that the party or parties to be benefited had cause to believe that defendant was insolvent. Plaintiffs, who had reason to believe their debtor insolvent, attached, and after judgment levied on the attached and other property; the attachment having been levied within four months of proceedings to declare the debtor a bankrupt. Held, that the sheriff was authorized to obey an order of the bankruptcy court restraining a sale of the property.

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Jules Alexander against T. W. Wilson, as sheriff of the county of Lassen, and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Garoutte & Goodwin, for appellant. C. L. Clafin and H. D. Burroughs, for respondents.

VAN DYKE, J. The plaintiff, as a creditor of the firm of Anderson & Berry, doing business in Lassen county, and as assignee of other creditors of said firm, commenced action against said firm September 19, 1899, in the superior court of Lassen county, to recover the sum of \$4,686.96, and at the same time procured an attachment, and placed the writ in the hands of defendant Wilson, sheriff of said Lassen county, who, as said sheriff, thereupon attached certain property belonging to said Anderson & Berry, and made return of the writ October 9, 1899. On November 29, 1899, judgment was entered in

said action in favor of plaintiff and against defendants therein, Anderson & Berry, for the sum of \$3,416.15 and costs; and on the same day execution was issued on said judgment and placed in the hands of said Wilson, as sheriff, who levied the same upon the attached and other property of the judgment debtors therein, and advertised the sale of said property to take place December 9, 1899. Said defendant Wilson, as such sheriff, for the reasons hereinafter stated, failed to sell the property levied upon, or to realize any sum therefrom, or to make return of the writ within the time specified. And said plaintiff brings this action against said defendant Wilson, as such sheriff, and the Fidelity & Deposit Company of Maryland, as surety on his official bond, for the sum of \$4,000 damages. Findings and judgment went for the defendants in the court below, from which plaintiff appeals upon a bill of exceptions.

The findings of the court sustain the defense to the action interposed by the defendant Wilson, and they are, in substance, as follows: That after the levy of the execution issued upon the judgment recovered in the action of Alexander against Anderson & Berry in Lassen county, to wit, on the 6th day of December, 1899, said Anderson & Berry, by an order and judgment of the District Court of the United States in and for the Northern District of California, were duly declared and adjudged to be bankrupt, within the intent and meaning of the act of Congress relating to bankruptcy. That two days thereafter, to wit, on the 8th day of December, 1899, the said order and judgment was duly served upon said defendant Wilson, and on the 11th day of December, 1899, the defendant Wilson readvertised for sale under the execution issued on the judgment obtained by the plaintiff against said Anderson & Berry, already mentioned, property held by him thereunder, said sale to take place on the 18th day of December, 1899, but that on the 14th day of December, 1899, the District Court of the United States in and for the Northern District of California, by an order and judgment duly given and made, restrained and enjoined the defendant Wilson from selling any of said property; setting forth the said judgment and order in *hac verba*. That thereafter, and before the 18th day of December, 1899, a copy of said order and judgment, duly certified, was delivered to and served upon the defendant Wilson, as in said order directed, and that neither said order and judgment declaring Anderson & Berry to be bankrupt, nor the order and judgment restraining and enjoining the defendant Wilson from selling said property under said execution, has ever been reversed, vacated, modified, or set aside, but they remain in full force and effect. That said proceedings in bankruptcy were commenced in the District Court of the United States in and for the Northern District of California on the 6th day of December,

1899, and that said proceedings were still pending in said court. It is further found that the lien created by the attachment, judgment, and execution in the action of Alexander against Anderson & Berry was obtained and permitted while the defendants in said action were insolvent, and that its enforcement would work a preference in favor of the plaintiff in said action, and that said plaintiff and his assignors had reasonable cause to believe that the said defendants Anderson & Berry were insolvent and in contemplation of bankruptcy when said lien was created, and that said lien was sought and permitted in fraud of the provisions of the act of Congress relating to bankruptcy; that said Anderson & Berry were insolvent on the 19th day of September, 1899, when said attachment was levied, and thereafter were continuously insolvent until so adjudged on the 6th day of December, 1899, and that said plaintiff, Alexander, and his assignors had reasonable cause to believe that said Anderson & Berry were insolvent during the whole of said period; that on January 25, 1900, the superior court of Lassen county, by an order duly given and made, extended the time for the return of the execution in the action of Alexander against Anderson & Berry, and that said order was still in full force and effect, and that on the 30th day of April, 1901, the defendant Wilson made due return of said execution; that plaintiff has not been damaged in any sum whatever on account of said sheriff's failure to return said execution.

The bill of exceptions contains specifications of insufficiency of evidence to support certain findings, but, from an examination of the record, we are satisfied that the evidence is sufficient in the particulars noted, and in fact there seems to be no point made in that respect in the argument of appellant's counsel on the appeal. The main point in the argument seems to be that a sheriff holding property of a judgment debtor under levy of an execution issued out of a state court cannot refuse to sell the property upon demand of the execution creditor, and thereafter permit the United States marshal to take said property from his possession upon an execution issued out of the United States court against the same debtor. And counsel refer in support of this contention to certain sections of the Political Code defining the duties of the sheriff. The first of these sections referred to provides that, if the sheriff does not return a notice or process in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved in the sum of \$200, and for all damages sustained by him. Section 4179. The next provides that if the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the judgment debtor which is liable to be levied upon or sold, he is liable to the

creditor for the value of such property. Section 4180. And the other section referred to provides that a sheriff or other ministerial officer must execute all processes and orders regular on their face, and issued by competent authority. Section 4187. It is proper to remark that these sections are not now in force, having been superseded by sections 92, 93, and 100 of the county government law (St. 1897, pp. 480, 481, c. 277), which, however, are in substance the same, with respect to the question involved. The appellant's counsel contend that, having levied upon property sufficient to satisfy, at least in part, the demands of the writ, he was not justified in failing to proceed thereunder and make his return as required by law. But, as the findings show, the sheriff was interrupted and prevented by superior power from executing the writ in question. By section 67 of the bankruptcy act of the United States of 1898 (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) it is declared "that a lien created by, or obtained in, pursuance of any suit or proceeding at law or in equity, including attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent, and at his instance, and enforcement will work a preference, or that the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent, or in contemplation of bankruptcy." As already shown, it appears from the findings in this case that the firm of Anderson & Berry were insolvent at the time the plaintiff commenced his action and attached their property. Not only this, but plaintiff and his assignors had reasonable cause to believe that they were insolvent, and that said attachment was created and the lien sought in fraud of the provisions of the bankruptcy law referred to. Attachment was levied on the 19th of September, and the adjudication in bankruptcy on the 6th of December following—less than two months—whereas the bankruptcy law provides that an attachment or judgment lien levied within four months is rendered null and void and is absolutely dissolved by an adjudication in bankruptcy. In *re Kemp* (D. C.) 101 Fed. 689; In *re Breslauer* (D. C.) 121 Fed. 910. In *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, it appears that after the sheriff had sold under an execution, and while the money was still in his hands, and within the time allowed for the return of the execution, upon a petition in bankruptcy being filed against the judgment debtor, it was held that the money did not belong to the judgment creditor, but went, under section 67 of the bankruptcy act of 1898, to the trustee in bankruptcy. The court, in its

opinion, says: "As judgment, execution, and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication in bankruptcy." This nullity and invalidity related back to the time of the entry of the judgment, and affect that and all subsequent proceedings. The language of the statute is not "when," but "in case he is adjudged a bankrupt," and the lien obtained through these legal proceedings was by adjudication rendered null and void from its inception. The court further proceeds to say that the rights of the creditor were subject to interception, and the bankruptcy proceedings operated as such interception. "They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy, and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone, and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy." Citing a number of cases. Many other cases to the same effect might be referred to, but it is altogether unnecessary. The bankruptcy court has jurisdiction to order a sheriff holding property of a bankrupt under attachment levied within four months before the filing of a petition in bankruptcy to deliver the same to the trustee in bankruptcy, or, where property has been sold, to order the proceeds to be delivered over to such trustee. The attachment, judgment, and execution in the case of *Alexander v. Anderson & Berry* were rendered absolutely void by the order adjudicating Anderson & Berry bankrupts, and any sale under the execution, after such adjudication, would have also been void, and, if it had been made, the proceeds, as already shown, would have remained the property of the bankrupt. Under the findings and the law, the defendant sheriff seems to have been entirely justified in the course he pursued.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

144 Cal. 10

**BORCHARD v. BOARD OF SUPRS OF VENTURA COUNTY. (S. F. 3,670.)**

(Supreme Court of California. June 30, 1904.)

WRIT OF REVIEW—CONTRADICTING RETURN—INCORPORATION OF CITY—PETITION—AFFIDAVITS—COUNTY SUPERVISORS—JURISDICTION—AFFIDAVIT OF PUBLICATION—ELECTION NOTICE.

1. The return to a writ of review may not be contradicted by affidavits of petitioner.

2. The writ of review lies only to review the exercise of judicial functions in excess of jurisdiction.

3. The petition for incorporation of a city, which St. 1883, p. 94, c. 49, § 2, as amended by St. 1889, p. 371, c. 251, provides shall state the population "as nearly as may be," is sufficient where it alleges that it states the popula-



tion "as nearly as the same can be stated by your petitioners."

4. Though affidavits accompanying a petition for incorporation of a city are dated March 13th, while the petition was filed April 7th, but they show that a certain number of electors had signed the petition on March 13th, they are sufficient; the presumption being that the state of facts shown continued, and it being for the opponents of incorporation to show on the hearing that, by death or departure from the district, the number had been reduced below that required.

5. The jurisdiction of a board of county supervisors in the matter of the incorporation of a city is not affected by the insufficiency of the affidavit of publication filed with the petition and affidavits of electors, a sufficient affidavit of publication having been filed before they reached their final determination.

6. The action of the board of supervisors of a county in the matter of the incorporation of a city in determining the boundaries is legislative, and in canvassing the returns and announcing the result is ministerial, and therefore cannot be reviewed under a writ of review.

7. As the municipal incorporation act of 1883 calls for an election notice, either by publication or by posting, it is sufficient, where it is given both ways, if it is given properly either way.

In Bank. Writ of review by J. E. Borchard against the board of supervisors of Ventura county. Writ discharged.

T. O. Toland and M. J. Rogers (Barnes & Selby, of counsel), for petitioner. Blackstock & Orr and I. M. Stewart, for respondent.

**HENSHAW, J.** Petitioner sues out this writ of review to test the validity of the proceedings of the board of supervisors of Ventura county, resulting in the incorporation of the city of Oxnard. The proceedings were had under the municipal incorporation bill of 1883.

The board of supervisors made return showing the proceedings had before them. Petitioner has filed affidavits attacking the return so made, and asks us to consider these affidavits, and, in effect, amend the return. This we may not do. Where the jurisdiction of an inferior tribunal turns upon a disputed question of fact, and the evidence before that tribunal is not made a part of the return, the court of review may call upon the inferior tribunal to certify the evidence upon which it acted. *Whitney v. S. F. Fire Department*, 14 Cal. 479, 501; *Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; *In re Madera District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Stumpf v. Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350. And the findings of fact prepared by the inferior tribunal, and voluntarily sent us with the record, may be resorted to when the proper disposition of the case renders their consideration necessary. *Blair v. Hamilton*, 32 Cal. 49; *Lowe v. Alexander*, 15 Cal. 300; 4 *Ency. of Pleading & Practice*, p. 265. But this is the limit to which the court will go under this writ. The record returned imports absolute verity, and evidence allunde

will not be received to contradict it. *De Pedreana v. Superior Court*, 80 Cal. 144, 22 Pac. 71; *In re Grove Street*, 61 Cal. 443; *Ex parte Sternes*, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; *Roe v. Superior Court*, 60 Cal. 93; *Hoffmann v. Superior Court*, 79 Cal. 475, 21 Pac. 862; *Sayers v. Superior Court*, 84 Cal. 642, 24 Pac. 296; *Deer v. Highway Com'rs*, 109 Ill. 379; *Rutlans v. Worcester*, 20 Pick. 71; *Mendon v. Worcester Com'rs*, 5 Allen, 13; *Spelling, Ex. Rel.* § 2021.

It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers exercising judicial functions to their proper jurisdiction. It may not be used to correct errors or irregularities within the jurisdiction of the inferior tribunal, nor will it ever lie to review a purely legislative or executive act. *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312; *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480; *Quinchard v. Trustees of Alameda*, 113 Cal. 664, 45 Pac. 856.

Under section 2 of the municipal incorporation act of 1883 (St. 1883, p. 94, c. 49), as amended March 19, 1889 (St. 1889, p. 371, c. 251), the jurisdiction of the board of supervisors is obtained by filing a proper petition, therein mentioned, together with the affidavit of three qualified electors residing within the limits of the proposed corporation, as prima facie evidence of the requisite number of bona fide signers to the petition, and the publication of such petition for at least two weeks before the time at which it is presented, in some newspaper printed and published in such county, together with a notice stating the time of meeting of the board at which the petition will be presented. It may be conceded, but only for the purposes of this case, that the board of supervisors, in determining that a proper petition has been so presented, supported by a proper affidavit that notice was published, acts judicially, or at least quasi judicially, and that its determination upon these matters is therefore subject to review. *People v. Town of Linden*, 107 Cal. 94, 40 Pac. 115.

Objection is made to the petition presented to the board of supervisors:

1. That the number of inhabitants residing within the boundaries of the proposed corporation was not stated "as nearly as may be," and in this regard it is said that no facts are given as a basis for the number stated, no census seems to have been taken, and that the petition, in terms, says that "more than 500 and not to exceed 3,000 persons reside within the proposed boundaries, herein above particularly described, \* \* \* and that the number of inhabitants therein, according to the best knowledge, information, and belief of your petitioners, is 2,000." It is argued that the clause "as nearly as

the same can be stated by your petitioners" is not a compliance with the terms of the law, which requires the number to be stated "as nearly as may be." But as the law contemplates that the petitioners are the ones who shall state the population "as nearly as may be," when they have stated it as nearly as it "can be stated by them" they would seem to have strictly complied with the law; and, indeed, the declaration in this regard is much more definite than that in *People v. City of Riverside*, 70 Cal. 461, 11 Pac. 759, where this court declared that stating the number of inhabitants to be "about 3,000" sufficiently conformed to the requirement of the act.

2. Objection is made to the sufficiency of the affidavit of the three electors. In this the sufficiency of the affidavit as to form and substance is not disputed, but it is urged that as the affidavit was dated upon March 13, 1903, and filed with the petition upon April 7th following, it does not comply with the requirements of the municipal incorporation act, because it only establishes the conditions existing upon March 13th. It is shown, however, by the affidavit, that 76 electors residing within the proposed corporation had signed the petition on the 13th of March, and the presumption is that the state of facts thus shown to exist continued. It was incumbent upon the opponents of incorporation to have made proof upon the hearing that, by death or departure from the district, the number had been reduced below that requisite under the law. *Kidder v. Stevens*, 60 Cal. 414; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557. Moreover, while the petition was presented upon April 7th, the board of supervisors continued the hearing of all matters connected with it from time to time until the 16th day of May, when, as the record shows, in regular session, it "proceeded to the further hearing of said petition, and took evidence oral and documentary upon the allegations thereof, and also heard the protests and objections of various and sundry persons interested therein objecting to the proposed boundaries and limits of said proposed corporation. \* \* \* From which evidence and hearing it appears to the satisfaction of the board, and it does hereby find and determine the following." Then follow findings upholding the sufficiency of the petition as to all matters here questioned. These findings, being a part of the record certified to us, may be resorted to in aid of the determination of the question. *Blair v. Hamilton*, 32 Cal. 49; *Lowe v. Alexander*, 15 Cal. 300; 4 Ency. of Pleading & Practice, p. 265.

3. It is said, however, that the affidavits of publication filed April 7th with the petition and with the affidavit of the three electors was insufficient, and that the board of supervisors therefore had no jurisdiction to continue the matter for hearing and determination, as they did. As has been stated,

they continued the consideration and hearing till May 7th, then again till May 9th, and then again until May 16th, for the purpose of taking evidence and hearing objections to the proposed incorporation. Upon May 7th the affidavit of publication in the Oxnard Courier was filed, and this affidavit in all respects complies with the law. Certain defects are alleged to exist as to the earlier affidavits of publication, which, it is contended, render them insufficient in law. However this may be, when the supervisors finally came to act, and when, for the first time, they reached their determination upon the matter, an affidavit sufficient in all respects was filed in proof of the publication of notice required by the municipal incorporation bill. The supervisors unquestionably had the power to continue their sittings from time to time, even if it be conceded that their jurisdiction to determine was not complete until a sufficient affidavit of publication had been presented to them. Indeed, it would have been in strict accord with legal propriety and procedure, if question had arisen as to the sufficiency of this affidavit, to continue their hearing in order to be the better advised upon the matter, or in order, if such were the fact, that additional evidence by way of a proper affidavit should be presented to them before reaching their final determination.

4. We have now considered all of the questions arising in this proceeding which by the utmost liberality can be said to be properly before us under this writ of review. In all other matters the action of the supervisors is either legislative, ministerial, or executive, and, whatever may be the errors committed by them in their disposition of such matters, those errors are not reviewable under this writ. Thus their power to determine the boundaries is legislative. *Vernon v. Board of Supervisors (Cal.)* 76 Pac. 253. In canvassing the returns and in announcing the result, their duties were ministerial. *Calaveras Co. v. Brockway*, 30 Cal. 325; *People v. Walter*, 68 N. Y. 403; *Clark v. Buchanan*, 2 Minn. 346 (Gil. 298); *McCrary on Elections*, § 268. The law under which they were operating, from the moment when they determined upon the sufficiency of the petition presented to them, and established boundaries, was mandatory, purely, and vested them with no discretion whatsoever. The board "shall" give notice of the election, "shall" proceed to canvass the votes cast, "shall" declare such territory duly incorporated, and "shall" cause a copy of their order so declaring, duly certified, to be filed in the office of the Secretary of State. Therefore, even if the board, in the doing of these things, should have been guilty of such irregularities and misconduct as to vitiate the election, no relief could be granted in this proceeding. In *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, it is said that the statute authorizing

the formation of sanitary districts requires that the order or proclamation calling an election "shall be posted for four successive weeks prior to the election in three public places within the proposed district, and shall be published," etc. The opinion declares, "Without such posting, the election was void, and the subsequent declaration of the board of supervisors to the effect that the Templeton sanitary district was duly organized is a nullity." This is said in proceedings under a writ of review, and, while the declaration is true in point of law, the purview of the writ was unduly extended when it was announced in that proceeding. We have already pointed out that the action of the supervisors in canvassing the returns and declaring the result was ministerial, purely, and by no extension of the rule or stretch of reasoning can it be said that the issuance of an election proclamation or notice is a judicial act. But as in this particular case it may be of benefit to dispose of the question of the sufficiency of the election notice, it may be said that the act calls for a notice, either by publication or by posting. From excess of caution, the supervisors required both. But as the law itself does not require both, if either the publication or the posting was sufficient, within the law, the notice itself was sufficient. That the publication was in fact sufficient fully appears from the return here made, showing, first, the order of the supervisors that notice be published, in the form prescribed, for at least two weeks prior to such election, in the Oxnard Courier, "which is a weekly newspaper of general circulation, printed, published and circulated within said proposed boundaries, as the same are established and defined by this board of supervisors." Following this, upon the 23d day of June, is the affidavit of the printer and publisher of the Oxnard Courier, sufficient in form and substance, showing the required publication, which affidavit was filed upon the 26th day of June, before the time when the board of supervisors proceeded to canvass the returns.

It appearing from the foregoing that the proceedings of the board of supervisors, had in the above-entitled matter, were within their jurisdiction, the writ is discharged.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

144 Cal. 46

PEOPLE v. KERRICK. (Cr. 1,153.)  
(Supreme Court of California. July 2, 1904.)

CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSE—EFFECT OF DISMISSAL—SECOND PROSECUTIONS—SETTING ASIDE DISMISSAL.

1. The offense of altering the brands on cattle with intent to steal the same, created by Pen. Code, § 357, is not a necessary element of the offense of grand larceny of the cattle, nor necessarily included therein within Pen. Code, §

1159, providing that the jury may convict defendant of any offense necessarily included in that charged, so that a conviction of the former cannot be had under an information charging the latter, and a conviction or acquittal of the latter is no bar to a prosecution for the former.

2. A larceny of cattle completed on one day by driving them out of the pasture where they were kept by the owner, with intent to steal the same, is a distinct offense from that of changing the brands and marks on the cattle on the following day, so as to prevent identification; and a conviction or acquittal of the former is no bar to a prosecution for the latter.

3. Under Pen. Code, § 1387, providing that an order for dismissal is not a bar to a subsequent prosecution when the offense is a felony, a dismissal, on motion of the district attorney, of a prosecution for grand larceny of cattle is no bar to a subsequent prosecution for changing the brands on the cattle, in violation of Pen. Code, § 357, even conceding that a conviction or acquittal of the former would be a bar to a prosecution for the latter, as both are felonies.

4. Pen. Code, § 1387, providing that an order of dismissal is not a bar to a subsequent prosecution when the offense is a felony, is not in conflict with any constitutional provision.

5. Under Pen. Code, § 1387, providing that an order of dismissal is not a bar to a subsequent prosecution when the offense is a felony, it is not necessary, when a case has been dismissed on motion of the district attorney, to set aside such judgment of dismissal before entertaining a second prosecution.

Commissioners' Decision. Department 1.  
Appeal from Superior Court, Fresno County;  
H. Z. Austin, Judge.

Marion Kerrick was convicted of altering the marks and brands on cattle with intent to steal the same, and appeals. Affirmed.

W. D. Tupper and Thompson & Prince, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., Geo. W. Jones, Dist. Atty., and S. C. St. John, Dep. Atty., for the People.

GRAY, C. The defendant was convicted of the crime defined in section 357 of the Penal Code, of altering and defacing the marks and brands on certain 22 head of cattle, with intent to steal the same, and prevent the identification thereof. He appeals from the judgment and from an order denying him a new trial.

At the trial it was admitted by the prosecution that the defendant had theretofore been duly tried upon an information charging him with the larceny of the same cattle referred to in this information, and that at such former trial the same evidence was used by the prosecution concerning the alteration of the marks and brands of the cattle in question as was presented by the people in this trial. Also that said former trial resulted in a disagreement of the jury, no verdict being found. The defendant then, in support of his plea of former acquittal and once in jeopardy, offered to prove that on motion of the district attorney, made on the ground that, in his opinion, the evidence that could be adduced upon a retrial would be insufficient to convict the defendant, a judgment and order of the court was duly made and

entered dismissing the information in said grand larceny case. The court excluded the offered evidence, and upon this ruling arises the only question presented upon this appeal.

The action of the court in excluding the offered evidence may be upheld on two grounds:

1. No conviction could be had of the crime defined in section 357 of the Penal Code under an information charging only grand larceny. The former crime is not in any sense a necessary element of the latter, nor can it be said to be "necessarily included" in the latter. Section 1159 of the Penal Code provides that "the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged." To be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. "To entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense charged be the same in law and fact." *People v. Helbing*, 61 Cal. 620. It seems, from the record before us, that the two crimes were not only distinct in law, but also in fact. The larceny of the cattle was completed on the 27th day of March, 1902, by driving them out of a pasture where they were kept by the owner, with intent to steal them. The marks and brands were changed the day following, to prevent identification. Here were two separate and distinct criminal acts, committed on different dates, each constituting a crime in fact as well as in law, and each being also entirely distinct in name and statutory definition, and neither constituting a necessary incident to or part of the other. *People v. Bently*, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225; *People v. Devlin* (Cal.) 76 Pac. 900.

2. Another reason why the objection was properly sustained is found in the fact that each of the prosecutions was for a felony, and a judgment of dismissal on motion of the district attorney does not bar a second prosecution in case of a felony, even assuming that there was but one offense, or that the one offense was included in the other. Section 1387, Pen. Code. This section is not in conflict with any provision of the Constitution. Nor is it necessary, where the case has merely been dismissed on motion to set aside such previous judgment of dismissal before the court would be authorized to entertain a second prosecution for a felony.

The judgment and order should be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

(144 Cal. 19)  
ADAMS et al. v. HOPKINS et al. (S. F. 1,757.)\*

(Supreme Court of California. July 1, 1904.)

DEEDS—CONSTRUCTION—CONDUCT OF PARTIES—TECHNICAL WORDS—QUANTITY OF LAND GRANTED—INDEFINITENESS OF DESCRIPTION—EFFECT—LIMITATIONS—PARTITION PROCEEDINGS—NATURE OF PLAINTIFF'S ACTION—FINDINGS—EVIDENCE—RECORDING STATUTES—POWER OF ATTORNEY.

1. Under Code Civ. Proc. § 318, which requires seisin or possession within five years before the commencement of an action to recover real property or the possession thereof, and Civ. Code, § 1007, providing that five years' occupancy of land confers title by prescription, an action for partition of land originally granted by the Mexican nation, brought within five years from the issuance of the patent therefor, was brought in time.

2. Code Civ. Proc. § 343, barring actions for relief not otherwise provided for after four years, has no application to suits for partition.

3. The statute of limitations never bars partition as between tenants in common, and affects partition proceedings only where the land sought to be divided has, by prescription, become vested in another.

4. The statute of limitations is a positive rule of law, which must be enforced by the courts when pleaded and found applicable, and when it does not apply it must be so held.

5. In partition proceedings it is not necessary to specifically find an ouster of certain co-tenants by others in order to support the ultimate finding that limitations has run against such co-tenants and the enforcement of their interests. The fact of such ouster, if necessary, will be implied from the ultimate finding.

6. In partition proceedings an amendment to the complaint, including in the lands sought to be partitioned certain tracts omitted in the original complaint, forming part of the same grant, did not introduce a new cause of action, and its allowance was within the discretion of the court.

7. In a partition suit of land constituting a Mexican grant it is not necessary that all the land covered by the grant be included, but all that is necessary is that the land sought to be partitioned be held and possessed by co-tenants having an estate of inheritance for life or for years, as required by Code Civ. Proc. § 752.

8. Under Code Civ. Proc. § 382, providing that where questions are of common interest, and the parties are numerous, one may sue for all; section 753, providing that the interest of all persons in the property must be set forth in a complaint for partition; and section 759, providing that in partition the rights of all parties may be ascertained—the action of the original plaintiff in partition is for the benefit of all persons interested in the property included in the complaint, and all such parties are actors from the commencement of the suit, so that the running of limitations as to them is stopped by the filing of the complaint.

9. The rights of adverse occupants of land sought to be partitioned may be put in issue, tried, and determined in the partition suit.

10. Where the pleadings and also the admitted facts, in partition proceedings, showed that limitations had not run against the suit, there was no necessity of awarding a jury trial to determine that issue.

11. Error, if any, in substituting the executor for a deceased plaintiff in partition, is cured by an amendment substituting the heirs.

12. Under Code Civ. Proc. § 416, providing that the voluntary appearance of a defendant is equivalent to personal service on him, defend-

\*Rehearing denied July 30, 1904.

ants who voluntarily demur to or answer the complaint waive defects in the service or return of summons.

13. A defendant cannot avail himself of defects in the service of summons on other parties.

14. The title of grantees who are not made parties to a subsequent foreclosure suit is unaffected by such suit and the sheriff's deed made in pursuance thereof.

15. A claim of fraud in a conveyance is barred both as stale and by limitations where over 40 years has elapsed since the facts claimed to constitute the fraud arose.

16. Where at the time a deed of conveyance was executed the grantees therein executed a deed to the grantors reciting the first deed, and stating that it was made in consideration of an agreement by the grantees to pay the grantors a sum of money, and purported to reconvey the land to secure the same, both deeds were to be construed as one; the former as a conveyance of title to the grantees, and the latter as a mortgage, under Practice Act 1851, § 260, p. 93, providing that a mortgage shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover possession without foreclosure.

17. Where there is a doubt whether an instrument was intended as a mortgage or not, the subsequent action of the mortgagees in referring to the same in a release as a "mortgage" may be looked to in determining the question.

18. A settlement between parties to a certain transaction, followed by releases and other instruments, confirming title in certain of the parties according to the term of the original deeds to them free from all incumbrances and conditions, effectually settled the title in such parties regardless of questions of fraud, want of consideration, etc., in the procurement of the original deeds.

19. Where the court found that a certain instrument was executed in full adjustment and settlement of all claims and demands arising out of a certain grant, it was not necessary for it to specifically pass on the questions of fraud and want of consideration in such grant.

20. The sufficiency of the evidence to support a finding cannot be questioned on appeal in the absence of any specification of the particulars wherein it is insufficient.

21. Under Code Civ. Proc. § 1951, allowing the introduction of original records of instruments affecting real property without further proof, official county records of a release may be received in evidence without accounting for the original.

22. Under Civ. Code, § 1459, providing that the assignment of a nonnegotiable written contract for the payment of money transfers all the rights of the assignor subject to equities and defenses existing in favor of the maker at the time of the assignment, an assignee of a released mortgage stands in no better position than his assignor, though he had no notice of the release, and it was not recorded.

23. There is no statute requiring a power of attorney to release a mortgage to be recorded.

24. Where a release of a mortgage appears of record, executed by an attorney in fact, subsequent purchasers of the mortgage do so at their peril, though the power of attorney is not of record.

25. A power authorizing an attorney in fact to release "the mortgage on the Sobrante for forty thousand dollars" does not condition the execution of the release on the payment of \$40,000, but the sum stated is merely descriptive of the mortgage.

26. It will be presumed that there was a good consideration for a written release in the absence of evidence to the contrary.

27. Civ. Code, § 1645, providing that technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, applies only to words ex-

clusively technical, or to those that are shown to be used in a technical sense, and not where the question to be determined is whether words not exclusively technical were used in a technical sense.

28. A deed reserving from the grant lands "heretofore conveyed" reserved in the grantors the legal title to lands, the equitable title to which had been previously sold.

29. A general finding, contained in the conclusions of law, that certain parties are the owners in fee of the interest claimed, settles all questions of title not negated by the special findings.

30. Where a deed conveyed "one-tenth part thereof, less by 640 acres," the 640 acres was deducted from the tenth conveyed.

31. A deed purported to convey "the one undivided one-half of all my interest \* \* \* which was granted," etc., "meaning to convey three-fourths of one-twentieth of said ranches less 320 acres." At the time the deed was made the grantor's whole interest was three-fourths of one-half of a certain interest. Held, that the grantor intended to convey merely one-half, and not his whole interest.

32. A deed conveying all the grantor's interest "to 320 acres of land, to be taken out of his interest which he now holds in a certain tract of land," etc., "not to be taken where the [grantor] or any of his tenants are in possession in said grant, the right here sold is an undivided one," etc., conveyed not 320 acres undivided of the tract then owned by the grantor, but merely the grantor's proportionate interest in the number of acres mentioned in said certain tract.

33. A deed quitclaiming all the grantor's interest in and to 50 acres of a certain tract undivided, conveyed not 50 acres of the undivided interest of the grantor, but his interest in 50 acres.

34. A deed purporting to convey a specific tract of land beginning at a designated monument, but too indefinite in its calls to inclose any particular tract of land, did not convey an undivided interest in the tract in which the deed stated the land lay.

35. A deed conveying all the grantor's interest in "one and one-half square miles of farming land, being a portion of the lands granted to me" in a certain tract "running from the corral one and one-half miles, and bounded by the creek," conveyed an undivided interest in the tract.

36. A finding that, with reference to certain tracts of land, the action is barred under designated sections of the Code of Civil Procedure, and that various parties occupying and claiming the several parts of the tract are the owners thereof, is a finding of an ultimate fact, and to be treated as such, though contained in the conclusion of law.

In Bank. Appeal from Superior Court, Contra Costa County; Jos. P. Jones, Judge.

Suit for partition by Edson F. Adams and others against Emily B. Hopkins and others. From an interlocutory judgment, and from orders denying a new trial, certain defendants appeal. Affirmed.

See 69 Pac. 228; 73 Pac. 971.

Appeal of Bernardo Fernandez et al.: Chas. E. Wilson and J. R. Glascock, for appellants Edson F. Adams et al. Robert O. Porter and W. S. Tinning, for appellant Fernandez. John O'B. Wyatt, for appellant Wilson. Julius Rayer, Judah Boas, Donald Y. Campbell, Walter Van Dyke, Maria Berard, Annals Richon, and Matilda Champrey, pro se. R. H. Latimer, A. B. McKenzie, H. V. Alvarado, G. W. Bowie, C. Y. Brown, III

R. Chase, Rodgers & Paterson, Sydney V. Smith, W. S. Goodfellow, J. H. Moore, Mastick, Belcher & Mastick, G. H. Cabaniss, R. H. Countryman, E. W. McGraw, R. W. Hent, Myrick & Deering, Gordon & Young, James D. Thornton, John B. Mhoon, Sawyer & Burnett, J. C. Bates, M. M. Estee, A. G. Fisk, Isaac Frohman, Henry E. Monroe, O. C. Tripp, W. T. Baggett, A. Everett Ball, Philip G. Galpin, A. E. Bolton, C. S. Peery, E. S. Pillsbury, Wm. H. Chapman, Stephen L. Sullivan, Henry E. Highton, M. G. Cobb, Theodore H. Hittel, Theodore Wagner, Reed & Nusbaumer, Sam Bell McKee, Davis & Hill, M. O. Chapman, W. H. Waste, H. Miller, Fitzgerald & Abbott, W. S. Wells, John Reynolds, Joshua B. Webster, G. S. Langan, Louis H. Sharp, G. W. Haight, W. F. Herrin, W. H. H. Hart, H. A. Powell, E. H. Rixford, G. C. Groezinger, and Edgar M. Wilson, for other respondents.

Appeal of Joseph Wohlfrom et al.: R. H. Countryman, for appellants. Julius Rayer, Judah Boas, Donald Y. Campbell, Maria Berard, Annals Richon, and Maltida Champrey, pro se. Chas. E. Wilson, John R. Glascock, E. W. McGraw, R. H. Latimer, A. B. McKenzie, H. V. Alvarado, G. W. Bowle, C. Y. Brown, Eli R. Chase, Rodgers & Paterson, Sydney V. Smith, W. S. Goodfellow, J. H. Moore, Mastick, Belcher & Mastick, G. H. Cabaniss, Robert C. Porter, W. S. Tinning, John O'B. Wyatt, R. W. Hent, Myrick & Deering, Gordon & Young, James D. Thornton, John T. Thornton, John B. Mhoon, Sawyer & Burnett, J. C. Bates, M. M. Estee, A. G. Fisk, Isaac Frohman, Henry E. Monroe, O. C. Tripp, W. T. Baggett, A. Everett Ball, Philip G. Galpin, A. E. Bolton, C. S. Peery, E. S. Pillsbury, Wm. H. Chapman, Stephen L. Sullivan, Henry E. Highton, M. G. Cobb, Theodore H. Hittel, Theodore Wagner, Reed & Nusbaumer, Sam Bell McKee, Davis & Hill, M. O. Chapman, W. H. Waste, H. Miller, Fitzgerald & Abbott, W. S. Wells, John Reynolds, Joshua B. Webster, G. S. Langan, Louis H. Sharp, G. W. Haight, W. F. Herrin, W. H. H. Hart, H. A. Powell, E. H. Rixford, G. C. Groezinger, and Edgar M. Wilson, for other respondents.

Appeal of Victor Castro et al.: Sam Bell McKee, for appellant Pierce. P. G. Galpin, for appellant Castro. W. T. Baggett, for appellants D. K. Tripp et al. O. C. Tripp, in pro. per. Chas E. Wilson, for plaintiff respondents. E. W. McGraw et al., for defendant respondents.

**PER CURIAM.** The suit was brought for the partition of the tract of land known as the "Sobrante," granted to Juan Jose and Victor Castro by the Mexican nation April 22, 1841, and patented August 11, 1883, for 18,982.49 acres. The appeals are from the interlocutory judgment, and (some of them) from orders denying a new trial. The original complaint was filed July 31, 1888, the

amended complaint February 19, 1894. The original plaintiff was Edson Adams, who died December 14, 1890. The present plaintiffs have succeeded to his title under his will, and under that of Hannah J. Adams, one of his legatees.

The original complaint excluded from the land sought to be partitioned six segregated tracts, forming part of the grant. These were afterwards included in the amended complaint, and are referred to in the findings and interlocutory judgment as "Specified Tracts" A, B, C, D, E, and F. As to all of these it was found by the court that the cause of action was barred by the statute of limitations, and they were accordingly allotted to the parties in possession. No question is made as to these allotments, except in so far as they affect other questions, in connection with which they will be considered. Otherwise they may be regarded as eliminated from the case. Besides these there were some other specific allotments, aggregating, with the others, 11,165.79 acres. The remainder of the grant, containing 8,816.70 acres, is referred to in the interlocutory judgment as the "Surplus Sobrante."

The several appeals may be arranged for convenience of consideration in the following order: (1) The appeals of Wohlfrom and others, relying (mainly) on the statute of limitations, which will be considered under the head of "Settlers' Case." (2) The appeals of Victor Castro and the defendant Tripp, contesting the title of the plaintiffs and of others, deraining title under the same conveyances, which will be considered under the head of the "Victor Castro Claim." (3) The appeals of Fernandez, Wilson, and the plaintiff, affecting (as expressed by the attorneys) the "John Wilson Title." (4) The appeals of Rodgers, Reynolds, and Mhoon and McElrath, affecting the "Anna Wilson Title," and appeals affecting the "Franklin Title."

1. **The Settlers' Case.** The appellants referred to under this head (with the exception of two) claimed and were allowed a small undivided interest in the Surplus Sobrante, but they claimed they should have been allowed the interest (323 acres) allotted to Emily B. Hopkins. They claim also, adversely to the title, by adverse possession and the statute of limitations. The decision, it is claimed, should have been in their favor on the statute of limitations. Other errors are urged, but the main contention is as to the statute, and to this our attention will first be directed.

The appellants in question appeared and answered the original complaint, which was filed July 1, 1888, within five years after issue of the patent, August 11, 1883. The plaintiffs' action was therefore not barred at the time the suit was commenced. On this point the law is too well settled to admit of discussion. *Anzar v. Miller*, 90 Cal. 344, 345, 27 Pac. 299, and cases cited; *Vai-*

entine v. Sloss, 103 Cal. 221, 222, 37 Pac. 326, 410; Tuffree v. Pohlemus, 108 Cal. 670, 41 Pac. 806. What was said by the court in *Emeric v. Alvarado*, 64 Cal. 603, 609, 2 Pac. 418, referred to a survey approved by the district court under the act of Congress of June 14, 1860, under which plats approved as prescribed by the act were made equivalent to a patent. It has no application to the present case. In *Reed v. Ybarra*, 50 Cal. 467, it was held that, even where there had been a survey thus approved, the statute commenced running only with the issue of patent. But appellants contend that section 343, Code Civ. Proc., prescribing a four-years limitation of actions, applies to the case. The statute of limitations never bars relief between tenants in common in an action of partition. *Knapp on Partition*, 193. It is only where a party has by operation of the statute of limitations lost all right to and in the land, and such right has by prescription become vested in another, that the statute of limitations cuts any figure in a partition case. Of course, if one has no interest left in the property, he cannot have partition. The only sections of our Codes then that could have any application to the case are section 318, Code Civ. Proc., and section 1007, Civ. Code, the former requiring seisin or possession within five years before the commencement of the action as a necessary condition of the right to maintain the action for the recovery of real estate; and the latter providing that occupancy for the period prescribed by the former section (five years) confers title by prescription. The facts do not bring the case within this five-year statute, and the four-year statute in no way applies.

There is no foundation for the complaint that the decision of the trial court as to the statute of limitations was inconsistent and unfair as applied to the interests of the several parties to the suit. These appellants were parties to the original complaint, and their lands were expressly included therein. The lands of the defendants whose titles by adverse possession were upheld were expressly excluded from the original complaint, and were brought in subsequently after the five-year statute of limitations had run in their favor. The statute of limitations is a positive rule of law, and the courts must, when it is pleaded, be governed by it where it applies, and where it does not apply it must be so held. Had these appellants, instead of waiting for the statute to run in their own favor, commenced a suit for partition against all the parties interested within the time allowed by law, they would not now be complaining of the unfair and inequitable operation of the statute. They might have commenced such an action after the patent issued at any time before this action was begun. It is said that an effort was made in this action to have these parties who were finally given the benefit of

the statute brought into the action. Our attention, however, is not called to any objection made to the action of the court, or any exception taken or implied, or any specification in this connection that can be here reviewed; and we have not been able to find anything of that kind in the record.

It was not necessary to find specifically whether there had been an ouster of their co-tenants on the part of these parties who successfully pleaded the statute of limitations. The finding of the ultimate fact that the statute had run in their favor was all that was necessary, and, if an ouster were necessary to set the statute in motion, the ouster would be implied from the finding of the ultimate fact of the running of the statute. It is clear that the statute of limitations may be resorted to in an action of partition so far as it establishes interests in the property. And this is in no way inconsistent with the general rule that the right of action for a partition of the property between tenants in common is not barred by the lapse of time. What is here said as to the statute of limitations is intended as a full reply to the contention of each and all the appellants along that line.

The case was not affected by the amendment to the complaint. The allowance of the amendment was within the discretion of the court, and there was no new cause of action. The change was simply in the inclusion of the specific tracts omitted in the original complaint. As to the rest of the lands the cause of action remained the same; nor were the defendants, as adverse occupants, in any way affected by the change. We have no doubt of the sufficiency of the original complaint. There is nothing in the law that requires the whole of a Mexican grant to be included in a partition suit. All that is required is that the land sought to be partitioned comes within the description given in section 752 of the Code of Civil Procedure. The plaintiffs' cause of action was therefore not barred. Nor after the commencement of the action did the statute run as to other parties. The plaintiffs' action is for the benefit of all persons interested in the property included in the complaint, and all are actors from the commencement of the suit. Code Civ. Proc. §§ 382, 753, 759. The case is substantially the same as that of a creditors' bill; where it is held that a creditor proving his claim "becomes a complainant by relation to the time of the filing of the bill." *Richmond v. Irons*, 121 U. S. 51, 7 Sup. Ct. 788, 30 L. Ed. 864 et seq., and cases cited. See, also, *Sterndale v. Hankerson*, 1 Sim. Ch. R. 398-400.

Other objections are: That the rights of these defendants as adverse occupants could not be determined in this case; that, at all events, on the question of title, the defendants were entitled to a jury trial; that on the death of the original plaintiff the court lost jurisdiction of the case by reason of the



substitution of the executors of deceased instead of his heirs; that the case should be dismissed for failure to serve and return summons, etc. But none of these objections are tenable. With regard to the first, it is settled in this state that the rights of adverse occupants of land sought to be partitioned "may be put in issue, tried, and determined in such action." *De Uprey v. De Uprey*, 27 Cal. 335, 87 Am. Dec. 81; *Gates v. Salmon*, 35 Cal. 597, 598, 95 Am. Dec. 139; *Martin v. Walker*, 58 Cal. 597; *Jameson v. Hayward*, 106 Cal. 687, 39 Pac. 1078, 46 Am. St. Rep. 268. Indeed, in the partition of large tracts of land it would otherwise be impracticable to proceed. Whether, in such case, parties in possession claiming adversely to the title under which partition is sought are entitled to a jury trial, is an interesting question, but one that it will be unnecessary to consider. In this case the claims of the defendants rest exclusively on adverse possession, and the statute of limitations or the doctrine of prescription; but these claims, as appears from what has already been said, are, on the admitted facts, untenable, and there was therefore no issue with regard to them to be tried. That these appellants were not entitled to the benefit of the statute of limitations can be determined from an inspection of the pleadings. The date of the patent was given in the original as well as in the amended complaints, and the answers of these appellants to the second amended complaint, upon which the action was tried, did not deny that date. The date of filing the original complaint was less than five years after the date of the patent. Nothing was put in evidence that could throw any light upon the defense of the statute of limitations, except the patent. At the very time that the jury was demanded the admissions of the pleadings disclosed that the statute of limitations had not run in favor of these appellants as against the plaintiffs.

The other objections are equally untenable. If there was error in substituting in the case the executors of the deceased plaintiff, it was cured by the subsequent amendment. With regard to the summons, that was issued within the year. The motions to dismiss for defects in the issuance, service, and return of summons, and on account of its amendment, were properly denied, because these appellants had, prior to the making of said motion, each and all answered the original complaint as well as the amended complaint. Their original appearance in the case was also made within three years after the action was begun. The court then had jurisdiction of their persons by reason of their appearance, and it was immaterial, as to them, whether any summons had been served or returned. The voluntary demurrers and answers to the complaint were equivalent to the due service of the summons. Section 416, Code Civ. Proc. They had thereby waived all right to take advantage of any defect in the

service or return of summons. *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006. Nor can the appellants avail themselves of defects in the service of summons on other parties. *Peck v. Agnew*, 126 Cal. 609, 59 Pac. 125.

With regard to the interest allotted to Emily B. Hopkins, both she and the appellants deraigned title under deeds to their respective predecessors in interest from the same grantors, Hatch, Brangan, Brown, and Coleman—the deed to the former, of date February 29, 1877, being for the 232 acres in question; the deed to the latter, of date March 12, 1877, being for the undivided interest of the grantors in the Sobrante. The former deed was not recorded until October 10, 1878, more than a year after the record of the latter; but there is no finding that the grantees in the latter deed took without notice. Civ. Code, §§ 1214, 1217; *Beattie v. Crewdson*, 124 Cal. 579, 57 Pac. 463. The deed itself is not in the record, but it is said in the brief of the respondent that the former deed is referred to in the latter, and the 232 acres conveyed expressly excepted; and we see no denial of this in the appellants' brief.

2. The Victor Castro Claim. The question here involves the original title of Victor Castro as one of the two grantees of the Sobrante. The plaintiffs' interest is deraigned from two sources: The one is a deed from Victor and Juan Jose Castro, of date November 23, 1853, to John B. Frisbie and Ramon De Zalido, purporting to convey to the grantees all the lands embraced in the grant except lands previously conveyed. The other, a sheriff's deed to A. Mhoon and Edson Adams (the original plaintiff), made in pursuance of a sale of date December 20, 1856, under a judgment foreclosing a mortgage made by Castro to Mhoon and Adams July 22, 1853. The plaintiffs' deraignment of title under these deeds is not disputed. If the validity of the former be assumed, it will be observed the title conveyed was not affected by the foreclosure deed, the grantees in the former deed not having been made parties to the suit; and it will be unnecessary to consider it. The deed from the Castros to Frisbie and De Zalido will therefore first demand our attention. Contemporaneously with this, a deed was executed by Frisbie and De Zalido to the Castros reciting the former deed, and that it was made in consideration of an agreement by the grantees to pay to the grantors \$40,000, to be realized from sales to be made, and not otherwise chargeable to them, and purporting to reconvey the land to the Castros for the purpose of securing the said sum of \$40,000. The position of the appellant rests upon the alternative contentions that the effect of the two deeds was to leave the title still in the Castros, and, if this be not the case, that the relations of the parties and the circumstances of the case were such as to make the transaction constructively fraudulent. With regard to the latter claim, were the case a new one, and unaf-



fectured by subsequent transactions, the contention of the appellant might easily be admitted. But it is found by the court that by an agreement subsequently made between Victor and Juan Jose Castro, Frisbie and Vallejo (a grantee of De Zaldo), and Adams, and other grantees of Frisbie and De Zaldo, a settlement was made of all claims and controversies between the parties relating to the Sobrante; and that this agreement was carried into effect by a written release of the mortgage by Victor of date April 1, 1857, and an acknowledgment of satisfaction by Juan Jose of date April 13, 1857, and by the deeds to Adams, Carpenter, and Hepburn of April 13, 1857, and to Victor Castro of September 11, 1858; the deeds referred to covering the whole, or nearly the whole, of the ranch. This—assuming that the deed from the Castros to Frisbie and De Zaldo passed the legal title—must, as found by the court, be taken to be a settlement and release of the Victor Castro claims. Were it otherwise, we should have to regard these claims of fraud as barred—both as stale and under the statutory limitation—by the time that has elapsed since the facts arose which are claimed to constitute the fraud.

As to the legal effect of the deed from the Castros to Frisbie and De Zaldo, and the accompanying deed, claimed by the appellant to be a reconveyance and by the respondent to be a mortgage, the case seems equally clear. The language used in the latter instrument has always, both here and elsewhere, been construed to constitute a mortgage; and in this state, under the provisions of section 260, p. 93, of the practice act, enacted April 29, 1851, it has been uniformly held that a "mortgage creates a mere lien for the purposes of security, and, as in other cases of lien upon real property, can only be enforced by judicial proceedings." *Fogarty v. Sawyer*, 17 Cal. 589; 2 Notes on Cal. Rep. 43. Nor, indeed, can the provisions be otherwise construed. Its terms are that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale" (Practice Act, § 260); which is but to say in effect that it shall not be deemed a conveyance so as to pass the title, for title is but "the means whereby the owner of lands hath the just possession of his property." *Coke on Littleton*, 349, cited *Bouvier's Law Dict.*, word "Title." The two documents are, indeed, to be construed together as one contract. But this does not alter the manifest effect of either; and, though the words of conveyance be the same in both documents, yet in the one they are to be construed as passing the title, in the other as merely mortgaging the land. Indeed, that the parties themselves understood that the deed from Frisbie and De Zaldo to Castro was intended as a mortgage, and actually constituted a mortgage, is evidenced by the recital in the

subsequent release executed by Castro, in which it is referred to as an "indenture of mortgage made by John B. Frisbie and Ramon De Zaldo to secure the payment of \$40,000," etc. In this language reference was made, not to both deeds and not to the whole transaction, but specifically to the "indenture" executed by Frisbie and De Zaldo, and it was over the signature of Castro, called a "mortgage to secure," etc. Even then, if the construction of the transaction were in doubt, this construction of the parties as to their own act might be looked to for the purpose of relieving the doubt.

Again, it may be properly said that the findings above referred to show that the settlement of 1857 and the several releases and other instruments following it had the effect to settle and end all disputes between the parties, and to confirm the title in Frisbie et al. and their grantees, as it was conveyed to them by the original deeds of the Castros to Frisbie et al., and to free that title of all incumbrances and conditions. Whatever doubts there may have been as to where the title to the property stood before the execution of these instruments, certainly there should have been no question about it after their execution. Then all questions of want of consideration for the original deed, constructive fraud in its procurement, and the like should have been considered as finally settled and disposed of forever.

It is still contended, however, that the issues made by the Victor Castro claimants as to the effect of the original agreement between Victor Castro and Frisbie and De Zaldo, and as to whether there was any consideration for the original deed by the former to the latter, and also as to fraud in connection with this deed, and as to notice to the subsequent grantees as to these defects in the original deed from Victor Castro, and that various other issues in this connection are not disposed of by the findings. It was, in effect, found, as already stated, that all those matters were disposed of by the settlement of 1857. By reason of that finding all matters affecting the original deed from Castro became immaterial, and it was not necessary that there should be any express findings on the issues indicated. In the language of the finding the instruments executed in 1857 and 1858 were "in full adjustment and settlement of all claims and demands, the one against the other, or of either against the others, arising or growing out of said Sobrante grant, or any matter or thing relating thereto." There is no specification of particulars of insufficiency of evidence to support this finding. Indeed, no reference is made to it in any way in Victor Castro's notice of intention to move for a new trial, or in any other specification of particulars of wherein the evidence is insufficient, so far as we can ascertain. That it is supported by the evidence is, therefore, not open to question on the record before us.

There is no merit in the objection urged to

the admission in evidence of the record of the release by Victor Castro contained in the official books of the records of Contra Costa county, based on the ground that the original was unaccounted for. The trial was had long after the amendment of section 1951, Code Civ. Proc. (made in 1889), allowing the introduction of the original record "without further proof." And the same thing may be said of the other similar objections.

The Claim of C. C. and D. K. Tripp. These appellants claim under an assignment of the mortgage of Frisbie and De Zaldo to the Castros, made by the latter to one Saville, of date January 27, 1860. This was subsequent to the settlement made by the Castros with Frisbie, Adams, and others, and the release made by Victor Castro in 1857; but it is claimed there was no proof or finding that Saville had any notice of the release. This, however, could make no difference. Saville took subject to all existing equities between the parties, and could stand in no better position than his grantor. Civ. Code, § 1459. It will be unnecessary, therefore, to consider the plea of the statute of limitations.

Much of what has been said as to the Castro claim applies with equal force to the Tripp claim, and is an answer to the greater part of the arguments made on the Tripp appeal.

The original mortgage from Frisbie and De Zaldo to the Castros, as we have seen, was extinguished by the subsequent settlement and the written release executed by the Castros in 1857. Hence there is no such mortgage in existence, and no necessity for quieting title as against it.

The appellants Tripp also fail altogether to specify any particulars as to wherein the finding as to the settlement and as to the release executed by Victor Castro is unsupported by the evidence. As to these appellants, also, the finding must be taken as true.

The objection to receiving in evidence the power of attorney from J. J. Castro to Hepburn, and the release executed by the latter as attorney in fact for the former, made on the ground that the instruments were not recorded in the proper book, is without merit for the reason that the assignee of the mortgage took no better title than his assignor had; and it was immaterial whether these instruments were recorded at all. A power of attorney to execute a mortgage is required to be recorded. Civ. Code, § 2933. And it is also provided that previous conveyances are void, unless recorded, "as against any subsequent purchaser or mortgagee \* \* \* whose conveyance is first duly recorded." Id. § 1214. There is no provision of law, however, requiring that a power of attorney to release a mortgage should be recorded. Section 1215, Civ. Code, reads as follows: "The term 'conveyance' as used in sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incum-

bered, or by which the title to any real property may be affected, except wills." It was not the power of attorney, but the release executed by the attorney, that affected the title to real property in this case. It was upon this construction of the section last cited that the Legislature deemed it necessary to enact the other section requiring the power of attorney to execute a mortgage to be recorded. There being no statute requiring the power of attorney to be recorded, and the release itself having been recorded showing that it was executed by an attorney in fact, the appellants and their predecessors were bound to take notice of the release, and thereafter they purchased the mortgage from the Castros at their peril. The power of attorney to Hepburn expressly authorized him to release "the mortgage on the Sobrante for forty thousand dollars." The words "for forty thousand dollars" were merely descriptive of the mortgage, and it was not intended to make the payment of \$40,000 a condition of the execution of the release. It will be presumed that there was a good consideration for the written release, in the absence of evidence to the contrary. Indeed, the court is not bound to believe an interested witness as against such a presumption, if the latter satisfies his mind. Code Civ. Proc. § 2061, subsec. 2.

3. The John Wilson Title. There are several appeals affecting this title, presenting different and unrelated questions. These are: (1) The plaintiffs' appeal, which attacks the title; (2) the appeals of Sarah A. Wilson and of John and C. F. Reynolds, involving the construction of the description of land in the agreement and deeds under which Wilson derived title; (3) the appeal of the former, involving also the construction of a deed from one Caryl to Venable under which she derives title; and (4) the appeal of Bernardo Fernandez, involving the construction of two deeds—one from Wilson to Narcisa Castro De Gutierrez, the other from McLane to Fernandez. The several questions thus raised will be considered in the order stated.

The Validity of the Wilson Title. This title originated in the agreement between the Castros and Wilson of date August 5, 1852. By the terms of this agreement Wilson, as attorney, was to prosecute to final confirmation or rejection the claim of the Castros to the Sobrante, and to receive for his services "one-tenth part thereof, less by six hundred and forty acres, whenever the said Wilson [should] demand the same." The agreed services were duly rendered by Wilson resulting in the confirmation of the claim by the board of land commissioners, the decree becoming final April 6, 1857. Conveyances of the interest agreed upon were subsequently made to John Wilson by the Castros—by Victor June 20, 1862, by Juan Jose February 7, 1862. But these deeds, it is claimed, being subsequent to the deed of the Castros to Frisbie and De Zaldo, conveyed no title. The justice of this contention is therefore the ques-

tion first to be considered. The deed referred to conveys to the grantees, Frisbie and De Zaldo, all the lands embraced in the grant, "excepting and reserving from this conveyance all lands which have been heretofore conveyed by the said parties of the first part from the above-described premises." The precise question is to determine the sense in which the words "heretofore conveyed" were intended by the parties. The term "conveyed" or "conveyance" is used in several senses. In the strict legal sense the latter term imports a transfer of legal title to land; but it is also habitually used by lawyers to denote any transfer of title, legal or equitable, and the last is also the popular sense of the term. On the face of the deed there is nothing to determine in which of these senses the term is used except the general principles of interpretation applying to contracts. One of these is that "technical words are to be interpreted as usually understood by persons in the profession or business to which they relate," etc. Civ. Code, § 1645. But this applies only to words exclusively technical, or that are shown to be used in a technical sense; and here the words do not come within the former description, and whether they are used in a technical sense is the very question involved. The case therefore comes under the rule "the words of a contract are to be understood in the ordinary and popular sense rather than according to their strict legal meaning," etc. (Id. § 1644); and it also comes within the rule "that a reservation in any grant \* \* \* is to be interpreted in favor of the grantor" (Id. § 1069). But the most decisive principle applying to the case is that a contract must receive such an interpretation as will make it "lawful" and "reasonable" (Id. § 1643); for it cannot be supposed that the parties had in contemplation the unlawful purpose of defrauding prior purchasers. Nor would the contract thus construed be reasonable, even from a purely selfish point of view, for thus construed it would simply amount to the purchase of lawsuits in which the grantees could have no prospect of advantage except the possible chance of defrauding prior purchasers. We must therefore conclude from the document itself that the parties intended—as honest men under the circumstances would intend—to except from the conveyance all lands previously sold. And this conclusion becomes the more manifest when we consider the circumstances of the conveyance, for at that time the only conveyances, legal or equitable, that had been made by the Castros, or either of them, besides the Wilson contract, and the Anna W. Wilson deed, disallowed by the court, were (1) the agreement of Juan Jose of December 4, 1847, to convey to Smith one square league (being the "specific tract A" of the findings); (2) the deed of the same to the Franklins March 29, 1852, 480 acres; (3) the agreement of Victor of August 18, 1852, to Kelly & Felton ("specific tract B"),

4,098.26 acres; (4) the deed of the same to F. F. Boudre, November 23, 1853, 100 acres; and (5) the deed of the same to the same November 1, 1853, 200 acres. These, in the aggregate, disposed of about 9,306 acres of land, of which only 780 had been conveyed by deed. The balance (8,526 acres) had been fully paid for, and it cannot be supposed that it was not intended to include them in the exception. We must conclude, therefore, that the legal title corresponding to these equitable interests and to that of Wilson remained in the Castros until the execution of their deeds to the equitable owners, subsequently to the deed to Frisbie and De Zaldo.

This conclusion renders it unnecessary to consider other points discussed in the briefs, and, among others, that of notice of the Wilson agreement to Frisbie and De Zaldo. With reference to this each party claims that the burden of proof was on the other; but, however this may be, the general finding (contained in the conclusions of law) that the parties deraigning title from Wilson are the owners in fee of the interest claimed must be regarded as settling this and all other questions involved in the question of title not negatived by the special findings.

The Quantity of the Wilson Interest. This question depends upon the construction of the clause in the agreement between the Castros and Wilson, heretofore cited, viz.: "That said parties of the first part agree to convey to the said Wilson one-tenth part thereof [referring to the Sobrante] less by six hundred and forty acres," etc. The question is whether it was intended that the 640 acres should come out of the whole grant before division, or out of Wilson's tenth after the division. The court adopted the latter construction, and, we think, rightly. This construction is the most obvious and natural, and it is confirmed by the circumstances that a deed of gift for 640 acres was executed contemporaneously to Ann R. Wilson, the wife of John Wilson. This was the construction placed on the agreement by Wilson himself in his deed to Tewksbury of February 13, 1854, under which the appellants deraigned title.

Complaint is made of the decision of the court below as to the interest which passed from Caryl to Lysnar by the quitclaim deed of February 1, 1863. It is said in that behalf that the court charged the Caryl interest with 42.32+ acres on account thereof, whereas the charge should have been 25.48+ acres. We deem it sufficient to say as to this that the appellant does not make any citation to the record which throws any light on the contention made. Our attention is not directed to any specific inconsistency between the findings and the conclusions of law, or to any inadequacy of the findings to support the decree as rendered. Nor is there any reference to any page or folio of the transcript on appeal disclosing any error of the

court below in this connection, either in the matter of figures or otherwise. Furthermore, after a long and tedious examination of the record, we find ourselves entirely unable to discover wherein or how the court can be said to have charged the Caryl interest with 42.32 or any other particular number of acres. The appellant has filed an original brief, two petitions for rehearing, and an oral argument, and, though his attention was called to his omission in this behalf in respondents' brief, he has continued to refrain from referring to page or folio of the record illustrating the point here made. From all this we cannot help but conclude that the contention is without support in the record.

Many of the points urged by appellants are rendered immaterial by our conclusion as to the correctness of the application of the statute of limitations by the court below. It will be unnecessary to further notice those points.

**Construction of the Caryl-Venable Deed.** The description in this deed (under which the appellants Wilson deraign title) is as follows: "The one undivided half of all my interest in and to that certain tract or portion of land \* \* \* known as the Castro Sobrante which was granted," etc. "Meaning to convey three-fourths of one-twentieth of said rancho less 320 acres. \* \* \* The aforesaid  $\frac{3}{4}$  of  $\frac{1}{20}$  acres of land was heretofore conveyed to the party of the first part by Marcella B. Bradley by deed," etc. At the time the deed was made the whole interest of Caryl was  $\frac{3}{4}$  of  $\frac{1}{2}$  of the Wilson interest in the Sobrante, or, as expressed in the deed, "three-fourths of one-twentieth of said rancho less 320 acres." The question then is, was it the intention of the grantor to convey the whole of his interest, or only half? The court held the latter to be the true intent of the deed, and we think there can be no doubt this was the case. The deed is very carelessly written, and under one of the clauses relied upon by the appellants—if taken literally and held to be the paramount call—the deed would convey only  $\frac{3}{4}$  of  $\frac{1}{20}$ , equal to  $\frac{3}{80}$  of an acre. There was evidently an omission here, and it is almost equally evident there was an omission in the other clause.

**Construction of the Wilson-Gutierrez and the McLane-Fernandez Deeds.** At the date of the former deed, June 25, 1862, Wilson was still the owner of about 673 acres undivided of his original interest. The deed purports to be made in consideration of "the good will and respect which the said John Wilson entertains for the party of the second part" (Narcisa Castro De Gutierrez), and "gives, sells and conveys (to her) all his right, title and interest \* \* \* to three hundred and twenty acres of land to be taken out of his interest which he now holds in a certain tract of land," etc. (the Sobrante), "not to be taken where the said Wilson or any of his tenants are in possession in said grant,

the right here sold is an undivided one," etc. It is claimed by the appellant (who has succeeded to the title of the grantees less an interest equal to 2.30 acres previously conveyed by her to another) that this deed should be construed as a grant of 320 acres of land, undivided, of the 673 acres then owned by the grantor; but the court construed the deed as granting only his proportionate interest in the number of acres mentioned, and as equivalent to 18.05 average acres of land in the whole of said Sobrante. This construction, we think, is correct. The deed does not purport to convey the specified number of acres undivided, or an interest equal to that quantity of land, but only the interest of the grantor in 320 acres, to be taken by the grantee in some part of the ranch other than "where the said Wilson or any of his tenants are in possession." The authorities cited by the appellant do not sustain his position. In *Grogan v. Vache*, 45 Cal. 613, and in the cases there cited, there was a "conveyance of a definite number of acres," which is different from the case here, where the conveyance is of the interest of the grantor, in a specified number of acres.

The deed from McLane to Fernandez does not appear in the record, but the court finds that McLane made and executed to Fernandez a deed "purporting to quitclaim to said Fernandez all the interest of the said grantor in and to fifty acres of the Sobrante undivided." The court held, in effect, that the deed conveyed to the grantee not 50 acres of the undivided interest of the grantor, but his interest in 50 acres. The question—so far as the facts are disclosed to us by the record—is similar to the question already discussed; and we must hold similarly that there was no error in the ruling of the court.

**4. The Anna Wilson Title.** This question depends upon the construction of the deed of Juan Jose Castro and Victor Castro to Mrs. Anna R. Wilson of date August 5, 1852. Whatever title vested in Mrs. Wilson by this deed—less a small interest previously conveyed by her to one Bickler—became vested prior to the beginning of the suit in the appellants Reynolds and Mhoon and McElrath. These claim that the deed conveyed to Mrs. Wilson an undivided interest of 640 acres in the Sobrante. This claim was disallowed by the court, and the question is as to the correctness of this ruling. The deed purports "to give, grant and \* \* \* donate \* \* \* to the party of the second part" the premises described. The description of the land conveyed—omitting parts unnecessary to consider here—is as follows: "The following described tract of land containing six hundred and forty acres being part of \* \* \* the Sobrante grant, \* \* \* beginning at a pile or point of rocks, \* \* \* which pile or point of rocks is known as and called the southwestern corner of the San Pablo grant, \* \* \* and from thence the line of the said land now granted by this deed is to run east-

ward along the south line of the said San Pablo grant till it reaches the western line of a piece of land lately sold by the said Victor Castro to one Henry L. Ford, and then at a stake made a corner; and thence with the said Ford's western line in a south-westerly direction till it reaches his south-westerly corner, and from thence with his southern line till it reaches his southeasterly corner, and then in the same direction up the hill as the party of the second part shall desire, and then from that point to extend her eastern line in the same direction as Ford's eastern line extends (i. e., parallel to Ford's eastern line), and she is also to extend her western line from the place of beginning in a southerly direction being a little east of south, till the amount of six hundred and forty (640) acres is included in her survey, making her south line parallel with the said Ford's south line, and reference is made to Ford's lines whether they are now completed or yet to be completed as the same shall be finally settled by the parties with all appurtenances thereunto belonging. To have and to hold the same," etc., "and as soon as the proper survey is made the parties of the first part covenant to make a new deed of the like effect with this only more particularly describing the metes and bounds of the tract now granted, and the parties of the first part further covenant if the land now conveyed shall not fall within the Sobrante grant as the same shall be confirmed under the laws and decisions of the United States, thence the parties of the first part are to convey in place of this an equal quantity in value and extent considered together out of such as shall be confirmed to them in the said Sobrante grant." The tract of land purported to be described in the aforesaid deed it is found by the court "is not and never was any part of or portion of said Sobrante." The contention of the appellants is that this falls within the decision in *Schenk v. Evoy*, 24 Cal. 104, and similar cases. The description in the deed under consideration in *Schenk v. Evoy* was of a tract of land "situate upon the western side of San Pablo creek, in a valley known as the Cruzito Valley, which is a part of the tract of land known as the Sobrante Claim, and situated in Contra Costa county and state of California, bounded and described as follows: Having for the eastern boundary thereof a line following the course of San Pablo creek, as it now runs, through the center thereof from the northern to the southern extremity of said valley, and extending back westward from said line so as to include one thousand (1000) acres of land, and no more, on the western side of said valley; said land to be laid out, as near as possible, in a square form; all the lines, except the first mentioned line to be straight, conforming with the cardinal points by true meridian." The court in that case, in commenting upon the foregoing deed, says:

"Cruzito Valley is seven or eight miles long, and runs, in its general course, north and south. The one thousand acres called for by the deed lies in the valley, and on the west side of San Pablo creek; and by the deed they are to be laid out 'as nearly as possible in a square form,' the eastern side of the square resting upon the creek 'as it runs through the center of the valley'; the other sides of the square 'to be straight, conforming with the cardinal points by true meridian.'" And the court held that the deed failed to locate the land conveyed by sufficient description, and it was therefore a grant of quantity, instead of any particular tract, and the grantee thereof became interested in all the lands embraced within the larger area as tenant in common with his grantor. It will be seen, however, that the deed in this case purports to convey a specific tract of land "beginning at a pile or point of rocks, \* \* \* which pile or point of rocks is known as and called the southwestern corner of the San Pablo grant." This starting call, it is presumed, was a known and recognized monument on the ground. The description then attempts to give the other calls, but they are too indefinite to inclose any particular tract of land. As contended by the respondents, the case falls within the rule laid down in *Grogan v. Vache*, 45 Cal. 610, and others in the same line. In that case the description of the deed was: "Commencing on the southerly side of the Palcines Rancho, at a large live oak tree, marked with a (X) cross; thence running in an easterly direction, crossing the creek above the upper ford; thence in a southerly direction and parallel with the line of said rancho to a large white oak tree marked with a (X) cross at the lower ford; thence along said creek to the line of said Rancho Palcines, containing thirty-five (35) acres, more or less." It was held in that case, after reviewing a number of decisions, *Schenk v. Evoy* included, that the deed there under consideration attempted to convey a specific tract of land, but was so defective as to fail in its purpose. The court says: "We find no case in which a deed which purports to describe a specific tract of land mentioned as parcel of a larger tract, but which fails to describe the land intended to be conveyed in such a manner that it can be located, is held to operate, by reason of such insufficient description of the specific tract, as a conveyance of an undivided interest in the larger tract; and, in our opinion, there is no rule for the construction of deeds which will work that result." The land mentioned in the deed in *Schenk v. Evoy* was within the Sobrante Rancho, whereas the land attempted to be granted in the deed, containing the defective description in the present case, falls entirely outside of the Sobrante. We think the ruling of the court in the premises was correct.

5. The Franklin Title. There are two ap-

peals affecting this title, viz.: That of the plaintiffs, who attack it; and that of Elizabeth A. Rodgers, to whom and another this interest was allotted, and who complains of a deduction of the quantity of her land on account of specific tracts A to F, inclusive, which were lost to the owners of the grant by the statute of limitations. These questions will be considered in the order stated.

The Validity of the Title. This question depends on the construction of a deed from Juan Jose Castro to Selim and Edward Franklin, from whom the respondent Rodgers derains title. The description in the deed, omitting immaterial parts, is as follows: "All my right, title and interest to one and one-half square miles of farming land \* \* \* being a portion of the lands granted to me in 1841," etc., "known as the Sobrante, running from the corral of Joaquin Castro, one and one-half miles and bounded by the creek one mile." This description is substantially identical with the description of the land construed in *Schenk v. Evoy*, 24 Cal. 109, and the court, we think, rightly construed it as conveying an undivided interest in the Sobrante.

The Quantity of the Franklin Interest. There is deducted from the Franklin interest (480) acres, a fraction of over 63 acres for loss to the owners of the Sobrante on account of the specific tracts found to be barred by the statute of limitations, which was charged proportionately to the owners of undivided interests who had not conveyed their interests in those tracts. It is objected that the court erred in holding that these tracts were barred. It is stated by the respondent's attorneys that the deduction was made wholly on account of specific tracts D, E, and F. Whether this statement is correct or the contrary cannot be determined from the record. But the case seems to be the same with reference to all the tracts, and in support of the judgment we may assume such to be the case. The objection is that the findings are insufficient to support the conclusion of the court that the action was barred as to these tracts. The objection is made on the findings, the effect of which is thus stated by the appellants' counsel: "As to specific tracts D, E, and F, the findings are that the original holders entered under conveyances from tenants in common having about nine-tenths of the whole Sobrante; and that those who succeeded to their interest had been in the open, peaceable, notorious, continuous occupation and possession of the several tracts, having them protected by substantial inclosures, for more than five years before the commencement of the action, as against these tracts." This statement is sufficiently correct as far as it goes, but it should have been stated more specifically that the periods referred to by the finding were, respectively, in the case of tract D from the year 1872, of tract E from the year 1863, and of tract F from the year 1859; and, further, that with reference

to each of these tracts it is found (in the conclusions of law) that the action is barred by the provisions of sections 318, 319, 321, and 322 of the Code of Civil Procedure, and that the various parties occupying and claiming the several parts of the tract are the owners thereof. These, though placed among the conclusions of law, are findings of ultimate facts, and are to be regarded as such. *Foot v. Murphy*, 72 Cal. 105, 13 Pac. 163; *Savings and Loan Society v. Burnett*, 106 Cal. 538, 39 Pac. 922, and cases there cited.

It was stated in one of the petitions for rehearing that "Mr. Justice Van Dyke was a party to the action; hence he is disqualified in the case." If counsel making the foregoing statement had examined the papers on file in the court below in said action, he would have found the disclaimer of Walter Van Dyke, dated May 9, 1895, of "all right, title, interest, or estate in or to the land or premises in said complaint described, or in any part or portion thereof."

The foregoing opinion disposes of every material contention made by appellants.

The judgment and orders appealed from are affirmed.

#### RAPPLE v. HUGHES.

(Supreme Court of Idaho. July 9, 1904.)

FRAUDULENT CONVEYANCES—SALES—CHANGE OF POSSESSION—SUFFICIENCY.

1. A sale of personal property is attacked as fraudulent, under the provisions of section 3021, Rev. St. Idaho 1887, on the ground that it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the property transferred. Evidence examined, and held that it is sufficient to support the findings and judgment of the court below.

2. The determination as to what constitutes immediate change and delivery and actual possession is purely a question of fact, to be determined by the jury, or the court in case a jury is waived, from all the evidence in each particular case. Following *Simons v. Daly* (Idaho) 72 Pac. 507.

(Syllabus by the Court.)

Appeal from District Court, Lemhi County; J. M. Stevens, Judge.

Action by William Rapple against Robert B. Hughes. Judgment for plaintiff. Defendant appeals. Affirmed.

John H. Padgham and Quarles & Quarles, for appellant. H. G. Redwine and F. J. Cowen, for respondent.

STOCKSLAGER, J. This action was commenced in the probate court of Lemhi county by the plaintiff against the defendant, as the sheriff of said county, in claim and delivery, alleging that the sheriff wrongfully levied upon and took possession of one certain cream separator, the property of plaintiff; that before the commencement of this action he demanded possession of said property, which was refused by defendant; that the property is worth the sum of \$125; and that he has

been damaged by its wrongful detention in the sum of \$50. Defendant denies the ownership or possession of said property of plaintiff at any time; denies that the property was worth at the time defendant took possession thereof any sum greater than \$75, or that plaintiff was damaged in the sum of \$50, or any other sum, for the possession of said property by defendant. Further answering, defendant alleges that in December, 1902, one Haman commenced an action in the probate court against one Frank Roche to recover the sum of \$64.17 for goods, chattels, etc., sold by Haman to Roche, and on the 6th day of December, 1902, a summons was issued and served upon said Roche by defendant sheriff, and also a copy of the complaint; that on the 11th day of December a trial of said cause was had in said court, and judgment rendered in favor of plaintiff for the sum of \$63.37 and costs; that on the 13th of December, 1902, execution was issued by virtue of said judgment, commanding defendant, as sheriff of said Lemhi county, to make the sum aforesaid out of the personal property of defendant, Roche, in that action; that on the 15th day of December, 1902, defendant, as sheriff, by Charles H. Simpson, deputy sheriff, duly levied upon the cream separator, goods, and chattels mentioned in the complaint, and all the right, title, and interest of the said Frank Roche; that the same was in the possession of said Frank Roche, at Salmon City, and was the property of the said Frank Roche, by taking said cream separator into the possession of the defendant, and the defendant, by virtue of being said sheriff, now holds said property under and by virtue of such levy for the purpose of making the amount of said judgment, and avers that he has a special property therein, and denies that he wrongfully withholds and detains said personal property from the possession of plaintiff, and denies that said plaintiff has, by reason of such possession of the defendant, been damaged in the sum of \$50, or any other sum, or at all. Alleges that Frank Roche has not paid the amount due and owing on said judgment. A jury was waived, and trial by the court was had. Judgment for plaintiff, from which defendant appeals.

Appellant insists that there was no change in the possession of the property in controversy, such as the law contemplates, or any change whatever. The undisputed facts, as disclosed by the evidence, are that plaintiff was working for Frank Roche on what was known as the "McDonald Ranch," about 2½ miles from Salmon City. In his settlement with Roche, he accepted a note for \$90, and thereafter, on December 1st, he surrendered the \$90 note, and took the cream separator in payment thereof, agreeing to pay a note due "on the company" of \$34—evidently meaning a note "to the company." And he says at that time he got a bill of sale of the machine, which was in evidence, to wit: "Salmon, Idaho, Dec. 1st, 1902. I have this 1st day of

December, 1902, sold to William Rapple, subject to last note due of \$33.33 to the De Laval Separator, payable at Langsdorf & Company Bank, Salmon, on December 20, for Ninety Dollars (\$90.00) due him for labor done this summer on the McDonald ranch. [Signed] Frank Roche." The witness says the above paper was given him at the time the separator was transferred to him, and is the only evidence of title he has; that he went and got the separator the same day, and delivered up the note for \$90.00 to Roche. It was on the 15th day of December, 1902, that the deputy sheriff levied upon and took possession of the separator. On cross-examination the plaintiff testified that he worked on the McDonald Ranch for Frank Roche and Phil Roche as a hired man. The two of them gave him a note due the next spring—May, .903. They had the separator in the kitchen on the McDonald Ranch. Garfield Roche went with plaintiff to get the separator. He is a brother of Frank Roche. They took it directly to the house of Frank Roche, in Salmon, and unloaded it in the kitchen of his house there, and in the room where plaintiff slept. Plaintiff was boarding with Frank Roche at the time, and it was the only home he had. Had his trunk there in the room. Plaintiff borrowed Frank Roche's team to go after the separator. These facts are gleaned from the evidence of the plaintiff, and none of them seem to be disputed by the appellant. Hence the question, and apparently the only question, is whether there was a change in the possession of this property. Appellant very earnestly insists that, owing to the fact that respondent had been working on the McDonald Ranch for Roche during the summer, he only took the cream separator from one of the places of possession of Frank Roche to another of his possession; that he used Frank Roche's team to remove it, and the brother helped him—all indicating to the outside world that he was still in the employ of Frank Roche, and changed the location of the separator at the instance of, and for the benefit of, Frank Roche.

Our attention is called to section 3021, Rev. St. 1887. It says: "Every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." Counsel for appellant insists that this section of the statute, under the cou-

struction given it in *Harkness v. Smith*, 3 Idaho, 211, 28 Pac. 423, precludes the plaintiff from a recovery in this action. Mr. Justice Huston, speaking for the court in that action, said: "Plaintiff brought action of claim and delivery for the recovery of possession of a stock of merchandise alleged to have been wrongfully taken and unlawfully detained by defendant. \* \* \* He then proceeds to state the following facts: On the 21st day of November, 1890, one P. Gallagher was, and for some months prior thereto had been, engaged in a general merchandise business in the town of Pocatello, Blingham county, Idaho. It appears by his own testimony that at the time he entered into the business he had about \$3,000 invested therein; that shortly after, for the purpose of erecting a store building, he borrowed \$2,000. The plaintiff is a ranch and stock man and capitalist residing at McCammon, about 25 miles from Pocatello. On November 21, 1900, Gallagher goes to McCammon, to the residence of plaintiff, and there makes a sale of his said stock of merchandise to the plaintiff, who at that time held a mortgage of \$4,000 on said stock of merchandise. The price alleged to have been paid by plaintiff was \$7,240. This included the stock and building. After deducting the amount of the chattel mortgage, plaintiff says he paid the balance, \$3,240, to Gallagher, in his checks, which were paid. On the morning following the sale, plaintiff and Gallagher went to Pocatello. The clerical force in the store at that time consisted of a man by the name of Smith and the son and daughter of Gallagher. Harkness (plaintiff) said to Smith when he first went into the store on the day after the alleged sale by Gallagher to him, "Will you work for me for the same salary Gallagher has been paying you?" and Smith said he would. No invoice was taken. No change was made in the personnel of the establishment. No sign was changed. Gallagher continued in charge of the business as theretofore. The clerical force was the same, two of the employes being members of Gallagher's family. Gallagher continued to buy and order goods as before the alleged sale, except that the letter heads were in the name of H. O. Harkness, and Gallagher signed all letters, checks, etc., "P. Gallagher, Mgr.," and this continued to be the condition of affairs up to the time of the levy of the attachment by defendant on February 25, 1891. We do not think the facts in this case applicable to the one at bar. In the *Harkness Case* the pretended transfer was made at McCammon, whilst the goods were at Pocatello, and no pretense of a delivery until the next day. When the pretended transfer was made the next day there was no appreciable change in any of the merchandise, the clerical force, the control or management of the business, or anything that would or could give the least intimation that there had been a change in the owner-

ship of the business. *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109, cited by appellant, involved the attempted or pretended sale of wheat in Nez Perce county. Mr. Justice Huston writes this opinion, also, and states the facts as follows: "On the 3d day of September, 1895, plaintiffs, being partners under the firm name of Hallett & Morrison, purchased of one C. J. Landon 7,000 bushels of O. K. No. 1 marketable wheat, to be delivered at top of tramway on or before sixty days; loss or damage by fire to be carried by the party of the first part. This sale was evidenced by an instrument in writing signed by C. J. Landon, attested with his seal, witnessed by Fred W. Hallett, one of the plaintiffs, and acknowledged before him as notary. On the 23d day of September, 1895, the defendant, as constable, levied an execution issued by justice of the peace of said county upon a judgment against C. J. Landon) upon and seized 800 sacks of wheat upon the premises and in the possession of said C. J. Landon." After this statement of facts, the court, in summing up its conclusions, say: "There was no delivery, nor any attempt of delivery, at that time, nor for quite a period thereafter. \* \* \* The evidence showing conclusively that there had been no delivery at the time of the sale by Landon to the plaintiffs of the wheat sued for in this action, nor any actual or continued change of possession thereof." The undisputed facts in the case at bar do not bring it within the rule laid down in *Hallett v. Parrish*. It cannot be said there was no attempt at change in possession of the property in controversy, in the face of the positive declaration of the plaintiff that he immediately took possession, and so remained in possession of the property until it was taken from him by the sheriff by virtue of the execution.

Counsel for appellant call our especial attention to *Bassinger v. Spangler*, 10 Pac. 810—a Colorado case. The writer of this opinion, Mr. Chief Justice Beck, collected and discussed the decisions of a number of states containing statutes similar to our section 3021, and says: "The argument that a reasonable interpretation must be placed upon the statute, and that impossibilities should not be required, is recognized by us as sound. At the same time, a purchaser cannot be permitted in any case to fold his arms after making his purchase, take no steps to complete the sale, and have his case excepted from the rule by reason of his good faith, and the inconvenience attending a substantial compliance with the statute. It is true, as suggested by counsel for the plaintiff in error that the statute does not require impossibilities. A purchaser of 2,000 sacks of grain cannot reasonably remove them all immediately. The purchaser of a kiln of hot bricks cannot remove the bricks while hot. But other acts can be substituted which will apprise the community of the change of own-



ership, and satisfy the demands of the law." The writer cites *Lay v. Neville*, 25 Cal. 545, and quotes this language: " \* \* \* The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case." This seems to us to be the correct rule, and is founded in equity and reason. It was followed in a recent case in this court. *Simons v. Daly*, 72 Pac. 507. Mr. Justice Ailshie, speaking for the court, said: "While the evidence as to the immediate delivery and continued possession of the property claimed is by no means satisfactory, we are not prepared to say that it is insufficient to support the verdict and judgment. Every presumption is in favor of the judgment of a court of record, and error will not be presumed. Such judgment should not be disturbed until the appellate court is fully satisfied that error has been committed. There was some evidence in this case tending to show that the transfer was accompanied by immediate delivery and followed by actual possession. The jury evidently believed this evidence, and returned their verdict accordingly. We cannot disturb the judgment founded thereon, upon the grounds of insufficiency of the evidence." Again, speaking of the question of immediate delivery and followed by an actual and continued change of possession, as required by section 3021, Rev. St. 1887, the opinion says: "While this statute seems to be very plain, and at first thought it might occur to one that no difficulty or uncertainty could arise as to its application, still, when we come to applying it to the numberless facts, circumstances, surrounding conditions, and various relations which the parties may sustain toward each other, the problem accompanying any particular transaction assumes a much more serious aspect, and we begin to question ourselves as to what 'immediate delivery' and 'actual possession' really mean. Certainly no fixed rule can be established as a test for ascertaining these results. An examination of the numerous decisions of the courts under statutes similar to our own will at once demonstrate the futility of such an effort. It must be conceded, we think, that these are purely questions of fact to be determined by the jury from the evidence in each particular case." A number of authorities are cited in support of this conclusion. Again it is said: "The evidence brought before us in this case is a most forcible reminder of the difficult duty which devolves upon a jury and trial court in passing upon evidence so close, unsatisfactory, and conflicting, and amply illustrates the virtue in the oft-repeated statement that the jury and trial court meet the witnesses face to face, and hear them testify, and observe their demeanor, and are therefore in a better position than the appellate court to judge of the weight to

be given to each and every statement made." Applying the rules laid down in this case to the case at bar, and what are the conditions? We find that the plaintiff testifies that he worked on the McDonald Ranch for Frank Roche and his brother; that he settled with them, and on settlement there was \$90 due him, for which he accepted a note due the next spring—he thinks, in May; that after such settlement, and after the note was given, he bought the property in dispute, and surrendered the note in part payment, and assumed the payment of an outstanding note of \$33.33 due on the separator; that immediately after the purchase he took possession of the property, and removed it from its place of use on the McDonald Ranch to the only home he had, which was at the residence of Frank Roche, in Salmon. He occupied the kitchen in Frank Roche's house, and there had his trunk and this cream separator. So far as the record shows, all his worldly possessions were in that room. We do not think the law required him to rent a room elsewhere to store his property, in order to give notice to the creditors of Frank Roche that he had bought this property. For aught we know, this might have forced him to abandon his property, as the rent of a storage room until such time as he could use it or dispose of it might have been in excess of his ability to pay, with any hope of realizing on his purchase. He had removed it, from its former place of use to Salmon, and stored it in his room, and we think this was sufficient compliance with the law.

A trial by jury having been expressly waived by both parties in open court, the case was tried by the court, which court found that the delivery and possession were sufficient to entitle the plaintiff to recover, and we do not think his findings and judgment based upon the evidence should be disturbed.

The judgment of the lower court is affirmed. Costs are awarded to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

#### HARVEY et ux. v. IVORY.

(Supreme Court of Washington. July 19, 1904.)

REPLEVIN—ISSUES AND PROOF—GENERAL DENIAL—OWNERSHIP—AFFIRMATIVE RELIEF—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CREDIBILITY OF WITNESS.

1. In replevin, defendant may show title in himself to the property in controversy under a general denial.

2. Ballinger's Ann. Codes & St. § 5020, provides that in replevin, "if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of plaintiff; or if they

¶ 2. See *Replevin*, vol. 43, Cent. Dig. § 411.

find in favor of defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property." Held that, where defendant in replevin proved title to the property in controversy, she was entitled, notwithstanding such section, to a judgment for the return of the property or its value, though she did not pray such affirmative relief in her answer.

3. A motion for a new trial on the ground of alleged newly discovered evidence, relating merely to the credibility of the defendant as a witness, was properly denied.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Replevin by Peter Harvey and wife against Dena Ivory. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

James Kiefer, for appellants. Bennett & Whitham, for respondent.

FULLERTON, C. J. The appellants brought this action against the respondent to recover the possession of certain personal property, consisting of a piano and certain household furniture. In their complaint they alleged ownership and right of possession of the property, its unlawful seizure and detention by respondent, that it was of value of \$390, and that the respondent had refused to surrender possession thereof to the appellants on demand made therefor. At the time of filing the complaint they executed and delivered to the sheriff the statutory affidavit and bond, claiming an immediate delivery of the property. On receipt of the affidavit and bond the sheriff took possession of the property and held it for the statutory time, when, no redelivery bond being filed, he delivered the property to the appellants, who had possession of it at the time of the trial. The respondent thereafter answered the complaint, admitting that she had possession of the property, that demand had been made upon her for it by the appellants, and that it was of the value of \$390, and denied generally all of the other allegations of the complaint. The prayer was that the appellants' action be dismissed, and that the respondent recover costs. On the issues thus formed a trial was had before a jury, which returned a verdict in favor of the respondent. On this verdict a judgment was entered adjudging that the respondent was the owner and entitled to the possession of the property, and directing its immediate return to her by the appellants, and, in case its return could not be had, that she have judgment against the appellants for its value, viz., the sum of \$390.

At the trial the court permitted the respondent to prove ownership and right of possession to the property in herself. This is assigned as error, on the ground that she had not pleaded title or right of possession in herself to the property; her answer, as we have said, being merely a general denial

of the allegations of ownership and right of possession made in the complaint on behalf of the appellants. But whatever may be the rule elsewhere, it is not the rule in this state that a defendant in an action of replevin may not, under a general denial, show title in himself to the property in controversy. On the contrary, the rule and the practice have been the other way ever since the case of *Chamberlin v. Winn*, 1 Wash. 501, 20 Pac. 780, decided by the territorial Supreme Court. It was there held that, in an action brought to recover possession of specific personal property, the defendant could, under a general denial, prove ownership or right of possession in a third person; and, of course, if it be permissible to prove title in a third person under such an answer, it is permissible to show title in one's self.

It is next urged that the court erred in entering a judgment for the return of the property, or its value in case return could not be had, because the respondent had not asked for such return in her answer. There are cases which maintain this position, but we do not feel inclined to follow them. They proceed on the theory that judgment for the return of the property is affirmative relief, and that a defendant, to be entitled to it, must allege and prove himself entitled to it. But plainly this is not sound. The plaintiff obtains possession of the property under the delivery bond by virtue of the statute, not by making good his title thereto. The remedy is allowed him in furtherance of justice, that he may not lose the fruits of his victory if he succeeds in proving his right to the property when the question of right is tried out. But his right to possession is not thus absolute. It is conditional only, dependent on his ability to make good his title and right of possession when these rights are called in question by the defendant. If he fails to make good his title or right of possession, the right of the defendant to have the property returned to him, or to have its value in case it cannot be returned, follows as a matter of course. The plaintiff is the actor, and it is his duty to prove his right to take the property from the defendant, not the defendant's duty to prove the taking wrongful. When, therefore, the plaintiff fails to prove his title or right of possession, the defendant's right to have it returned to him, or have its value in case return cannot be had, is absolute, and needs no allegations or proofs to support it; and judgment in his favor, requiring such return or payment of the value of the property, is a matter of right. The statute (section 5020, Ballinger's Ann. Codes & St.) does not prescribe a different rule.

The last assignment is that the court erred in denying the appellants' motion for a new trial. The ground of the motion is that of newly discovered evidence, but we are clearly of the opinion that there was no error here. The newly discovered evidence goes

to the credibility of the respondent as a witness, rather than to her right to recover; and for this reason, were the matter unexplained, it would seem that the motion was properly overruled by the trial court. 14 Enc. Pl. & Pr. 807. But the respondent offers an explanation of the transaction seemingly satisfactory to the trial court. And so satisfactory, indeed, does it seem to us, that we think it more likely that the impeaching witness is mistaken as to the matter to which he avers, than is the respondent.

As we find no error in the record, the judgment will stand affirmed.

MOUNT, ANDERS, and HADLEY, JJ., concur.

BJORKLUND v. SEATTLE ELECTRIC CO.  
(Supreme Court of Washington. July 21, 1904.)

CARRIERS—INJURY TO PASSENGER—RELEASE—  
FRAUDULENT REPRESENTATIONS—JURY QUESTION—  
DEFENSE—RETURN OF AMOUNT PAID FOR RELEASE—VERDICT—DAMAGES.

1. In an action against a street railroad for injuries to a passenger caused by a collision, to which the company pleaded a release by plaintiff, who was also an employé of the defendant at the time of the injuries, evidence examined, and held that whether the release was obtained by fraudulent representations of the defendant's physician and representatives was a question for the jury.

2. Where a release of a claim for injuries caused by negligence is obtained by fraud, the release is no defense to an action for damages caused by the negligence.

3. Where, at the time of fraudulently obtaining a release of a claim for injuries caused by negligence, a sum of money is paid as the purported consideration of the release, the return of the sum so paid prior to bringing an action for damages for the negligence is not necessary to the maintenance of the action; an allowance by the jury of the sum paid in returning the verdict being sufficient.

4. Where an employé of a street railroad is injured while riding as a passenger on its lines, and a release of a claim for damages is procured from him by fraudulent representations of the defendant's representatives, the fact that he was induced to continue in the service of the defendant after the release was obtained—the defendant paying him his wages all the time—does not militate against his recovery of damages for the injuries.

Appeal from Superior Court, King County; Geo. C. Hatch, Judge.

Action by John Bjorklund against the Seattle Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant. Geo. F. Aust and G. Meade Emory, for respondent.

HADLEY, J. This is an action for damages for personal injuries received by respondent while travelling as a passenger upon one of appellant's cars. Respondent was at the time, and for several years prior thereto had been, an employé of appellant, engaged in rendering services about the car

barn of the railway company; but when he received his injuries he was a passenger on his way to his home, after completing a day's work, and he says he had paid his fare, as the other passengers had done. The question of want of original liability is not urged upon this appeal, but it is contended that respondent had, prior to bringing the action, for a consideration, fully released appellant from all claims for damages. In reply to the answer setting up the release, respondent alleged: That, by reason of his long employment by appellant, he had a great confidence in the company's agents, physician, and representatives. That he understands very imperfectly the English language, and can, with great difficulty, only read the simplest English words and phrases. That at the time of signing the alleged release he did not obtain legal advice, and was entirely ignorant of his legal rights and of the extent of his injury. That appellant, well knowing the above facts, did, by its agents, to wit, its superintendent, claim agent, and physician, with the intent and purpose of intensifying respondent's ignorance as to his legal rights and physical condition, falsely and fraudulently represent to him that it was inadvisable for him to consult a lawyer; that his injuries were such that, without doubt, he would be entirely well within six weeks' time, at most, and that he was even then able to return to work; that appellant was willing to pay him his wages until he was able to return to work, and was also anxious to have him continue in its service; that it would give him a good, easy job, soon raise his wages, and give him ample opportunity for promotion. That appellant's claim agent and superintendent then informed him that, in order to carry out said arrangement for him to draw his wages and get an easy job, it was necessary for him to sign a writing, which was then for the first time produced. That respondent could not read it, and that said claim agent then pretended to read it to him, but that he could not understand its meaning, and the claim agent knew he could not understand it. That he then told the claim agent that he could not understand it. That the claim agent thereupon told him that the only purpose of the paper was to have respondent go to work again for appellant; to give him a good, easy job, with promise of promotion and raise of wages; and to enable him to draw his wages for the time he had been off duty. That appellant, its agent, servants, and physician, well knew of respondent's ignorance of his rights, and of the extent of his injuries. That he was relying upon their representations, and that, but for such false representations, he would not have signed any paper—a release or otherwise. That he was ignorant of the fact that he was signing any purported release for injuries of any extent or duration contrary to said representations, or any purport-

ed representations whatever, and that he never intended to release appellant. That the aforesaid promises made by appellant's agents have not been carried out. That respondent did not recover from his injuries within six weeks, has not yet recovered, is now unable to work by reason thereof, and is informed and believes that his injuries are of a permanent nature, and that he will always remain crippled and deformed. A trial was had before the court and a jury, and a verdict was returned for respondent in the sum of \$2,500. Motion for new trial having been denied, judgment was entered upon the verdict, and the defendant has appealed.

It is assigned that the court erred in overruling appellant's challenge to the legal sufficiency of the evidence. Respondent was injured in a "head-on" collision between two of appellant's cars, and his hand was severely cut, and his thigh was struck in such a manner as to cause a bad bruise to the muscles and to the bone, accompanied with subacute inflammation of the periosteum. Such was shown to be his condition by a letter in the record, written by the company's surgeon. This letter was written January 23, 1903, a short time before this suit was begun. The injury occurred April 23, 1901, near two years prior to the writing of this letter. In the course of the testimony of the doctor upon the witness stand, he said that he, as the company's surgeon, examined respondent's injuries soon after they were received, and that he then told respondent that he thought he would be well in a short time. It is easy for us to believe, from a personal standpoint, that the doctor was originally simply mistaken in his judgment; but, in view of the fact that his letter stated that "there was a bad bruise to the muscles and to the bone," and in view of his entire testimony upon the stand, we think it became a question for the jury whether the doctor as surgeon of the company knew at the time that respondent was seriously injured. He admits that he did not so inform respondent. If he knew the fact, and if his failure to so inform respondent misled the latter, to his injury, it amounted to a legal fraud upon his rights. Appellant suggested that respondent had no right to rely upon the physician's statement, and that it is not bound thereby. We think, the relation of employer and employé having long existed between appellant and respondent, the latter had the right to place trust and confidence in the statements of the company's surgeon, who had examined the injuries at the instance of the company. It therefore became a question for the jury, even if they found that respondent knowingly signed a release, whether he did so as the result of being fraudulently misled by appellant's agents as to the extent and character of his injuries.

The testimony of respondent as to what occurred at the time of the signing of the al-

leged release is in substantial accord with the allegations of the reply hereinbefore set out. The chief negotiations leading up to the signing of the paper, aside from the statements of the physician heretofore discussed, were between the claim agent and respondent. The sum of \$70 was paid by the claim agent to respondent at the time the paper was signed. That was the amount of wages, at respondent's rate, for the time he had been unable to work; and he says he was informed by the claim agent and that he understood that he was simply signing a receipt for the wages, so that he could go to work again, and get his easy job. The paper signed contained a release provision. It was prepared upon a printed blank, and contained technical words, both in the printed and written matter, and bore evidence of careful and skillful preparation, with a view to making it an effective release. In view of respondent's testimony as to his inability to read and understand English, and particularly such technical words and phrases as were contained in this paper, it became a question for the jury whether he did understand it, and whether the claim agent had intentionally and fraudulently misrepresented to him what it contained, and thereby purposely misled him into signing what he would not have signed if its actual contents and legal effect had been fully made known to him. The jury could reasonably find, under the evidence, that appellant and respondent did not stand upon an equal footing, by reason of the latter's imperfect understanding of English, and the legal effect of what he signed, or the nature and extent of his injuries, while the agents of the former were fully informed. They could also reasonably find that respondent was justified in placing confidence in what appellant's agents told him, because of his long-established relations with the company. That it is for the jury to say whether one has been fraudulently misled into signing a release of this character under similar circumstances is expressly held in the following cases: *Pioneer Coöperage Co. v. Romanowicz* (Ill.) 57 N. E. 864; *Meyer v. Haas* (Cal.) 58 Pac. 1042; *International & G. N. Ry. Co. v. Harris* (Tex. Civ. App.) 65 S. W. 885; *Great Northern Ry. Co. v. Kasiechke*, 104 Fed. 440, 43 C. C. A. 626; *Schus v. Powers-Simpson Co.* (Minn.) 89 N. W. 68; *Whitney & Starrett Co. v. O'Rourke* (Ill.) 50 N. E. 242; *Indiana, D. & W. R. Co. v. Fowler* (Ill.) 66 N. E. 394; *Burik v. Dun-dee Woolen Co.* (N. J. Sup.) 49 Atl. 442; *St. Louis, I. M. & S. Ry. Co. v. Phillips*, 66 Fed. 35, 13 C. C. A. 315. This court also discussed the general principles governing the procurement of a release by fraud in *Sanford v. Royal Ins. Co.*, 11 Wash. 653. There it was held that false statements as to the law, for the purpose of inducing one to sign a release of an insurance company, amounted to fraud, where the assured believed the insurer's agent to be his personal friend, and

relied upon his statement that it would do no good to consult a lawyer, and also relied upon his superior knowledge and experience in such matters. In essential features, that case contained elements not unlike those in the case at bar.

Appellant urges that the evidence is insufficient to establish fraud. It is true, there is conflict, but the weight of the evidence must be determined by the jury. We think there is sufficient evidence bearing upon the question of fraud, if true, to support the verdict; and it is clearly established by the above authorities that, when a purported release has been procured by fraud, it does not become a release, and is not a defense to an action of this kind. The cases cited by appellant are lacking in some elements found in the issues of this case. In *Pederson v. Seattle, etc., Street Ry. Co.*, 6 Wash. 202, 33 Pac. 351, 34 Pac. 665, urged by appellant as decisive of this case, the respondent testified that he could understand and speak the English language, but could not write in that language; that the language used in the release was not read to him; and that, if the words therein found had been read to him, he would have understood them. It thus appeared that he was capable of understanding the paper upon merely hearing it read, and there was much testimony that it was read to him. In the case at bar the respondent testified that he did not even at the time of the trial understand the meaning of terms used, such as "release," "acquit," "discharge," etc. In the *Pederson Case* there was no evidence that even any false statement was made to him. He merely claimed that the paper he signed was not read to him. He did not deny that a paper was read to him, but asserted that it was not the one he signed; thus leaving it to be inferred that, if he signed the paper which was present at the reading, it was not correctly read. Moreover, in that case there was no evidence that any representations were made respecting the nature or duration of the injuries. In *Albrecht v. Milwaukee & S. Ry. Co. (Wis.)* 58 N. W. 72, 41 Am. St. Rep. 30, the opinion expressly states that "there is no pretense that the plaintiff was induced to sign the release through fraud or misrepresentation, or that any deception was practiced by misreading it to him." In *Wallace v. Chicago, St. P., etc., Ry. Co.*, 67 Iowa, 547, 25 N. W. 772, the party who signed the release stated in his testimony that there was nothing to hinder him from reading the papers before signing them, and that nothing was done to keep him from reading them. It is stated that he was a railroad conductor, had been a deputy sheriff, and could read writing, make out papers, and transact any kind of ordinary business. The court concluded from these facts that no fraud appeared, and that he was therefore bound by the writing which he signed. In *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599, an insurance policy was involved.

The applicant had been previously insured in the same company, and was held chargeable with notice of its by-laws and routine of business. The opinion states: "There is no pretense that he was overreached or deceived, otherwise than in the fact that he could not and did not read the policy. That was his own negligence. His want of English is no excuse." *Hawkins v. Hawkins*, 50 Cal. 558, was determined upon demurrer, and it is said that no relation of special trust or confidence existing between the parties appeared, and that the terms and conditions of the writing were equally open to both. In *Chicago, St. P., etc., Ry. Co. v. Bellwith*, 83 Fed. 437, 28 C. C. A. 358, the party who signed the contract testified that he did not ask any one to read it to him, and, moreover, his own attorney was present and assisted in the negotiations. In *Spitze v. Baltimore & Ohio R. Co. (Md.)* 32 Am. St. Rep. 378, no representations of any kind were made when the release was signed, and no explanation was asked. The court found that the testimony did not prove fraud on the part of defendant, but carelessness on the part of plaintiff, and that the relief asked could not be granted solely on the ground of plaintiff's carelessness. In *Gulliber v. C., R. I. & P. R. Co.*, 59 Iowa, 418, 13 N. W. 429, there was no evidence of any false representation when the release was signed. It neither appeared that the party was unable to read, nor that he was refused an examination and reading. The court say that they have searched the record in vain for any evidence of fraud in procuring the release. Having thus noted the cases cited by appellant upon this subject, we believe, for reasons above indicated, that they are all distinguishable from the case at bar, by reason of testimony of this case bearing upon fraudulent representations. The court therefore did not err in denying the challenge to the sufficiency of the evidence.

This disposes of appellant's chief contention in this case. Errors are assigned on the introduction of testimony. It is contended that evidence was improperly admitted as to statements made by the physician concerning the duration of respondent's injuries. Under the issues of the case, and within the authorities first above cited, the testimony was proper. It was for the jury to say whether the statements were intended to be, and were understood to be, mere expressions of opinion, upon which respondent had no right to rely, or whether it was intended that they should be received, and whether they were received, as the statements of facts upon which he might and did rely, by reason of the relation of trust and confidence between himself and the agents of his long-time employer, and also by reason of the superior and peculiar professional knowledge of the physician. The same rule applies to statements said to have been made by the claim agent at the time the release was signed,

and prior thereto. We think the instructions were clear, and covered the law of the case. The jury found the whole damage to be \$2-570, and, following the court's instructions, they deducted \$70 from said sum, which was the amount paid respondent when he signed the alleged release. Due credit was therefore given for the sum in respondent's hands, and, under the authorities, there was no necessity for its return before bringing this suit. It is true, respondent worked for and received wages from appellant for about a year and a half after his injuries, but he was presumably giving value received. A few weeks after the injury he began work again, as he says, under the statement of the physician, reinforced with that of the claim agent, that his injury was slight, and that he would soon recover. But during the time he worked he seems to have suffered continually, and made no apparent progress toward recovery, which is not remarkable, in view of the testimony of the physician that the bone was badly bruised. We do not see that his struggle to earn a living, even though as an employe of appellant, should militate against his recovery for the injuries previously received, if he never released appellant from liability. The verdict of the jury says that he did not release the company, in fact.

We see no reason for disturbing the verdict or for granting a new trial, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

#### DICKERSON v. CITY OF SPOKANE. <sup>4</sup> (Supreme Court of Washington. July 10, 1904.)

MUNICIPAL CORPORATIONS—CONTRACT FOR PUBLIC WORK—ORDER BY CONTRACTOR—LIABILITY OF CITY—EVIDENCE—ADMISSIBILITY—JURY QUESTION.

1. The contract for the erection of waterworks for a city provided that the city would make payment of the contract price semimonthly, on estimates of the value of material and labor furnished during the preceding half month, less 20 per cent. of the amount of each estimate, which should be retained by the city until all of the work should be entirely complete, and accepted by the city. An order was given by the contractor during the progress of the work for money to be paid by the city out of any moneys belonging to the contractor, or that might thereafter become due on the contract, either in the 20 per cent. reserve, or on account of money to be due on account of final estimate on the contract. The order was delivered to the city comptroller, and the waterworks plant was completed and accepted by the city. *Held*, that the order was payable only out of the reserve, or anything that might become due on the final settlement.

2. The city comptroller had no authority to bind the city by any admission or statement that he might have made, pertaining to the payment of, or the liability of the city on, the order.

3. Plaintiff's right of action on the order was measured by the terms of the order on

which the action was founded, so that, in an action against the city on the order, evidence that the order was for material furnished to the contractor, which would make the order a preferred claim against the city, under the waterworks contract, was properly excluded, though it was alleged in the complaint that plaintiff had taken the order from the contractor for an amount due plaintiff from one of the contractor's materialmen.

4. In an action against a city on an order drawn on it by a contractor for the erection of a waterworks plant for the city, evidence examined, and *held* that whether any moneys with which to pay the order were due the contractor out of the funds from which it was payable was a question for the jury.

Appeal from Superior Court, Spokane County; Leander H. Prather, Judge.

Action by William Dickerson against the city of Spokane. From a judgment for defendant, plaintiff appeals. Affirmed.

James Dawson, for appellant. John P. Judson, A. H. Kenyon, and E. O. Connor, for respondent.

PER CURIAM. This is an action brought by plaintiff, William Dickerson, appellant below, against the city of Spokane, defendant and respondent, in the superior court of Spokane county, on a certain written order for the payment of money issued by one R. A. Jones to appellant, which is as follows:

"Spokane, Washington, January 27th, 1895. To the City Comptroller of the City of Spokane—Dear Sir: Please pay to William Dickerson the sum of \$294.00 out of any moneys belonging to me, or that may hereafter be due me from the city of Spokane, on the waterworks contract, either in the twenty per cent. reserve, or on account of money to be due me on account of final estimate on said waterworks contract. Said sum of \$294.00 to bear interest at the rate of one and one-half per cent. per month until paid, which principal sum and interest please pay in the manner as aforesaid. R. A. Jones."

This cause was here on a former appeal taken by appellant from a judgment of dismissal rendered by the lower court at the first trial on the ground that the complaint did not state facts sufficient to constitute a cause of action. The judgment of the superior court was reversed, and the case remanded. 26 Wash. 202, 66 Pac. 381. The allegations upon which the present cause of action is founded sufficiently appear from the opinion of this court delivered on the former appeal, which renders it unnecessary to restate such averments in this connection. The amended answer of the city of Spokane denies the material allegations of the complaint charging it with any liability whatever to appellant by reason of the drawing and presentation of the above written order to respondent, admits that it has neglected and refused to pay the same, and avers that, under the contract between R. A. Jones and the respondent city, "it was expressly provided that defendant should not be obliged to accept or pay orders like the one described

in the complaint." It is alleged in the first affirmative defense "that at no time since the filing of said order has the defendant had any money or funds of said R. A. Jones subject thereto, nor has said Jones, at any time since said order was filed, had any credit or account with said defendant on account of said contract, or otherwise, from which said order, or any part thereof, could be paid." The reply denies the allegations of new matter contained in the above answer. The cause came on for trial before the lower court and a jury. Verdict and judgment were rendered in favor of respondent city, and appellant, William Dickerson, appeals.

On January 5, 1894, R. A. Jones and the city of Spokane entered into a written contract for the construction of a waterworks system for such city for the consideration of \$339,880, to be paid Jones, the contractor, by the respondent city, in the manner and amounts and at the times therein provided. This contract contains the following provision with reference to the times and manner of payments: "And the said city of Spokane, hereby agrees to make payment of the said sum for said work in manner and at the times following, to wit: Said payments to be made semimonthly on or about the first and fifteenth day of every month upon estimates of the value of the materials delivered at the site, and the labor performed upon the said work, during the preceding half month, \* \* \* less 20 per centum of the amount of each estimate, which 20 per centum shall be retained by the city of Spokane until all and every part of said work shall be entirely complete, and accepted by the said Board of Public Works." On September 21, 1895, Jones assigned all of his interest in this contract to Philip Buehner, one of his sureties. At that time he (Jones) also gave Buehner a general power of attorney authorizing and empowering him (Buehner) to act in his place and stead and complete this contract. The city council of Spokane consented to the change. The 20 per cent. reserved by the terms of the original contract was reduced to 10 per cent. At the trial in the court below before a jury, on December 20, 1901, appellant's evidence tended to show that, when the order was issued, he filed the same with the comptroller of the city of Spokane. Over the objection of respondent's counsel, appellant testified that Mr. Liebes, the comptroller, told him this order was all right and would be paid. Appellant offered in evidence a certain affidavit purporting to have been made by him October 19, 1895, in which it is stated "that the indebtedness which formed the basis of said order was incurred by said Jones for work and labor performed on said waterworks by J. L. Martin and Thos. Olsen, and said claim has been heretofore assigned to this affiant." His counsel contended that, if this document were not proper testimony to show the true consideration of this order,

still it was sufficient to put the city upon inquiry as to the nature of the claim. The trial court rejected the offer, and appellant excepted. The court also ruled out appellant's offers of estimates Nos. 16, 17, and 18, as tending to show the amounts due from the city to Jones under the contract on January 27, 1895, when the order was filed. Witness R. A. Jones testified that the order was given to William Dickerson, at the request of Thomas Olsen, as payment for labor performed on and piling furnished for the waterworks by Thomas Olsen. Appellant took the order for a debt which Olsen owed him. The trial court, in explanation of its position, remarked that if it were shown that this order was given on account of work and labor performed or material furnished in the construction of the water works, and ought to have gone into one of their estimates, and by some mistake of the city it was omitted, the respondent would be liable primarily. The appellant, however, failed to show any state of facts leading to such conclusion.

On behalf of the defense, Mr. E. F. Gill, city commissioner and a member of the board of public works of Spokane in 1895 and 1896, testified that when the waterworks contract was turned over by Jones to Buehner, on the 21st of September, 1895, \$260,000 had been expended under the contract; that the final estimate, which included all other estimates, was \$388,000 and some hundred dollars, and that there was not money enough left of the contract price remaining unexpended, when Philip Buehner took charge of the work, to pay the claims for labor and material then due or thereafter incurred in completing the works. This witness further testified that more than \$1,000 was expended over and above the contract price; that there were a great number of bills not allowed. The evidence of Messrs. Jones and Buehner, as well as the documentary evidence adduced in behalf of the defense, tended to show that there was no money due the contractor, unless on the final settlement there was a balance in the reserve fund; that upon the completion of the contract there was no money to turn over to the contractor. The transcript shows that the appellant's counsel objected to nearly every item of evidence, oral and documentary, offered by the city at the trial.

The trial court, among other things, instructed the jury as follows: "The defendant admits the contract as alleged; admits that the order, as alleged, was delivered to the comptroller of the city; denies that the comptroller indorsed it or promised to pay anything upon it; admits that the waterworks plant was completed and accepted by the city. It denies, however, that anything was due to Jones on the contract, upon the final settlement, so that the issue raised for you to determine, gentlemen, is whether or not, upon the final settlement between Jones and the city, there was anything due from the

city to Jones upon that contract. \* \* \* Now, gentlemen, this order is that the city pay to the plaintiff out of the reserve that is kept back by the city upon the contract with Jones, or out of anything that may become due him on the final estimate or final settlement. \* \* \* The comptroller had no authority to bind the city by any statement that he may have made to Dickerson, or any one else with regard to the payment of this order, outside of the terms of the contract, and outside of the legal liability of the city, as I have explained to you." Appellant excepted to the giving of each of these instructions. In our opinion, these instructions, in connection with the evidence above noted, present the two material questions for our consideration under the assignments of error: (1) The proper interpretation of the terms of the written order described in the complaint, and upon which the present action is founded. (2) The liability of the city of Spokane, respondent, to appellant on such written instrument.

The main contention arises as to the proper significance and meaning of the terms contained in this written order, "out of any monies belonging to me, or that may hereafter be due me from the City of Spokane, on the waterworks contract, either in the twenty per cent. reserve, or on account of money to be due me on account of final estimate on said waterworks contract." The lower court decided that it was payable from the 20 per cent. reserve, or the amount found due on final estimate. The learned counsel for appellant forcibly urges that, "instead of designating two funds, as the trial judge held, it designated really three funds: (1) His [Jones] semimonthly earnings, earned when the order was given and presented; (2) the 20 per cent. reserve; and (3) the amount due on final estimate." In support of this position he directs our attention to the following language found in the former opinion: "Certainly the written order from Jones, when filed by appellant with the proper accounting officer of the city, was an equitable assignment of any of the funds belonging to Jones in the possession of respondent." *Dickerson v. Spokane*, 26 Wash. 292, 294, 66 Pac. 381. This language should be considered in connection with the written order declared upon in the complaint. This court did not undertake to decide out of just what funds this order was made payable, but the language employed referred only to the funds designated in the order. There was nothing in the record at that time, outside of the complaint, to enlighten us regarding the condition of the funds designated in the order or in the waterworks contract; neither were we called upon to consider that matter. After a careful consideration of the record in this case in connection with the arguments of able counsel, we are of the opinion that the trial court committed no error prejudicial to the rights of appellant in its rulings respecting the admission and re-

jection of evidence, or in any of the instructions given to the jury at the trial; that there is ample evidence to sustain the verdict. It seems plain to us that this order was drawn upon the 20 per cent. reserve fund, or the balance due the contractor upon completion of the waterworks. This fund was reserved for the protection of the city against any liability which might arise under or in connection with the contract between the city and Jones. When the waterworks system was completed, it was found that there were no funds available with which to pay the order in question, and therefore the appellant cannot recover thereon as against the respondent. The comptroller had no authority to bind the respondent by any admission or statement he may have made pertaining to the payment of, or the liability of the city of Spokane on, this order. --

We think the trial court committed no error in refusing to admit plaintiff's Exhibit No. 1 in evidence, as to the alleged consideration of this order being for labor or material furnished by Thomas Olsen at the instance of Contractor Jones, and that this order was therefore a preferred claim against the city, under the waterworks contract, operating as an assignment of Olsen's claim. The appellant is seeking to recover against respondent on this written order, and not on the original consideration. True, he alleges such consideration in his complaint, but it is plain that his right of action is measured by the terms of the written instrument upon which this action is founded. It does not lie with appellant to assert that it is payable otherwise than in the manner designated by the instrument itself.

The judgment of the superior court is clearly right, and should be affirmed.

#### LOUGH v. JOHN DAVIS & CO.

(Supreme Court of Washington. July 25, 1904.)

LANDLORD AND TENANT—AGENT OF LANDLORD—DUTY TO APPEAL—INJURIES TO THIRD PERSONS—LIABILITY—SCOPE OF AUTHORITY—EVIDENCE—QUESTION FOR JURY—VERDICT.

1. The agent of a nonresident owner of a building, in complete charge thereof, and authorized to make repairs, was liable for injuries to the infant child of a tenant, caused by the agent's negligent failure to repair a rotten and unsafe veranda railing.

2. Where, in an action for injuries to the child of the tenant of a building against the agent of the nonresident owner, it was admitted that the agent had authority to rent the property and collect the rents, evidence that certain repairs had been made and paid for at the instance of such agent was admissible, as tending to show its authority to repair the defect in question.

3. Where the authority of an agent to represent the nonresident owner of a building was not in writing, both the fact and scope of such agency could be proved by parol.

4. Where an agency was not created by writing, whether the authority was general or spe-



dial was for the jury to determine from the conduct of the parties and attending circumstances.

5. Where, in an action against the agent of the nonresident owner of a building for injuries to the child of a tenant by the agent's failure to repair a veranda railing, there was evidence that the agent had performed other repairs in and about the building, which were more extensive than the one in question, and defendant's president, in answer to a question as to what authority his company had with reference to making repairs, answered, "Well, they [the owners] did not want to spend any more money than was absolutely necessary on it," a verdict finding that defendant had authority to repair the railing was warranted.

'Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Mona Gertrude Lough, by her guardian ad litem, against John Davis & Co. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chas. F. Munday, for appellant. Frederick R. Burch and Robert H. Lindsay, for respondent.

**HADLEY, J.** This cause was once before in this court. See *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848. A demurrer to the complaint had been sustained by the lower court, and this court reversed the judgment; holding that the complaint stated a cause of action. The essential facts averred in the complaint will be found stated in the former opinion. The question involved is that of the liability of an agent in charge of a building for injuries received by a child who fell from an upper porch by reason of a rotten and unsafe railing, the father and guardian ad litem of the child being a tenant of the building. The complaint averred that the defendant, a corporation, as agent of the owner, had full power and authority from the principal to keep the property in repair and in safe condition for tenants. Upon the return of the cause to the superior court, the defendant answered; admitting that it had authority to rent the property and collect the rents, but denying the said allegations as to authority to repair. A trial was had before the court and a jury, resulting in a verdict for the plaintiff. The defendant moved for a new trial, which was denied, and judgment was entered upon the verdict. The defendant has appealed.

It is first assigned that the court erred in overruling the demurrer to the complaint. That question was passed upon by this court in the former appeal. Appellant now asks us to overrule that decision. The question was exhaustively examined and discussed before, and the decision is supported by eminent authority. We shall therefore adhere to the former ruling. The property was owned by one Webb, and both he and the appellant were made parties defendant. Webb, however, was not served with process, and the question of his liability in the premises is therefore not before us. Respondent's com-

plaint alleges that Webb was a nonresident of this state. The allegation was disputed by appellant, and there was testimony to the effect that he was a resident of King county, and was available for the service of process. The record, however, shows an evident earnest effort on the part of respondent's counsel to find his location for the purpose of making service upon him, and this was supplemented by the sheriff's return that he could not find him in King county. There is also in the record a certified copy of a deed executed by Webb, bearing date December 18, 1901, in which he recites that he was "formerly of King county, state of Washington, but now of Staunton county, state of Virginia." The complaint was verified and filed a little more than one month before the date of said deed, to wit, on November 4, 1901. It also appears from the evidence that Webb was never seen by the tenants of the building. They knew no one as being in charge thereof except the appellant, and it does not appear that Webb was ever about the property or gave it any personal attention. The circumstances therefore make the fact of his residence in this state at least a doubtful one, and also show that, even though he may in fact have been a resident, yet he practically eluded a personal service of the summons. The building was a large, four-story frame structure, occupied by numerous tenants. The rotten and insecure condition of the railing which gave way cannot be doubted, and this was also accompanied by other similar dilapidated conditions about the premises. The evidence also shows that it was bought for speculative purposes, and this is given as a reason for the limited repairs. The child fell from an upper porch by reason of the insecure railing, and received serious injuries, which must be lifelong in effect, thus entailing upon her permanent suffering and inconvenience, through the neglect of some one. We make these observations at this time not because the owner of the property, under the theory of the complaint, was a necessary party, and not because it is material in this case whether the owner was in fact a resident or nonresident, but by way of argument, in order to show what we believe to be the wisdom of the rule declared by this court in its former decision—that any one, under such circumstances as appear in this case, who is charged with a duty respecting the repair of property, shall not escape the consequences of his neglect, when serious harm to an innocent person has resulted therefrom. Particularly should this be so if the owner is a nonresident, or may so direct his whereabouts as to make the service of personal process upon him a difficult if not an impossible thing. It must always be remembered, however, that, in order to charge an agent, he must have authority to make repairs at the owner's expense, which places upon him the duty to do so. This was what was decided

before, and its application to the facts of this case will be hereinafter examined.

It is assigned that the court erred in permitting testimony to be given as to certain repairs made by one Case and others, in the absence of a showing that the authority to make the repairs was vested in appellant by Webb, the owner. It is not disputed that Case and the others made the repairs by authority of appellant, and were paid therefor by appellant. It is also admitted that appellant was the owner's agent to the extent of renting the property and collecting the rents. The evidence was therefore proper, as tending to show that appellant had also authority to repair, inasmuch as it had undertaken to make at least some repairs. It appeared that appellant collected and handled the rents, thus having in its possession funds of the owner which could have been applied upon repairs. The fact that repairs were made by authority of, and paid for by, appellant, was therefore proper to go before the jury as a circumstance connected with the conduct of the parties, coupled also with the fact that the owner at no time appeared to be personally present and directing as to repairs. Under the evidence complained of, there must have been some authority to repair; and whether that authority was general, or special and limited, was a fact for the jury to determine from the conduct of the parties and attending circumstances. It is not claimed by appellant that its authority as agent was created by writing. It was therefore competent to prove it by parol. In such case the agency may be implied from the conduct of the parties, and both the fact and scope of the agency are for the jury, under proper instructions from the court. *Loudon Savings Fund Society v. Hagerstown*, 36 Pa. 498, 78 Am. Dec. 390. In the above case the court said: "And in all instances where the authority, whether general or special, is to be implied from the conduct of 'the principal, or where the medium of proof of agency is per testes, the jury are to judge of the credibility of witnesses, and of the implications to be made from their testimony." See, also, *Nicoll v. Am. Ins. Co.*, 3 Woodb. & M. 529, Fed. Cas. No. 10,259; *Dickinson County v. Miss. Valley Ins. Co.*, 41 Iowa, 286; *Nicholson v. Golden*, 27 Mo. App. 132; *Golding v. Merchant & Co.*, 43 Ala. 705; *Jacobson v. Poindexter*, 42 Ark. 97.

It is next assigned that the court erred in overruling the defendant's motion for nonsuit. It had already appeared that the aforesaid Case made and caused to be made repairs under the direction of appellant. It was shown that Case himself connected the toilets to the sewer, nailed up the railing which broke, put a brace against a board in the alley, worked at tarring the roof, repaired the rear steps, nailed a board across the north stairway, and fixed the windows. Others, employed through and directed by Case, but paid by appellant, repaired the

fence, built a bulkhead on the side of the house to prevent the earth in the alley, which was higher than the foundation of the house, from coming against the house, put boards in the walks around the house, put shores under the house, cleaned away the dirt which had fallen down from the house against the next property, and cleared away some evaporating works from the south side of the house. There was also testimony that John Davis, the president of appellant company, was about the premises, and gave immediate and peremptory orders concerning certain repairs, the necessity for which appeared to have then first come to his notice. The directions were given in such a manner as to warrant the jury in concluding that he had authority to act upon his own judgment, and without consulting the owner, as to such small details as the repairing and strengthening of a porch banister and railing. It having been admitted that appellant was the owner's agent for at least some purposes, and it having appeared that all the repairs were made and paid for under the direction of appellant, the owner never being seen in connection therewith, it was for the jury to say, under the circumstances, whether appellant derived its authority from the owner to make the repairs it did make, and, if so, whether its authority was extended to as simple a matter as the repair of this railing, which was, in grade and character, similar to a number of other repairs that were made. In *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 209, the following instruction was requested and refused: "In order to raise a presumption that a person is authorized to act for another, the acts and recognitions of acts relied upon as evidence of authority must be more than one act of the alleged agent, and one recognition of the act by the principal. They must have been done often enough to raise in the mind of a person of ordinary care a presumption of authority given by the principal to the alleged agent." The Supreme Court, commenting upon the refused instruction, said: "This request is bad. A single act of the agent, and a recognition of it by the principal, may be so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond any question. The value of such proof does not depend so much on the number of acts, as upon their character." Even if it be conceded that the rule as stated by the court is too strong, we think it must also be conceded that the requested instruction did comprehend the law, and the frequent similar acts on the part of the agent in the case at bar bring the case within the terms of said requested instruction. The court did not err in denying the motion for nonsuit.

It is urged that the court erred in its statement of the issues to the jury, in that it referred to certain averments of the complaint, which, it is claimed, are not support-

ed by any evidence. It is appellant's position that the court should either not have referred to such allegations of the complaint, or should have told the jury that there was no evidence upon the subject. Should the court have made the latter statement to the jury, it might have subjected itself to the criticism of commenting upon the evidence. We see no error in stating the issues as laid in the pleadings, when the jury are instructed that they must base their findings entirely upon evidence. Such was made sufficiently clear to the jury in this case.

No other errors are urged upon the instructions given, but assignments are made upon the refusal to give several requested ones. We think the instructions given fully and fairly cover the law of the case, and that no prejudicial error was committed in refusing the requested instructions.

The next claims of error, which are considered together, are that the court refused to instruct the jury to return a verdict for the defendant, and also that the motion for new trial was overruled. This contention is based upon the claim that there was not sufficient evidence upon which to base the verdict. We have already referred to the evidence introduced prior to the motion for nonsuit, and which we have held sufficient for submission to the jury. The testimony in behalf of defendant was to the effect that it had no general authority to repair, and that the repairs which were made by it were made under special authority and direction. There was also testimony by officers of the defendant, and also by a Mr. Smith, an uncle of Webb, the owner, that no special instructions were given to repair the guard rail in question. Smith appears to have in some manner represented Webb in Seattle, and it is claimed that authority to repair came only through him. Webb, the owner, did not testify at the trial. As already stated, there were at least some repairs ordered by appellant under circumstances which justified the jury in finding that they were ordered without waiting for special directions. The secretary of the company testified that appellant was authorized to keep the building clean and do the janitor work. Just what was comprehended in the janitor work was not stated, but the man Case, who made and oversaw so many of the small repairs, was the janitor, and these circumstances were such as we think justified the jury in concluding that such small repairs as the nailing and securing of this guard rail were included in the janitor's duties. Mr. Davis, the president of appellant company, was asked the following question: "What power or authority or direction from Webb, or any one representing Webb, did John Davis & Co. have as to repairs to the property?" To which he answered: "Well, they did not want to spend any more money than was absolutely necessary on it." From the above the jury could reasonably imply an author-

ity to make no more repairs than were absolutely necessary, and it certainly appeals to any reasonable mind that the repair of this guard rail and banister was necessary for the safety of the occupants of the building who paid rent with the expectation of enjoying reasonably safe premises. It is true, Mr. Davis afterwards testified, in answer to further questions, that his company had no authority to make repairs, except such as were specifically directed; but the above was his answer to a plain and direct question—the first upon the subject—and was as much for the consideration of the jury as any of his other answers. The case was fairly submitted to the jury. They were not left to the realm of speculation for the verdict they returned, as suggested by appellant, but they had substantial evidence, as above outlined; and from said facts, the attending circumstances, and conduct of the parties, they found that appellant had authority to make the repair in question. The evidence is such that we do not deem it our province to disturb that finding. Not only did the jury find the fact, but the trial court, who heard and saw the witnesses, also passed upon the sufficiency of the evidence by a denial of a new trial. With the fact of authority to repair established, the duty to do so arose, within the former decision in this case. That duty having been neglected, it follows that the appellant is liable. The evidence upon other features necessary to establish liability is ample and unquestioned.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

#### In re DRASDO'S ESTATE.

(Supreme Court of Washington. July 19, 1904.)

#### APPEAL—STAY BOND—AMOUNT—DETERMINATION BY COURT—RECORD.

¶ 1. Where, on appeal from an order allowing fees to a special administrator, the record does not show that the amount of the appeal bond had been fixed by the court, as required by 2 Ballinger's Ann. Codes & St. § 6506, in order to stay proceedings, the appeal will be dismissed.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Judicial accounting of William Hickman Moore, special administrator of the estate of Paul Drasdo, deceased. From an order allowing such administrator a fee of \$1,000 for his services, certain claimants appeal. Dismissed.

Wm. Martin and W. A. Keene, for appellants. Wm. Hickman Moore, for respondent.

PER CURIAM. This is an appeal from an order of the superior court allowing to William Hickman Moore, as special administrator of the estate of Paul Drasdo, deceased,

the sum of \$1,000 as fees for his services as such special administrator, together with certain other minor sums allowed in the order to be paid to other persons than the special administrator, and which he is directed to pay. The executors of the will of the deceased are prosecuting the appeal. The respondent moves to dismiss the appeal on the ground, among other reasons, that the appellants did not furnish an appeal bond, as required by law. A bond was given in the sum of \$500, which purports to stay proceedings. Respondent contends that the appeal is from an order which is a judgment for the recovery of money, and that the bond, in order to effect a stay of proceedings, should be in double the amount of the judgment, which would require a bond for more than \$2,000. Whether the order appealed from is a judgment for the recovery of money within the meaning of section 6506, 2 Ballinger's Ann. Codes & St., is a question that admits of controversy. If it be such a judgment, then manifestly the bond is insufficient; but, without deciding that point, and conceding for the purposes of this motion that an order fixing and allowing the compensation of an administrator should not be classified as a judgment for the recovery of money, still, under the section of the statute cited, the amount of the bond must, in any event, be fixed by the court, in order to stay proceedings. The record is silent upon that subject. No order or entry of any kind appears by which we can determine that the court fixed the amount of the supersedeas bond at \$500, or at any other sum. Respondent, in his brief, asserts that the court did not fix the amount. Appellants' counsel, in the reply brief, does not dispute the assertion, but in a mere inferential manner, following argumentative matter, says, "We take it that this was the reason that the lower court fixed the amount of the bond in the sum of \$500." He, however, points out nothing in the record to verify the statement, and, after diligent search, we are unable to find any order in the record fixing an amount for the supersedeas bond.

The appeal must therefore be dismissed,

#### McINNES v. SUTTON.

Supreme Court of Washington, July 15, 1904.)

ATTORNEY AND CLIENT—WITHDRAWAL FROM CASE — STATUTE — CONSTRUCTION — PROTEST AGAINST JUDGMENT — EFFECT — MOTION FOR JUDGMENT—NEW TRIAL.

1. Where a motion for judgment on special findings and for a new trial are filed under the same cover, any rights of the party under the motion for judgment are effectively determined by the granting of the motion for a new trial.

2. Under 2 Ballinger's Ann. Codes & St. § 4771, providing that, when an attorney ceases to act as such, a party to an action for whom he was acting as attorney must, at least 20 days before any further proceedings against him, be

required by the adverse party, by written notice, to appoint another attorney, or to appear in person, the validity of a judgment is not affected by a party's counsel, without leave of court, announcing their withdrawal from the case, serving on the adverse party and filing with the clerk of the court a notice thereof and by refusing to proceed with or participate therein, on the denial of their application for a continuance when the case is called for trial.

3. Where, on the denial of a continuance of an action, the defendant's counsel refused to participate in the trial, but before judgment was entered on the verdict for plaintiff defendant appeared by other counsel, and filed what he designated a protest against the signing or entering of judgment, reciting therein the facts about the attempted withdrawal of defendant's former counsel, the protest was, in effect, an application for new trial.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by N. McInnes against H. Sutton. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. Foster, for appellant. Humes, Miller & Lysons and Ralph Simon, for respondent.

HADLEY, J. Respondent brought suit for damages against appellant, and charged wanton injury and destruction of property of the respondent. Issue was formed, a trial was had, and a verdict returned against appellant. With the general verdict a special one was returned by way of answer to submitted interrogatories. The defendant moved for a new trial, and also moved for judgment in his favor on the special findings of the jury. The latter motion was denied, but the motion for new trial was granted. The cause came on for trial a second time in pursuance of regular assignment, the plaintiff, with his witnesses, being present in court and ready for trial. At that time counsel who then represented the defendant applied to the court for a continuance, but made no showing by way of affidavit or otherwise. The request was denied, and said counsel then sought to withdraw from the case, by announcing his withdrawal, and by serving upon the plaintiff and filing with the clerk of the court a notice thereof, and by refusing to proceed with or participate in the trial. The court, however, proceeded with the trial. A jury was impaneled, and the plaintiff's evidence submitted. A verdict was returned in favor of the plaintiff. Before judgment was entered upon the verdict, the defendant appeared by other counsel, being the same who now represents him in this court. Said counsel filed in the cause what he designated as a "protest against the signing or entering of judgment," in which he recited the facts about the attempted withdrawal of former counsel, and stated that the defendant had no knowledge that the cause was to be called for trial at the time it was called, and did not know that his said attorney intended to withdraw from the case. The paper filed also states that the defendant was neither present nor represented by counsel at the

trial. The court heard counsel upon the matters suggested by the paper filed in the record, and, after duly considering the same, denied the protest against entering judgment. Judgment was thereupon signed in accordance with the verdict on the 22d day of May, 1903, and the same was filed June 16, 1903. Afterwards, on the 3d day of July, 1903, the defendant filed a petition to vacate the judgment, claiming that it had been irregularly entered, because of the facts concerning the attempted withdrawal of counsel, which are again recited in the petition. The petition also avers that the defendant has a good defense, as shown by his answer; that the plaintiff has no right of action; and that the complaint is insufficient to sustain a judgment. It is also alleged that the defendant is entitled to a judgment in his favor on the special findings of the jury heretofore mentioned. The court denied the petition to vacate, and the defendant has appealed.

We think the claim that the judgment was irregularly entered is not well taken. The complaint undoubtedly states a cause of action, and is sufficient to sustain the judgment. It recites a plain, wanton, and malicious removal, injury, and destruction of respondent's property. Referring to the point that the appellant was entitled to judgment upon the special findings of the jury, it will be remembered that those findings were returned at the first trial. Appellant both moved for judgment upon the findings and for a new trial, evidently intending the motions filed under the same cover to be in the alternative. With the granting of the motion for a new trial the other motion was, of course, denied, and any rights of appellant under the motion for judgment were effectively determined by the granting of the other motion. Having asked for the new trial, he was not in position to complain, since he did not stand upon his motion for judgment. The final judgment entered is therefore not irregular by reason of the denial of judgment upon the special findings. If any element of irregularity attended the entry of the judgment, it must, therefore, have been through the attempted withdrawal of counsel. The statutory method for effecting withdrawal of counsel is found in section 4771, 2 Ballinger's Ann. Codes & St., as follows: "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, at least twenty days before any further proceedings against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person." It seems to be appellant's view that the withdrawal was complete when his counsel announced in open court, after the case was called for trial, and when a mere request for continuance was denied, that he would withdraw from the case, and followed this by then serving upon respondent a written notice to that effect. We do not think the terms

of the above-quoted section relate to a mere voluntary refusal to proceed with a case when it is regularly called for trial and the adversary is prepared with his witnesses to proceed. If such were the meaning of the statute, it could, by collusion between attorney and client, easily be used as a means for effecting at least a 20 days' delay, which, in some instances, might amount to a practical denial of justice. The relation of attorney and client, when once established in a case, is not to be so easily severed, when the rights of others depend thereon. The interdependent relation is such that what is the client's duty is often the attorney's duty, and the client cannot escape his obligation to the court and to his adversary to proceed with a trial for the mere reason that his duly appointed confidential agent—his attorney—may have declined to act. In *Coon v. Plymouth Plank Road Co.*, 32 Mich. 248-250, the Supreme Court of Michigan, speaking of a statute in all essential respects like our own, said: "We do not understand this to apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice. It might be made the means of serious mischief, if it could have such a construction. The plain meaning of the statute is to provide for cases in which the attorney or solicitor, by reason of death, disability, or other cause, has ceased to practice in the court. His refusal to proceed in a particular case is not ceasing to 'act as such' attorney or solicitor. It does not even disconnect him with the case, for that can only be accomplished by consent of the parties, or of the court, or by regular proceedings for the substitution of another." Again, the Supreme Court of Maryland, in *Henck v. Todhunter*, 16 Am. Dec. 300, when speaking of striking the name of an attorney of record, said: "When, therefore, an attorney on the record applies for permission to cause his name to be stricken out, it is presumed to be done at the instance and by the authority of the party for whom his appearance has been entered. But it will never be permitted to a party, or his attorney, to obtain a continuance of a cause beyond the time allowed him by law by striking out the attorney's appearance at the term at which the cause stands for trial; otherwise, by collusion between client and attorney, the trial of a cause might be delayed without limit. Hence, though the court will, on application, permit the attorney's name to be stricken out, considering him as acting on that very application as the attorney, and at the instance of the party, yet it will not be done to the prejudice of the other party, and the cause will be made to progress as if the appearance had not been stricken out." In *Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103, it was held that when a defendant, who has been served with process, causes an appearance to be entered by an attorney, and the

latter subsequently withdraws his appearance, but without obtaining leave of court, the record is left in a condition in which a judgment by default may be entered. To the effect that a voluntary withdrawal is not effective without leave of court, see 3 Am. & Eng. Ency. of Law (2d Ed.) 410. The following case, cited in support of the above-mentioned text, we especially note as being in point: *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

No leave of court was given in the case at bar, and under the above authorities appellant could not delay the trial by reason of the then attempted withdrawal of his counsel. The trial therefore proceeded regularly. The protest against the judgment on the verdict was, in effect, an application for new trial, and the ruling thereon amounted to a denial of the new trial. The judgment having been regularly entered, it was not error to deny the petition to vacate. All matters of substance contained in the petition had already been passed upon by the court adversely to the petitioner, and it was therefore proper to dismiss the petition. *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Greene v. Williams*, 13 Wash. 674, 43 Pac. 938. Mere errors of law cannot be corrected by a petition to vacate a judgment, but the remedy is by appeal from the judgment. *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

(45 Or. 276)

WOOD et al. v. FISK et al.

(Supreme Court of Oregon. Aug. 1, 1904.)

FRAUDULENT CONVEYANCES—EQUITY TO ATTACK—EXECUTION—PURCHASERS.

1. Where execution was issued on a judgment from the county in which it was rendered, and the property levied on and sold to plaintiff's predecessors in interest, to whom a deed was issued, the sale having been confirmed, plaintiff could attack a previous conveyance made by the judgment debtor for the purpose of defrauding creditors.

Appeal from Circuit Court, Wallowa County; Robert Eakin, Judge.

On petition for rehearing. Denied.

For former opinion, see 77 Pac. 128.

Long & Sweek, for appellants. D. W. Shehan, for respondents.

BEAN, J. It is immaterial whether the judgment recovered by Miles against Fisk in the circuit court for Gilliam county was docketed so as to become a lien upon the real property of the defendant in Wallowa county. An execution was issued on the judgment from the county in which it was rendered, the property now in controversy levied upon and sold to plaintiff's predecessor in interest, the sale confirmed, and a deed issued to him.

This gives plaintiff a standing in equity to attack a previous conveyance by the judgment debtor, made for the purpose of hindering, delaying and defrauding creditors, and that is the purpose of the cross-bill.

The motion is denied.

(45 Or. 346)

STATE v. EGGLESTON.\*

(Supreme Court of Oregon. Aug. 1, 1904.)

ADULTERY—INFORMATION—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—STATUTES—MARRIAGE—PRESUMPTION—APPEAL.

1. Where an information charged that defendant, on a specified day, in a certain county in the state then and there being, did then and there unlawfully and feloniously commit the crime of adultery with a female commonly known by the name of C., he, the defendant, then and there being a married man, and the husband of A., and she, the said C., not being his wife, sufficiently charges that defendant was on the date of the alleged crime the husband of A., without the phrase "then and there" being inserted before the phrase "the husband of A., under B. & C. Comp. § 1303, forbidding repetitions in pleading.

2. On a prosecution for adultery, evidence that the female participant bore the reputation of being a common prostitute is admissible against the male participant as a circumstance tending to show his guilt.

3. On a prosecution for adultery, evidence that defendant and the female participant committed adultery at other places and on other occasions than the time and place charged in the information is admissible as tending to show the adulterous disposition of the participants at the time alleged in the information.

4. Where the trial court was not requested to instruct the jury to acquit the defendant in a criminal case by reason of any failure of proof, it will be presumed, on appeal from a conviction, that the evidence was sufficient.

5. Error cannot be predicated of the failure of the trial court to charge that the jury must find that the crime was committed in the county alleged, where no request was made to so instruct.

6. On a prosecution for adultery, any error in the admission of alleged declarations of the female participant to the effect that the defendant was guilty as charged in the information is cured by the court instructing the jury to disregard the evidence.

7. One participant in an act of adultery may be convicted of crime, though the other was free from criminal intent.

8. Testimony of an eyewitness in a criminal case is sufficient proof of a marriage.

9. Where marriage is once shown to exist, the presumption is that it continued.

10. Proof of an adulterous or amorous disposition on the part of defendant in a prosecution for adultery is a circumstance tending to show guilt.

11. When proof of an adulterous disposition on the part of each participant in an act of adultery has been produced, the commission of the crime may be inferred from evidence of an opportunity to commit the act.

12. On a prosecution for adultery, where evidence tending to show that defendant and the female participant in the act had committed adultery at a time so remote that the statute of limitation had run against it in favor of defendant was received for the purpose of showing their lascivious disposition, a charge which told the jury, in effect, that, though the crime was alleged to have been committed on a certain date, it was not necessary that they should find

\*Rehearing denied October 2, 1904.

that was the exact date, but that, if they were satisfied that it was perpetrated within a month or more from the date stated, and before the information was filed, it would justify them bringing in a verdict of guilty if they were satisfied beyond a reasonable doubt that at the time the crime was committed the defendant was a married man, and the husband of the woman named in the information, was not erroneous.

13. A charge requested is properly refused when covered by instructions given.

14. Under B. & C. Comp. § 1309, providing that the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, and within the time in which an action may be commenced therefor, except where time is a material ingredient in the crime, adultery need not be proved to have been committed on the day alleged in the information.

15. Where errors alleged to have been committed by the court are not set out in the bill of exceptions, they are unavailing on appeal.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

John Eggleston was convicted of adultery, and appeals. Affirmed.

George J. Cameron, for appellant. Robert G. Morrow, for the State.

MOORE, C. J. The defendant was tried upon an information the charging part of which is as follows: "The said John Eggleston on the 24th day of May, A. D. 1903, in the county of Multnomah and state of Oregon, then and there being did then and there unlawfully and feloniously commit the crime of adultery with a certain female person commonly known by the name of Florence Cline, he the said John Eggleston then and there being a married man and the husband of Alice A. Eggleston and she the said Florence Cline not being his wife, contrary," etc.; and, having been found guilty thereof, he appeals from the judgment which followed.

It is contended by his counsel that the court erred in overruling a demurrer to the information, interposed on the ground that it did not state facts sufficient to constitute a crime. It is argued that, the words "then and there" having been omitted after the word "and" and before the words "the husband of," etc., the information does not allege that on May 24, 1903, the defendant was the husband of Alice A. Eggleston, and hence the circumstances necessary to constitute the commission of the crime are not averred. An information, which takes the place of an indictment (B. & C. Comp. § 1259), is sufficient, so far as challenged herein, if the act charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended (Id. § 1314). Our statute prescribing the person authorized to make a complaint in a prosecution for the crime of adultery, and who may be found guilty thereof, so far as deemed material herein, is as follows: "A prosecution for the crime of adultery shall not be com-

menced except upon the complaint of husband or wife. \* \* \* When the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery also, and be punished accordingly." Id. § 1917. The information not having stated that Florence Cline was, on May 24, 1903, a married woman, a prosecution against the defendant for the crime of adultery could only be commenced by his wife, and, this being so, the necessity of alleging that he on that day had a wife living is important. An information having once stated time with certainty, may refer to it, in respect to other facts alleged, by the terms "then" and "there" without repeating it. State v. Thurstin, 58 Am. Dec. 695. In that case the indictment stated that the defendant, at Avon, "on the 25th day of March, 1851, did commit the crime of adultery with one Emeline Whitehouse, the wife of one Solomon H. Whitehouse, she, the said Emeline Whitehouse, being a married woman, and the lawful wife of him, the said Solomon H. Whitehouse," and it was held to be insufficient; the court saying: "In this case the fact of committing the crime of adultery, at a certain time and place, with Emeline Whitehouse, is first alleged against the accused; but to the fact that she was a married woman, and the wife of another, no time is averred, nor is there a reference, to the certain time before stated, by the words 'then and there,' or any equivalent terms. Although we can readily suppose what was intended by the averments, yet in criminal pleading nothing can be taken by intendment. The allegation, 'being a married woman, and the lawful wife of Solomon H. Whitehouse,' has reference to the time of finding the indictment, and not to the time of the offense, in strictness of criminal law." In the case at bar, however, the averment, "he, the said John Eggleston, then and there being a married man, and the husband of Alice A. Eggleston," etc., does not, in our opinion, come within the rule announced in the case to which attention is called; but the clause "then and there being," in the language quoted, by the use of the word "and," which follows, applies by implication as much to the words "the husband" as it does to the phrase "a married man," and is tantamount to an averment, by reference to the time once stated with accuracy in the information, that on May 24, 1903, the defendant was the husband of Alice A. Eggleston. If the clause adverted to had been inserted in the information where defendant's counsel insists it should have been, it would have violated the rules of grammar, and constituted a repetition, disapproved by the statute. B. & C. Comp. § 1303. The omission was, therefore, of no importance. Commonwealth v. Langley, 14 Gray, 21; State v. Doyle, 15 R. I. 527, 9 Atl. 900.

It is contended that the court erred in admitting, over defendant's objection and ex-

ception, testimony tending to show that Florence Cline bore the reputation of being a common prostitute. Positive evidence of the commission of adultery is rarely possible, and, as crimes against morality and decency must not go unpunished, a resort must be had to circumstantial evidence, from which the overt act charged may be inferred. In prosecutions for rape, evidence of the previous unchastity of the female alleged to have been assaulted is admissible on the part of the defense as a circumstance from which consent might reasonably be inferred. *State v. Ogden*, 39 Or. 195, 65 Pac. 449. So, too, in cases of seduction, evidence of the reputation of the female for lewdness is admissible as a circumstance tending to show that the act complained of may not have been the cause of her going astray. B. & C. Comp. § 1921. In prosecutions for adultery, however, a diversity of judicial utterance is observable, but we believe that reason renders such testimony admissible, from which the overt act may be inferred. Thus, in *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378, it was held at the trial of an indictment for adultery that evidence of the reputation for unchastity of the woman with whom the defendant was alleged to have committed the act was competent. To the same effect is the case of *Blackman v. State*, 36 Ala. 295. In our opinion, no error was committed in receiving the testimony in question.

It is insisted by defendant's counsel that an error was committed in introducing, over defendant's objection and exception, testimony tending to show that the defendant and Florence Cline, at other places, and prior to the time specified in the information, had been guilty of the crime of adultery. In *Commonwealth v. Nichols*, 19 Am. Rep. 346, upon the trial of an indictment for adultery, it was held that evidence of other acts of adultery, committed by the same parties, near the time alleged, though in another county, was admissible to support the charge. In *State v. Bridgman*, 24 Am. Rep. 124, on the trial of an indictment for adultery, it was held that evidence of improper familiarity and adultery, both before and after the commission of the crime alleged, was admissible; the court saying: "The offense charged in this case cannot ordinarily be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches, and the relations of the parties have been changed from those usually existing between the sexes to the most intimate. \* \* \* Thus it appears that the true relation of the parties to each other in this respect is very material and proper to be shown, and there could be nothing more potent to show that no barrier of modesty or manners was remaining between the parties, and to show the real relation between them, than the fact that they were in the habit of committing the act from time to time.

\* \* \* But this relation of intimacy, as before suggested, does not usually take place suddenly, and the fact of its existence at any time to that extent that intercourse was actually had would be some evidence that the relation had been existing previously, and, offered with evidence of other acts so as to show the relation to be continuous through a period covering the time in question, would be quite material and convincing." The rule is well settled that on the trial of a person charged with the commission of the crime of adultery evidence of other acts of that kind, or of familiarity between the same persons, is relevant, as tending to show the adulterous disposition of the parties at the time alleged in the information. 2 Greenl. Ev. § 47; 1 Jones, Ev. § 143; Underhill, Cr. Ev. § 381; Wharton, Cr. Ev. § 35; 1 Cyc. 961; *State v. Scott*, 28 Or. 331, 42 Pac. 1; *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892; *State v. Snover*, 47 Atl. 583.

It is maintained by defendant's counsel that no testimony was introduced at the trial tending to show that the crime was committed in Multnomah county; nor was the jury instructed that, before they could find defendant guilty, they must find that he committed the crime charged in that county. Though the bill of exceptions has attached thereto the testimony given, the court not having been requested to instruct the jury to acquit the defendant by reason of any failure of proof, it will be presumed that the testimony was sufficient in this respect. It is true the jury were not told that they must find that the crime was committed in the county alleged, but, as no request so to instruct was made by the defendant, any failure of the court in this particular is unavailing. *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *State v. Meldrum*, 41 Or. 380, 70 Pac. 526.

The court, over objection and exception, admitted in evidence alleged declarations of Florence Cline, not made in the presence of the defendant, to the effect that he was guilty of the crime charged; but thereafter the jury were instructed not to consider such evidence, and any error that may have been committed by the admission of such declarations was cured by the instructions given. *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *State v. McDaniel*, 39 Or. 161, 183, 65 Pac. 520.

The defendant, having called as his witness the district attorney of Multnomah county, was not permitted to show that such officer had filed "Not a true bill" against Florence Cline, and, an exception to the court's refusal having been reserved, it is contended that an error was thereby committed. In *Alonzo v. Texas*, 15 Tex. App. 378, 49 Am. Rep. 207, the defendant in a prosecution for adultery pleaded in bar the acquittal of his codefendant, but it was held that the plea interposed was untenable; the court saying: "While it is true that, to constitute adultery,



there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery may be complete. Thus, if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime." As the defendant, if guilty, could have been convicted of the crime charged notwithstanding the acquittal of Florence Cline, the action of the district attorney in returning "Not a true bill" as to her did not thereby discharge him, and no error was committed as alleged.

The court, in referring to the alleged marriage of the defendant, charged the jury as follows: "The marriage may be proved in different ways. Evidence of eyewitnesses who saw the marriage performed is sufficient (that is, it is sufficient if you believe the evidence to be true); and if you are satisfied from the evidence in this case that at the time this act is alleged to have been committed the defendant, John Eggleston, was married to Alice Eggleston, that would be sufficient evidence upon that part of the case. I will further say that if you are satisfied that the marriage was performed, that the defendant and Alice Eggleston were married at some time prior to the time this offense is alleged to have been committed, it would not be necessary for the state to go on and show that they continued to be husband and wife, but it would be presumed they have continued to be husband and wife, in the absence of any evidence to the contrary." An exception having been taken to this part of the charge, it is maintained that the court erred in giving it. As explanatory of the first clause of the instruction complained of, the defendant's brief contains the following statement: "It was attempted at the trial to prove the marriage of the defendant by the evidence of a daughter of Mrs. Eggleston, who testified that she was present at the marriage of defendant and her mother, in Chicago, by a justice of the peace, but no proof was given that the justice of the peace had any jurisdiction or authority to perform the same, and we understand that the state must prove that a marriage in fact took place. The state endeavored to introduce a license and return, but the same was objected to by the defendant,

and is wholly incompetent to prove that a marriage in fact was ever performed." The bill of exceptions does not contain a copy of the evidence "endeavored to be introduced," nor does it appear therefrom whether or not such evidence was received. Mr. Wharton, in his work on Criminal Evidence (9th Ed.) § 173, in speaking of the proof of marriage, says: "The testimony of a witness present at the marriage is ordinarily admissible, and adequate proof, unless the law requires official evidence." In *State v. Clark*, 54 N. H. 456, on the trial of an indictment for bigamy, it was held that the testimony of persons who were present and witnessed the former marriage ceremony of the defendant was admissible to prove the fact of marriage; the court, in referring to the person who performed the ceremony, and of his authority, saying: "The evidence shows a marriage ceremony duly performed by a person who was in fact a magistrate; and it is to be presumed that the magistrate acted within the scope of his legal power and authority until evidence to the contrary appears." In *Lord v. State*, 17 Neb. 526, 23 N. W. 507, at the trial of an indictment for adultery, it was held that the marriage might be proved by an eyewitness; the court saying: "Any person who was present when the marriage took place is a competent witness to prove the marriage." It is quite probable that the license and return were received in evidence, and, this being so, the testimony of the witness who was present at the celebration of the ceremony was competent to identify the parties and to prove the marriage in fact. In *People v. Stokes*, 71 Cal. 263, 12 Pac. 71, on the trial of an indictment for adultery, it was held that, after the defendant's marriage had been proved, the continuance of that relation would be presumed until a dissolution by death or divorce is affirmatively shown; the court saying: "In the absence of affirmative evidence, the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it." It is a disputable presumption that a thing once proved to exist continues as long as is usual with things of that nature. B. & C. Comp. § 788, subd. 33. The solemnization of a marriage is based upon the mutual assent of the parties that the relation entered into shall continue until it is severed by the death of one of them. The marriage, however, is sometimes dissolved by a decree of divorce, but this method of separation is happily the exception, rather than the rule, in view of which we think the instruction complained of was proper. *Hemingway v. State*, 68 Miss. 371, 417, 8 South. 317.

It is contended that the court erred in giving the following instruction, to which an exception was saved, to wit: "You can take into consideration, however, evidence tending to show an adulterous or amorous disposition on the part of the accused, and also on the part of the person with whom it is al-

leged that he committed this crime—any adulterous or amorous disposition, or evidence tending to show an inclination on the part of these parties to commit adultery. You can take into consideration any evidence tending to show such a disposition or inclination, either before or after the time when this crime is alleged to have been committed; and you may take into consideration any evidence tending to show that this act was committed at other times and places, although it may show distinct and separate crimes, because such evidence would tend to show an adulterous disposition or inclination on the part of the parties." This instruction was evidently founded on the rule announced in *State v. Bridgman*, 24 Am. Rep. 124, where it was held on the trial of an indictment for adultery that evidence was admissible of improper familiarity and adultery both before and after the commission of the offense charged, although it proved other and different offenses. What has heretofore been said in relation to the admission of testimony tending to show an adulterous disposition on the part of the defendant and of Florence Cline applies with equal force to the instruction complained of, in the giving of which no error was committed.

An exception was taken to the following instruction, and it is contended that an error was committed in giving it, to wit: "You may also take into consideration any evidence tending to show an opportunity upon the part of these parties to commit this crime. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in a verdict of guilty against this defendant, if this evidence satisfies you beyond a reasonable doubt that the crime was committed." In *State v. Scott*, 28 Or. 331, 42 Pac. 1, it is said: "Mere proof of an opportunity to commit adultery is insufficient to convict a person of that crime, unless there be proof also of an adulterous mind on the part of both parties; and to prove this state of mind circumstantial evidence is admissible to show a purpose or inclination to commit the act." To the same effect, see *Herberger v. Herberger*, 16 Or. 327, 14 Pac. 70; *Freeman v. Freeman*, 31 Wis. 235. If adultery could be inferred from the existence of an opportunity to commit the act, it would be unsafe for persons of opposite sex to meet, except in the presence of others. When, however, proof of an adulterous disposition on the part of each party has been produced, evidence of an opportunity to commit the act is admissible, and from these combined factors the commission of the crime may be reasonably inferred. No error was committed in giving such instructions.

The court told the jury, in effect, that, though the crime was alleged to have been committed May 24, 1903, it was not necessary that they should find that was the exact

date; but if they were satisfied that it was perpetrated within a month or more from the date stated, and before the information was filed, it would justify them in bringing in a verdict of guilty, if they were satisfied, beyond a reasonable doubt, that at the time the crime was committed the defendant was a married man and the husband of Alice A. Eggleston. An exception to this part of the charge having been taken, it is contended that an error was committed in giving it. The court admitted, over defendant's objection and exception, testimony tending to show that the defendant and Florence Cline committed adultery at a time antedating the statute of limitations, but such testimony was received as tending to show their lascivious dispositions, so that the court's limitation of a month or more from the day alleged, but prior to the filing of the information, necessarily excluded the time anterior to the statute in question, and no error was committed in giving this instruction.

The court refused to give the following instructions requested by the defendant, to wit: "(1) I will instruct you that you must find that the defendant and Alice Eggleston were duly and regularly married in the state of Illinois, and such evidence must show a marriage in fact, and must be proved by witnesses, who were present at the same, that such a legal marriage was performed. (2) I will also instruct you that you must find from the evidence adduced that the present prosecution was commenced by the consent of Alice A. Eggleston, the supposed wife of the defendant. (3) You must also find beyond a reasonable doubt that up to this time, on the filing of the information, the defendant and Alice A. Eggleston were and now are husband and wife. (4) I will instruct you also that you must find beyond a reasonable doubt that the act of adultery charged in the information was committed on the day mentioned in the information, to wit, on the 24th day of May, 1903, otherwise your verdict should be for the defendant. (5) You are instructed that you are not to take into consideration any of the other times and opportunities that have been testified to, only in so far as showing intent of the parties. (6) In reaching your verdict I will instruct you not to consider any of the evidence showing statements made by Florence when she was alone, and not in the presence of the defendant." Exceptions having been taken to the action of the court in not charging the jury as requested, it is insisted by defendant's counsel that errors were thereby committed. That the marriage could have been proved by the production of the record and of the statute of the state where and in pursuance of which it was solemnized, must be admitted; and, while it might have been proved in the manner indicated in the first request, it could have been proved otherwise, and no error was committed in refusing to give the first instruction. A part of the

court's general charge to the jury is as follows: "I should have said that you should be satisfied that this prosecution was brought at the instance of the wife before you can convict." The jury having been properly enlightened on this branch of the case, no error was committed in refusing to give the second requested instruction. The third request has heretofore been disposed of by invoking the presumption that a marriage once proved to have been celebrated continues during the lives of the parties. The fourth request does not correctly state the law (B. & C. Comp. § 1309), and no error was committed in refusing to give it. The fifth and sixth requests were given, in effect, by the court in its general charge. It is insisted in the defendant's brief, and was maintained by his counsel at the trial herein, that other errors were committed by the court, but as they are not set out in the bill of exceptions, they are unavailing.

It follows that the judgment should be affirmed, and it is so ordered.

#### MUCKLE et al. v. GOOD.

(Supreme Court of Oregon. Aug. 1, 1904.)

#### TIDE LANDS—SALE—STATE GRANTS—QUIETING TITLE—ADVERSE POSSESSION.

1. Where land in controversy lay between ordinary high and low water mark along a tidal river, it belonged to the state; and, where the board of school land commissioners found the land to be tide land, and as such conveyed it, it passed to the grantees.

2. A naked adverse claim of title by adverse possession, not based on color of title, is insufficient to entitle the claimant not in possession to institute a suit to quiet title, or require an exhibition of the nature of his adversary's title.

Appeal from Circuit Court, Columbia County; Arthur L. Frazer, Judge.

Suit by James Muckle, Jr., and another against James Good. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

W. B. Dillard, for appellants. S. H. Gruber, for respondent.

**BEAN, J.** This is a suit to quiet title to a tract of land on the Columbia river, in front of the town of St. Helens. The plaintiffs do not assert any record or paper title, but base their right alone on an alleged adverse possession for more than 10 years. The defendant denies that the plaintiffs are the owners or in possession of the property, and asserts title in himself by mesne conveyances from the grantees of the state; alleging that it is tide land, and as such was conveyed by the state to his predecessors in interest in 1883. The land in question lies along the margin of the Columbia river, between low-water mark and a precipitous

ledge of rock about 150 feet distant therefrom. This ledge of rock is practically parallel with the river, and forms the east line of the Strand—a street in St. Helens—and the west bank of the river, making the line of high water. The Columbia river at St. Helens is a tidal stream, and at an ordinary stage of the water is affected by the diurnal tides from the ocean. At extreme low water the tide rises perpendicularly from 1 to 4 feet, and a space of from 50 to 60 feet wide of the land in controversy is alternately covered and uncovered by the ordinary fluxes and refluxes of the tides. During the winter and spring freshets, however, the rain and melting snows cause the river to rise to such a height that for a month or two in the winter and two or three months in the summer the effect of the tide is not perceptible. During such time the water extends up to the perpendicular bank of the stream, and the land in controversy is entirely covered. The land covered and uncovered by the tide at extreme low water becomes submerged whenever the river has risen from 2 to 4 feet. The water is still affected by the tides, however, though in less degree; another but narrower strip of land, farther up the shore, being covered and uncovered by it. As the water continues to rise, the tides flow and reflow over another still narrower strip of shore, until the perpendicular bank is reached. For the plaintiffs it is contended that, upon this state of facts, the deed from the state to the defendant's grantors conveyed no title, because the land is not tide land, within the meaning of the act of 1878 (Laws Or. 1878, p. 41) authorizing the sale of such land. We do not think it necessary in this case, however, to determine that question. The land lies between ordinary high and low water, and was therefore, in any event, the property of the state. *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435; *Olney v. Moore*, 13 Or. 238, 11 Pac. 187; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. The river is a tidal stream. The board of school land commissioners found the land to be in fact tide land, and as such conveyed it to the defendant's predecessors in interest. The title thus acquired by the grantees of the state is good against the plaintiffs, who, in our opinion, have no title, either legal or equitable.

A mere presumptive title, founded upon a lawful possession under a claim of right, may in some instances be sufficient to sustain a complaint to remove a cloud from title against an adverse claimant, whose title is weaker than that of the plaintiff, or who has no title at all. *Giltinan v. Lemert*, 13 Kan. 476; *Loomis v. Roberts*, 57 Mich. 284, 23 N. W. 816. A mere naked claim of title, however, by a plaintiff not in possession, is not sufficient to authorize him to institute a suit, or require an exhibition of the nature of the estate or title of the defendant. The

¶ 2. See *Quieting Title*, vol. 41, Cent. Dig. §§ 8, 38.

plaintiff must have some right based upon title, actual or presumptive, and such title must be shown by him before the adverse claimant can be required to produce the evidence upon which he rests his claim. *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925. Now in this case the plaintiffs do not assert any paper or record title, but base their right alone on adverse possession, and this claim is not supported by the testimony. At the time this suit was instituted, no part of the property was in the actual possession of any one, except a small space occupied by a building of the defendant. Plaintiffs never had such an exclusive, open, and hostile possession under a claim of right as to give them title by adverse possession. The testimony upon this point is clear and convincing, and it would serve no useful purpose to set it out in detail.

The decree is therefore affirmed.

MOORE, J., took no part in this decision.

(44 Or. 587)

#### ROBERTSON v. LOW.

(Supreme Court of Oregon. Aug. 1, 1904.)

PUBLIC LAND—CONVEYANCES—FORFEITURE—  
WAIVER—POWER OF STATE BOARD—TRUSTS—  
STATUTES—CONSTRUCTION.

1. Hill's Ann. Laws 1892, § 3607, relating to the sale of school lands, provides that on default in interest on any note given for the price for one year, the sale and certificate shall be void, and all payments thereon shall be forfeited, and the land shall again be subject to sale. B. & C. Comp. § 3307, containing the same provisions as to forfeiture, has superseded section 3707 in some respects. B. & C. Comp. § 3299 (Hill's Ann. Laws 1892, § 3608), relating to the same subject-matter, empowers the board of commissioners for the sale of such lands to make rules for the transaction of business within the scope of the act, and to decide all questions about priority of settlement and other disputes between applicants, and makes their decisions as to the legal title final as to the right of a deed from the state. *Held*, that the power accorded to the board of commissioners carries with it, by a fair intendment, authority to waive a forfeiture for the nonpayment of interest within the time limited.

2. In a suit to enforce an alleged trust against the holder of the legal title to certain school lands purchased from the state board of commissioners, it appeared that defendant had regularly applied for the purchase of the tract in question, paid part of the consideration, and given his notes for the balance. The certificate received by defendant provided that, on default in the interest for one year, the sale and the certificate should become void, and all payments be forfeited, and that the land should be again subject to sale as required by Hill's Ann. Laws 1892, § 3607, and so much of B. & C. Comp. § 3307, which amended section 3607, as was not changed on amendment. Default for more than one year having occurred in interest, plaintiff applied in due form to purchase the lands; but, on subsequently making payment of the balance due, defendant was awarded a deed on his certificate by the board, whereupon plaintiff made tender to defendant of the full purchase price of the land. *Held*, that the act of the board in accepting payment from defendant and awarding the deed to him was a waiver on the part of the state of the forfeiture, and hence,

in the absence of allegation and proof of fraud or arbitrary action on the part of the board, plaintiff obtained no enforceable right to the land by his application.

Appeal from Circuit Court, Klamath County; H. L. Benson, Judge.

Suit by John P. Robertson against S. B. Low. From a judgment for defendant, plaintiff appeals. Affirmed.

On November 25, 1884, the board of commissioners for the sale of school and university lands, upon due application, issued to one Joseph Wilson a certificate of sale for 160 acres of school land, described as the southeast quarter of section 24, township 39 south, range 9 east of the Willamette meridian, in consideration of the sum of \$320, of which \$108 was paid in cash; the purchaser giving his two promissory notes for the balance in equal parts, payable one and two years from the date thereof, respectively, with interest at the rate of 10 per cent per annum. The certificate was conditioned that, in case any interest on the notes should remain unpaid for one year after the same became due, then that the sale and the certificate should become void, and all payments be forfeited, and that the land should be deemed to be vacant, and subject to sale as if it had not before been sold. The defendant subsequently became the owner and holder of this certificate through mesne assignments from Wilson, and the interest was paid on the notes to November 20, 1899. On July 21, 1902, plaintiff made application to the board to purchase the land, depositing at the same time with the clerk thereof one-fifth of the purchase price, or \$64, as required by law; but the defendant, having subsequently made payment of the balance due upon the aforementioned notes, both principal and interest, was on August 1, 1902, awarded a deed upon his certificate. These facts are set out in the complaint, and it is further alleged that, by reason of the delinquency in payment of the interest for more than one year after the same became due and payable, the former payments became forfeited, the certificate was henceforth void, and the land vacant and again subject to sale; that plaintiff duly tendered to defendant the full purchase price of the land, namely, \$320; and that the defendant now holds the legal title thereto in trust for plaintiff—and prays a decree accordingly, and that defendant be required to convey to plaintiff. A demurrer to the complaint was sustained, and a decree was rendered dismissing it, from which plaintiff appeals.

Webster Holmes and John P. Robertson, for appellant. J. C. Rutenic, for respondent.

WOLVERTON, J. (after stating the facts). By section 3607, Hill's Ann. Laws Or. 1892 in force when Wilson's certificate was issued, it was provided that, "if any interest should remain unpaid on any note or notes given for

part of the purchase price of lands for one year after the same becomes due, the sale and certificate shall be void, and all payments thereon shall be forfeited, and the land shall be deemed vacant, and shall be subject to sale as if it had not before been sold." This has been superseded by section 3307, B. & C. Comp., which provides that, if any installment of the purchase price or interest shall remain unpaid for one year after the same becomes due, the certificates shall be void, etc.; running otherwise the same as the section amended. The board was empowered by section 3608, Hill's Ann. Laws Or. 1892, and is still empowered, under the provisions of section 3299, B. & C. Comp., to make rules for the transaction of business within the scope of the act of which the foregoing sections were and are a part, to pass upon all matters properly coming before it for consideration, to hear and decide all questions about priority of settlement and other disputes between applicants; and all their acts and decisions as to the legal title are to be final, as to the right of a deed from the state. This court has virtually decided in *Robertson v. State Land Board*, 42 Or. 183, 70 Pac. 614, and quite properly, we think, after a re-examination of the matter, that the authority thus conferred upon the board was ample to empower it to make a rule that persons delinquent in the payment of their purchase price and interest should be notified, and given 30 days in which to bring up such payments before cancellation of their certificates would be made, and that applications of others for the purchase of the land involved meanwhile would not be considered. Such a rule is manifestly reasonable and just, and well calculated to promote a systematic regulation, adjustment, and disposition of the business intrusted to the board. It is very true that the Legislature has made time of the essence of the contract, and, further than this, the board, by the very terms of the certificate issued to Wilson, which eventually came into the hands of the defendant, made time of the essence thereof also, by express stipulation, following the mandate of the law. But the same law has empowered it to make rules for the government and adjustment of its business, comprising among other matters the sale of school land, and to hear and decide all questions as to the priority and other disputes between applicants, involving as well the authority to determine as to who is entitled to the legal title, and consequently the deed from the state; and these statutes must be read in pari materia. It is also true, as a legal proposition, that a technical forfeiture was incurred under the provisions of the law, and the certificate of sale by the non-payment of interest for more than one year, and is now incurred under the present statute for the nonpayment of either principal or interest for more than one year after the same becomes due and payable, and takes place ipso facto upon the happening of the

event, and that no judicial declaration thereof is necessary to determine the fact. It was and is a legislative declaration, and takes effect upon the happening of the event; and the land is to be deemed vacant and subject to sale, as if it had not before been sold. *Miller v. Wattier* (Or.) 75 Pac. 209. In further support of the principle, see *State v. Emmert*, 19 Kan. 546; *Ewing v. Baldwin*, 24 Kan. 82; *Baker v. Newland*, 25 Kan. 25; *Reynolds v. Reynolds*, 30 Kan. 91, 1 Pac. 388; *Conklin v. Hawthorn*, 29 Wis. 476. We said in the *Miller* Case that "it [the forfeiture] took place ipso facto upon the nonobservance of the conditions of the sale, and the purchaser at once lost all right or interest therein." We should have added, to be more exact, "that he was entitled to enforce." But notwithstanding such legislative declaration, the state can undoubtedly, as against all persons not having acquired a vested right or interest, waive or relieve against the forfeiture, which is just what it did do by legislative act in the *Miller* Case. It stands in a like relation as an individual contracting with another, where time is made of the essence of the contract, and a forfeiture has been incurred. The party entitled to the benefits of such conditions, and to insist upon the forfeiture as an absolute termination of contractual relations, may nevertheless waive it by accepting the overdue payment or payments, or extending the time in which to meet them; thus restoring the party in default to his former relationship, entitling him still to the rights thereby bargained and stipulated for. The board is the state's instrumentality for the sale and disposition of school lands. Although constituted a part of the administrative department of the government under the Constitution, it is nevertheless governed and controlled in the exercise of its functions by the Legislature and the laws emanating therefrom; and the cardinal and pivotal controversy here is whether it is so authorized and empowered to waive or forego in any event, and, if so, under what conditions, a technical forfeiture on the part of the purchaser, so as to entitle or permit him to complete the purchase notwithstanding his default. We are clearly of the opinion that the power accorded to make rules for the transaction of its business, and to hear and determine disputes between applicants touching priority of settlement, and to decide between them finally as to the legal title, and as to who is entitled to a deed from the state, carries with it, by fair and reasonable intendment, such requisite authority. The power is manifestly of considerable proportions, and designed to cover a multitude of details, as well as to afford adequate administrative discretion for the regular, orderly, and equitable adjustment of its business with purchasers. It is not far to suppose that a purchaser has suffered both legislative and contractual default but for a day, and for a very small sum, under such

circumstances that it would be atrociously inequitable to insist upon the forfeiture. Would any one say in such a case that the party must lose his land, notwithstanding the board has permitted him to make payment, and has executed to him a deed therefor, when no adverse rights have intervened? Doubtless many state deeds have been executed under similar or even much less excusable circumstances, and it would probably unsettle many titles if the board was absolutely without authority to act in any case to reinstate the purchaser where a forfeiture has thus been incurred. It is highly appropriate, therefore, that the board should take some definite step to indicate finally the state's determination not to recognize contractual relations further, and thereby to cancel its obligations to sell. This the law says, by the plainest intendment, it may do by rule; and the rule becomes a law unto all applicants, just as binding as a legislative edict, and no one can gain a vested right in the face of it. It is not left in the province of the board to act arbitrarily in such matters, and to deny one applicant and prefer another as its peculiar predilections may suggest; but it must act under the law, and by reasonable rule made for the transaction and regular adjustment of its business in dealing with the purchaser. When it has done this, no one can complain, as all are fully advised beforehand of their absolute rights and remedies in the premises, and are required to act accordingly. Such seems to have been the equitable policy of the board, and we are not disposed to disturb its just interpretation of the law, and its consequent action in that regard. In a case of similar import to this (*Baker v. Newland*, 25 Kan. 25), Mr. Justice Brewer, now of the Supreme Court of the United States, makes use of the following significant language: "It is generally true that one in whose favor a forfeiture exists may waive it. The state was the party entitled to the benefit of this forfeiture. No one else could claim its benefits. If, notwithstanding, it receives full payment of the purchase price and gives a patent, it does not lie in the power of any individual to question that title. Doubtless many instances will be found in the history of this state in which purchasers of school lands have failed to make their payments on the very day. Technically and strictly, such failure worked a forfeiture. But if notwithstanding thereafter such purchasers completed their payments and received patents, we suppose that their title is safe—certainly as against any one but the state, and probably as against it. It may be said that no officer is in terms authorized to waive such a forfeiture, or to relinquish any legal claims of the state. No officer can act outside the law, and bind the state. Doubtless this is true. But where the just and equitable claims of the state are fully satisfied, the acts of its officers in waiving mere technical and arbitrary forfeitures,

and which are never challenged by the state itself, will be upheld as against the complaints of any third party." But we have no need to go so far in the present case, as the board possesses much more ample authority in the premises than any officer would seem to possess under the laws of Kansas. Now, it appears from the complaint that the board, within a few days after the plaintiff made his application to purchase, executed to defendant a deed, in pursuance of his certificate, to the land in dispute, thus deciding and determining the matter before it between the claimants as to who was entitled to the legal title; and we must assume, without a showing to the contrary, that it acted in pursuance of law and its rules regularly adopted, and must therefore hold that its adjustment of the matter is a finality between the parties. *Robertson v. State Land Board*, supra. There is no allegation in the complaint, nor any fact relied on, tending in any manner to show that the board acted fraudulently or arbitrarily in the premises; the sole reliance of the plaintiff for relief being that it exceeded its lawful authority in executing the deed to defendant, and thus denying plaintiff's application. On this contention, he has not stated a cause of action, and the demurrer was properly sustained.

The judgment of the trial court will therefore be affirmed, and it is so ordered.

(45 Or. 422)

### BLACKBURN v. LEWIS.\*

(Supreme Court of Oregon. Aug. 1, 1904.)

TAXATION — ASSESSMENTS — "UNOCCUPIED LANDS"—STATUTES—CONSTRUCTION — DEEDS — ESTOPPEL — QUIETING TITLE — IMPROVEMENTS—PLEADING.

1. The conclusiveness of a tax deed as evidence should be measured by Hill's Ann. Laws 1892, § 2823, as it stood at the time of the assessment and levy of the tax and the sale for its delinquency, and not by the section as subsequently amended (B. & O. Comp. § 3127); there being no sufficient legislative declaration attending the amendment indicating an intent that the deed provided for therein should apply to former sales.

2. Hill's Ann. Laws 1892, § 2735, provided that unoccupied land, if the owner was unknown, should be assessed as such, without inserting the name of the owner; and section 2775 declared that unoccupied land liable to taxation, when the owner was unknown, should be described, and the value thereof set down separate from other assessments, and the value thereof designated. *Held*, that the words "as such," in section 2735, referred to unoccupied land, and not to unknown owner, and, that such sections, construed together, required that the unoccupied land, if the owner was unknown, should be described and valued in a part of the assessment roll separate from other assessments.

3. Under Hill's Ann. Laws 1892, §§ 2735, 2775, requiring unoccupied land, the owner of which is unknown, to be separately described, valued, and assessed for taxes in a part of the assessment roll separate from other assessments, an assessment of land not shown to be unoccupied to "unknown owner," in the column of the general list headed "Names of Taxpayers," was void.

\*Rehearing denied October 3, 1904.

4. A grantee of land under a deed subject "to all unpaid taxes and sales for the same" was not thereby estopped to deny the validity of a tax sale, where the assessment on which the sale was based was wholly void.

5. Where, in a suit to remove a cloud on title, plaintiff made no claim in the pleadings for improvements placed on the land, he was not entitled to recover for such improvements on his title being declared void.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Action by J. E. Blackburn against Leander Lewis. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. N. Percy and John T. McKee, for appellant. Wm. M. Gregory, for respondent.

**WOLVERTON, J.** This is a suit by plaintiff, claiming under a tax deed, to remove a cloud from title. The defendant claims under deed by regular conveyances from Ladru Royal and J. D. Hart, who, it is conceded, are the common source of title as between the parties. The defendant's title is regular, if the tax deed has not divested him of it, and the whole question turns upon the validity of such deed. It is based upon a sale for delinquent taxes for the year 1892, and an amendatory deed executed by W. A. Storey, as sheriff and tax collector of Multnomah county, Or., October 2, 1902. The former deed, which was executed November 9, 1897, by William Frazier, former sheriff and tax collector, having been declared inoperative and void by this court in the case of *Lewis v. Blackburn*, 42 Or. 114, 69 Pac. 1024, there is a question here touching the authority of the sheriff to execute an amendatory deed of the kind, under our statute; but we may pass that over, as the second is also void for another reason.

But before reaching that question, it is well to premise that the validity of a tax deed is to be tested by the statute in force when the sale was made, unless there is some expression denoting an intendment that the later act should operate retrospectively. *Black, Tax Titles* (2d Ed.) § 410; 2 *Blackwell, Tax Titles* (5th Ed.) § 795; *Strode v. Washer*, 17 Or. 50, 56, 16 Pac. 926; *Woodman v. Clapp*, 21 Wis. 350, 360; *McCann v. Merriam*, 11 Neb. 241, 9 N. W. 96; *Baldwin v. Merriam*, 16 Neb. 199, 20 N. W. 250; *Capital State Bank v. Lewis*, 64 Miss. 727, 2 South. 243; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240. We do this to show that the effect of the deed in question, as to its conclusiveness as evidence, should be measured by the provisions of section 2823, Hill's Ann. Laws Or. 1892, as it stood at the time of the assessment and levy of the tax and the sale for its delinquency, and not in its amended form (B. & C. Comp. § 3127); there not appearing to be any sufficient legislative declaration attending the amendment indicating an intendment that the deed thereby provided for should apply to any former sales.

Now, as to the sufficiency of the tax deed to pass the title. Section 2735, Hill's Ann. Laws Or. 1892, provided that unoccupied land, if the owner was unknown, should be assessed as such, without inserting the name of the owner; and section 2775, Id., that unoccupied land liable to taxation, when the owner was unknown, should be described, and the value thereof set down in the assessment roll, in a part thereof separate from other assessments, in the same manner that lands of residents are required to be described, and the value thereof designated. These sections, when construed together, as they should be, simply mean that unoccupied land, if the owner be unknown, should be assessed as such—that is, as unoccupied land—and should be described and valued in a separate part of the assessment roll from other assessments. The words "as such" have relation to unoccupied land, not to unknown owner, and an assessment of land of that kind, where the owner was unknown, by a substantially different form, was unknown to the statute, and therefore unauthorized and void. If unoccupied land was found, and the owner known, it simply took the regular course, and was assessed in the name of the owner, so that no land of that description would escape assessment by construction. But it is argued that occupied land, where the owner is unknown, would escape assessment, unless assessable under the designation of "unknown owner." To this there is but one answer. The statute seems not to have made provision for the manner of assessment of that particular kind of land, and it must be regarded as an oversight of the Legislature, or else it assumed that all such land would have a known owner. But however that may be, the loss in revenue could not be of any considerable proportion if it did escape, for land of that description must necessarily be very limited in amount. The statute provided only for the assessment of unoccupied, not occupied, land, when the owner was unknown; and it was to be assessed as "unoccupied land," or, rather, in such a case the assessment was to be in rem—that is, against the thing, as contradistinguished from the general plan or scheme, which was in personam, or against the person. *Middleton v. Moore*, 43 Or. 357, 73 Pac. 16. The distinction is radical and fundamental, and an assessment by one method where the law prescribes the other is admittedly such a departure from the mandate of the law as to render it utterly void. The premises in question were assessed to "unknown owner," the designation appearing in the column headed "Names of Taxpayers," and there was nothing to indicate that it was unoccupied land. Such an assessment is manifestly not in personam, for it is against no one, and it cannot stand upon that hypothesis. But to be assessable in rem—that is, against the thing, the land—it must have been unoccupied land, and

nothing appears to indicate that it was of such a description. So that there was no assessment upon either basis. The proper method would have been to have assessed it as "unoccupied land," or under that designation "owner unknown." But it was not pursued, and the attempted assessment cannot be considered otherwise than ineffectual and nugatory.

Another proposition insisted upon by plaintiff is that, as the defendant holds under a deed purporting to convey the premises in question subject "to all unpaid taxes and sales for the same," he is estopped to deny the validity both of the tax, and the sale of the lot had in pursuance thereof, and consequently of the tax deed under which plaintiff claims title. The principle is ordinarily invoked where a deed is made subject to incumbrance, and it becomes apparent that the incumbrance constituted part of the consideration for the premises conveyed. In such a case the grantee, having thus recognized the existence of the incumbrance, and having secured a corresponding reduction of the purchase price on account of it, is estopped to deny its validity. But the principle could hardly apply where there was never any incumbrance, either colorable or otherwise, as in the case at bar, where there is absolutely no assessment; the property having been listed, as we have seen, to "unknown owner," or no one, whereas it should have been assessed in rem, as unoccupied land. There being no assessment, there could not be any tax, and any sale for a supposed tax that had not even a colorable existence would, of course, be entirely nugatory (*Jory v. Palace Dry Goods Co.*, 30 Or. 196, 46 Pac. 786), so that a conveyance subject to all taxes and sales for same could not logically operate to preclude the grantee from denying the validity of a deed which had no foundation whatever—either in law, equity, or good morals—for its support. The position insisted upon is therefore untenable.

Some claim is also made for improvements placed upon the premises by plaintiff. The pleadings, however, present no such issue, and the subject-matter is not before us for consideration.

These considerations lead to an affirmance of the decree of the circuit court, and such will be the order of this court. Affirmed.

#### UNITED BRETHREN FIRST CHURCH OF EUGENE v. AKIN et al.

(Supreme Court of Oregon. Aug. 1, 1904.)

#### EXECUTORS AND ADMINISTRATORS—EXECUTOR'S PERSONAL INDEBTEDNESS—DISTRIBUTION —CHARGES—SURETIES' LIABILITY.

1. Under Hill's Ann. Laws 1892, § 1117, providing that an executor of an estate shall be liable for any claim of the testator against him.

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 302.

"as for so much money in his hands," a debt of the executor of an estate on a note executed to the testator in his lifetime was properly charged as so much money in the hands of the executor on the settlement of his final account, though the executor at the time and after his appointment was insolvent and unable to pay the note.

2. The sureties on an executor's bond, who executed the same without knowledge of the executor's indebtedness to the testator or of his insolvency, are liable under the decree of final distribution for the amount of the executor's personal debt to the estate, which was properly charged against him in his final account as so much money in his hands.

Appeal from Circuit Court, Benton County; J. W. Hamilton, Judge.

Action by the United Brethren First Church of Eugene against J. L. Akin and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. R. Wyatt, for appellants. E. R. Bryson, for respondent.

BEAN, J. This is an action by a creditor of the estate of Peter W. and Hannah R. Mason, deceased, against J. L. Akin, as executor of such estate, and the sureties on his official bond, to recover the amount due plaintiff under the decree of final settlement and distribution. Akin was indebted to the estate in the sum of \$330 and interest on a promissory note executed and delivered by him to Peter W. Mason in his lifetime. At the time of his appointment as executor he was insolvent, and has ever since so continued, and is unable to pay the note. He was nevertheless properly charged, under section 1117, Hill's Ann. Laws 1892, on his final settlement, with the amount of such note and interest, as "so much money in his hands," and the amount was included in the order of distribution. *Mason's Estate*, 42 Or. 177, 70 Pac. 507.

The single question on this appeal is whether the sureties on his official bond, who executed the same without knowledge of his indebtedness or his insolvency, are liable under the decree of final distribution for the amount of his personal debt to the estate. In our opinion, there can be but one answer to the question. It is common learning that the liability of the sureties of an executor is coextensive with that of the principal, and a decree of the county or probate court which binds the principal will, in the absence of fraud or collusion, bind them. *Bellinger v. Thompson*, 26 Or. 320, 343, 37 Pac. 714, 40 Pac. 229; *Thompson v. Dekum*, 32 Or. 516, 52 Pac. 517, 755; 11 Am. & Eng. Enc. Law (2d Ed.) 901; *Abbott, Trial Ev.* (2d Ed.) 638; *Abbott, Probate Law & Practice*, § 538; *Greer v. McNeal*, 11 Okl. 519, 69 Pac. 891; *Stovall v. Banks*, 10 Wall. 583, 19 L. Ed. 1036. It follows that when an executor has been charged upon the settlement of his accounts with a personal debt which he owed the deceased, whether by virtue of a statute, as in this state, or without a statute, as in other jurisdictions, the sureties on his bond are



bound for the payment thereof, and the executor's insolvency or inability to pay is no defense; and so are the adjudged cases. Judge of Probate v. Sulloway, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619, was an action on an executor's bond to recover the amount decreed to be in the hands of the executor upon final settlement, which account included a debt due from him to the estate. The executor was insolvent when appointed, and continued so, but it was held nevertheless that the amount of his debt was, under the statute of that state, properly charged to him as "so much cash on hand," and that his bondsmen were bound by the decree; the court saying: "The liability of the sureties is coextensive with that of the principal. They are his privies. By whatever decree of the probate court their principal is bound, they are bound. This is because they have, in legal effect, so stipulated in the bond. It necessarily follows that they are bound to whatever, in law, their principal, the executor, is bound. That he is bound to account for his indebtedness to the testator is not questioned, nor is it claimed that he is relieved from this obligation by the fact that he is insolvent or unable to pay." In Massachusetts, an executor, though insolvent, is chargeable on final settlement with the amount of a debt due from him to the deceased, without a statute, as though "he had actually received so much money." Stevens, Administrator, v. Gaylord, 11 Mass. 256. In Bassett v. Fidelity & Deposit Co. (Mass.) 68 N. E. 205, the court was asked to hold that, although an executor was so chargeable, the sureties on his official bond were not liable, but it said: "That is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account, and the elementary principles as to the obligation of a surety on a probate bond. In the first place, a decree of a probate court allowing an account of an executor or other official is binding on all interested in the estate, including sureties on the bond of the accountant. \* \* \* In the second place, the obligation of a surety on a probate bond is the obligation of the principal. The bond is a joint bond, and the judgment necessarily must be the same against both. This is more than a technical rule of law. It is a place where the true character of a surety's liability comes to the surface. The ground on which it was held that a surety has a right of appeal in such a case was that the decree settling the account of the principal, 'if once properly established, fixes the amount of liability of the sureties on their bond.' And Endicott, J., in Tarbell v. Jewett, 129 Mass. 457, 468, speaking of Leland v. Felton, 1 Allen, 531, said that it was held that the executor would be charged for his own notes and for the notes of his firm held by the testator, although both he and the firm were insolvent, 'which, of course, rendered his

sureties liable.'" California has a statute in reference to the liability of executors similar to ours. Treweek v. Howard, 105 Cal. 434, 39 Pac. 20, was an action on an executor's bond based on a decree of final settlement, in which the executor had been charged with a large amount of money which he had embezzled during the lifetime of the deceased. It was held that the sureties were liable, and that "the decree of distribution entered in the superior court, and the order of such court in passing upon and approving the account of the executor, were, in the absence of fraud, binding upon the executor and his sureties, although the latter were not parties to the proceeding." These cases are but the necessary application of the general doctrine that the sureties of an executor or administrator are bound by the decree against their principal. To the same effect are Wright v. Lang, 66 Ala. 389; Lambrecht v. State, Use of Gill, Adm'r, 57 Md. 240; and McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. 231. Baucus v. Barr, 45 Hun, 582, affirmed on appeal, without an opinion, in 107 N. Y. 624, 13 N. E. 939, is the only decision to which our attention has been called, or which we have been able to find, holding a contrary doctrine. It stands alone, and not only disregards or overlooks the rule recognized and enforced in that state that a decree against an executor, in the absence of fraud or collusion, is binding on the sureties (Gerould v. Wilson, 81 N. Y. 573; Harrison v. Clark, 87 N. Y. 571), but it is also against the great weight of authority as to the liability of the sureties of an executor for a personal debt of their principal, under a statute like ours (see cases cited in Mason's Estate, 42 Or. 177, 70 Pac. 507). The Estate of Walker, 125 Cal. 242, 57 Pac. 991, 73 Am. St. Rep. 40, was an appeal from a decree of final settlement of an administrator, and is not in point. We are therefore of the opinion that under the statute of this state, and by the great weight of authority, the sureties on the official bond of Akin as executor of the Mason estate are liable for the amount of his personal debt to the estate, notwithstanding his insolvency. The fact that they executed the bond in ignorance of the indebtedness or of his insolvency is no defense for them, or ground for relief, legal or equitable. The sureties on an executor's bond will not be discharged from liability, even by the fraud of the executor in procuring their execution of the bond, when the beneficiaries of the estate in whose interest the liability is sought to be enforced are themselves innocent of the fraud. Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. 231.

The conclusion reached may in some respects be a harsh one, and impose on the sureties a liability which they did not suppose themselves assuming. The statute fixing the liability of their principal was, however, a part of the law of the state at the time the

bond was executed, and they must be presumed to have executed it with reference thereto, and, as said in *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20, "are as liable as they would have been, had section 1447 been incorporated in the bond."

The judgment is therefore affirmed.

### STATE v. BRIGGS.

(Supreme Court of Oregon. Aug. 1, 1904.)

CONSTITUTIONAL LAW—LEGISLATIVE AUTHORITY—DELEGATION—BARBERS—REGULATION OF TRADE—LICENSES—BOARD OF EXAMINERS—POWERS.

1. Laws 1903, pp. 27, 32, §§ 1, 12, declare that it shall be unlawful for any person not registered to practice the business of a barber or conduct a barber school without the sanction of a board of examiners created by section 2, which also defines the duties and powers of such board, among which is to make such by-laws as it may deem necessary, not inconsistent with the Constitution of the state or with the provisions of the act, and prescribe the qualifications of a barber. Section 9 (Laws 1903, p. 31) defines what shall constitute the occupation of a barber, and section 10 provides a penalty for violation of the act. *Held*, that such act was not unconstitutional for failure to prescribe the standard or degree of knowledge or qualification required for barbers' licenses and in delegating power to prescribe such qualifications to the board.

2. Laws 1903, p. 31, § 9, authorizing the board of barber's examiners to prescribe the qualifications of a barber within the state, does not confer on the board arbitrary power to refuse to issue licenses, the board being required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all in like situation.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

H. L. Briggs was convicted for conducting a barber school without a license. From an order in arrest of judgment, the state appeals. Reversed.

John H. McNary, for the State. Frank S. Grant, for respondent.

BEAN, J. The defendant was convicted for conducting a barber school in violation of an act of the Legislature of 1903 (Laws 1903, p. 27), amendatory of the act of 1899 (Laws 1899, p. 287; B. & C. Comp. §§ 3841-3853), regulating the trade or calling of a barber, and providing for the licensing of persons carrying on such trade. Judgment was arrested upon motion, however, the trial court holding the act in question unconstitutional and void on the ground that it delegates to the board of barber examiners legislative authority, and vests in them power to issue and withhold licenses arbitrarily and at pleasure. If the law is open to either objection, the judgment must be affirmed. It is a settled maxim that the power conferred upon a Legislature to make laws cannot be delegated by that department to an-

other body or authority (*Cooley*, Const. Lim. [7th Ed.] 163), and any statute attempting to vest in a board, officer, or tribunal arbitrary power to issue or withhold permission or license to practice any trade, profession, or calling without regard to discretion, in the legal sense of that term, or without regard to the qualifications of the applicant, is void. *White v. Holman*, 44 Or. 180, 74 Pac. 933; *Yick Wo v. Hopkins*, Sheriff, 118 U. S. 356, 6 Sup. Ct. 1004, 30 L. Ed. 220; *Noel v. The People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238. Without setting out the provisions of the law challenged in detail, it is sufficient for the purposes of the question here involved that it defines what shall constitute the occupation of a barber (Laws 1903, p. 31, § 9); provides for the appointment of a board of examiners; defines the powers and duties of the board, among which is "to make such by-laws as it may deem necessary not inconsistent with the Constitution of this state, or with the provisions of this act, and shall prescribe the qualifications of a barber in this state" (Id. p. 27, § 2); declares that it shall be unlawful for any person not registered to practice the business of a barber, or conduct a barber shop or barber school, without the sanction of the board (Id. pp. 27, 32, §§ 1, 12); and provides a penalty for the violation of its provisions (Id. p. 31, § 10). While the law defines what shall constitute a barber, it does not prescribe the standard or degree of knowledge, learning, experience, or qualification which shall be required before applicants shall be licensed or authorized to practice or follow the trade or calling, but leaves that matter to be determined by the board of examiners. This, it is argued, renders the act void, because it is a delegation of legislative authority, and vests in the board arbitrary and unregulated powers. The position of the defendant is that, while the Legislature may lawfully regulate the trade or calling of a barber, and require all persons following it to register, or obtain certificates from the board of examiners, it must provide in the act the standard of qualification required, leaving to the board the mere duty of ascertaining whether the applicant possesses such qualification. Legislative power cannot be delegated, and the Legislature cannot confer upon any person, officer, or tribunal the right to determine what the law shall be. This is a function which the Legislature alone is authorized under the Constitution to exercise. The constitutional inhibition, however, cannot be extended so as to prevent the Legislature from conferring authority upon an administrative board to adopt suitable rules, by-laws, regulations, and requirements to aid in the successful carrying out and execution of a law it has passed. The doctrine on this subject is admirably stated by Mr. Justice Agnew in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, as follows: "Then the true dis-

tion, I conceive, is this: The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." It is well settled by a long line of authorities in harmony with this doctrine that the power given to an administrative board like the one now under consideration to prescribe rules and regulations reasonably adapted to carry out the purposes and object for which the board is created does not constitute an improper delegation of legislative authority. See *Blue v. Beach*, 155 Ind. 121, 133, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195, and cases there cited. Thus the Legislature of South Carolina passed an act giving the board of agriculture power to grant or refuse licenses to mine for phosphate rock in the property of the state, as the board might in its discretion deem best. The act was held valid, and not a delegation of legislative authority; the court saying: "It is undoubtedly true that legislative power cannot be delegated, but it is not always easy to say what is and what is not legislative power, in the sense of the principle. The Legislature is only in session for a short period of each year, and during the recess cannot attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents appointed for that purpose—such as the railroad commission, regents of the lunatic asylum, the state board of canvassers of elections, sinking fund commission, etc. The numerous authorities cited in the argument show conclusively that, while it is necessary that the law itself should be full and complete, as it comes from the proper lawmaking body, it may be—indeed, must be—left to agents in one form or another to perform acts of executive administration which are in no sense legislative." *Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841. The pure food law of Indiana provided that within 90 days after its passage the board of health should adopt measures to facilitate the law's enforcement, and prepare rules regulating minimum standards of food, defining specific adulterations, etc. It was held not an attempted delegation of legislative power. Mr. Justice Hadley said: "The obvious purpose of the provision last quoted was to commit to a body of learned and scientific experts the duty of preparing such rules, and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combination of

substances are injurious to health, and to what extent, if at all, admixtures or deteriorations of foods and drugs may go without injuriously affecting the health of the consumer. That which is required of the State Board of Health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate." *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 223. A law of Georgia vested in a railroad commission authority to make reasonable and just rates for freight and passenger traffic, to be observed by all railroads doing business in the state, and the act was held valid, the court saying: "It was not expected that the Legislature should do more than pass laws to accomplish the ends in view. When this was done, its duty had been discharged. All laws are carried into execution by means of officers appointed for that purpose; some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced. Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws are by no means uncommon in the history of our legislation." *Georgia Railroad v. Smith et al.*, Railroad Commissioners, 70 Ga. 694. An act of Congress authorizing the Secretary of War to make such rules and regulations as might be necessary to prevent obstructions in the Mississippi river provided that any violation of such rules and regulations should constitute a misdemeanor, and it was held that the act was not invalid because conferring legislative authority on the secretary, as he was only authorized to make rules, and it was the act itself which declared a violation to be a crime. *United States v. Breen* (C. C.) 40 Fed. 402. The Legislature may properly delegate to a board the power to determine what is a college in good standing or a reputable college, within the meaning of a law authorizing graduates of such a college to practice their profession. *Barmore v. State Board of Medical Examiners*, 21 Or. 301, 28 Pac. 8; *People v. Dental Examiners*, 110 Ill. 180.

These authorities are directly to the purpose that in the regulation and licensing of trades, occupations, callings, and professions which affect the public welfare the Legislature must enact the law necessary to accomplish the object in view; but it may be carried into execution by some officer or board appointed for that purpose, and such officer or board may be authorized to prescribe the qualifications of those desiring to follow such callings or professions. There are other cases holding laws of this character valid, although the point in issue here is not directly discussed in them. Thus, in West Virginia, every practitioner of medicine was required to obtain a certificate from

the State Board of Health that he was a graduate of a reputable medical college, or that he had practiced medicine in the state continuously for 10 years prior to the passage of the act, or that he had been found, upon examination by the medical board, qualified to practice medicine in all its branches. There was no provision in the statute as to the standard of qualification which the board should exact or enforce in its examination of applicants, that being left entirely to its judgment; and yet the law was held valid by both the Supreme Court of the state and of the United States. *West Virginia v. Dent*, 25 W. Va. 1; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. In the latter case Mr. Justice Field said: "No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications." The Legislature of Alabama passed an act making it unlawful for an engineer of any railroad train to draw or operate an engine upon the main line or roadbed of any railroad without first undergoing an examination and obtaining a license from the board of examiners for locomotive engineers. The Supreme Court of the United States held the law valid, although it did not provide what should constitute the qualification of an engineer, but left that matter to the judgment of the board. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. A law of the state of New York providing for the examination and licensing of plumbers was held valid and constitutional, although it did not attempt to define the qualification which should be required of licensed plumbers, but vested that power in the board of examiners. *People ex rel. v. Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718. Similar statutes were upheld in Maryland (*Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551), and in Ohio (*State v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785). Other cases to the same effect could be referred to, but these are sufficient to show that the provision of the act under consideration, vesting authority in the board of examiners to prescribe the qualifications of a barber, is not a delegation of legislative power.

It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of callings, trades, or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the Legislature; but this does not mean that the Legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission cre-

ated and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the state; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the state, and binding as such. The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical knowledge and learning in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the state, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the Legislature, must be complete, but there are many matters affecting its execution and relating to methods of procedure, which the Legislature may properly delegate to some ministerial board or officer, and prescribing the qualifications of persons who shall be licensed to follow or engage in the practice of a given trade or profession is one of them.

Now, is the law in question open to the objection that it confers upon the board of barber examiners power to prescribe varying standards of qualifications for different applicants, or arbitrarily to grant or refuse a license at will? The authority to prescribe the qualifications of a barber is a general grant of power, and does not, like the laws held void in *Noel v. The People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238, and *Yick Wo v. Hopkins, Sheriff*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, vest in the board the absolute discretion to grant or withhold licenses. The board is required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all in like situations; and there is no pretense that it has not done so. If it should act arbitrarily or oppressively, its conduct might call for a remedy against the members of the board, but it would not furnish a ground for declaring the act invalid. *People v. Hasbrouck*, 11 Utah, 291, 306, 39 Pac. 918; *People ex rel. v. Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *People ex rel. v. Dental Examiners*, 110 Ill. 180. The constitutionality of a law is to be determined by its provisions, and not by the manner in which it may be administered; and, unless it conflicts with the Constitution, the law is valid. The law here in question provides for the appointment of a board, made up of persons skilled in the calling, to which the duties imposed are intrusted for performance, and to which is committed the power of prescribing such qualifications for applicants applying for licenses desiring to practice the trade or calling of a barber as may be just

and reasonable, and it must be presumed that the board will exercise fairly and impartially the powers conferred.

It follows that the judgment of the court below must be reversed, and it is so ordered.

# HEARST et al. v. PUTNAM MINING CO. et al.

(Supreme Court of Utah. July 28, 1904.)

CORPORATIONS—FRAUDULENT CONVEYANCE—ACTION—RIGHTS OF STOCKHOLDERS—JUDGMENT—RES JUDICATA.

1. A corporation has the same dominion over its property, with the same right of disposition, as a private person.

2. Where a corporation has exercised the right of disposition of its property, stockholders thereof cannot in their own right maintain a suit to cancel the conveyance on the ground of fraud giving rise to a trust in their favor, ex maleficio or otherwise; the act complained of having been fully consummated, and the title of the property having passed to third persons.

3. Where a suit to cancel the conveyance of the property of a corporation on the ground of fraud was instituted by stockholders suing in the right of the corporation, a judgment therein, rendered by a court of competent jurisdiction, that there was no fraud, is conclusive on other stockholders in a subsequent suit for the same purpose, based on the same facts.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Suit by Phoebe A. Hearst and another against the Putnam Mining Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an action in equity resulting from certain mining transactions, whereby the plaintiffs claim they were defrauded.

From the pleadings and the record, it appears, in substance, that the defendant Putnam Mining Company was a corporation organized under the laws of Utah, with a capital stock of 100,000 shares, of the par value of \$10 each. When the transactions, of which complaint is made, occurred, each of the plaintiffs was the owner of 3,293 shares of that stock. The company owned 12 mining claims, with all their "appurtenances, buildings, tunnels, shafts, tools thereon and therein," situate in Summit county, Utah. The defendant William M. Ferry was the vice president and a director of the company, and on about October 16, 1895, the company gave him a lease and bond on said mining property, whereby it was, in substance, agreed that Ferry should, at his own expense, operate and develop the premises for a period of two years from the date of the lease, and should yield and pay to the lessor 20 per cent. in value of all pay ores which he would mine and extract under the lease; that the lessee should have the disposal of certain "treasury stock" of the company, to

aid him in defraying the expense of developing the mine under his lease; that he should have an option, at any time before the expiration of the lease, to purchase the said premises and property for the sum of \$300,000, the money to be paid to the lessor; and that the lessee would not assign the lease, or any interest therein, without the consent of the lessor. Thereafter the lease and bond were extended to October 16, 1898, and on May 20, 1898, they were extended to October 16, 1900. On August 15, 1899, the lessee, having then become financially unable to proceed with the work of developing the property, assigned an undivided two-thirds interest in his lease and bond to Francis Smith and David C. McLaughlin, both of them since deceased, on condition that the Putnam Company would consent to such assignment. The assignees, by the assignment, agreed to prosecute the development work on the property, agreeably to the lease, at their own expense, upon the condition that the assignor would procure a reduction, in the purchase price of the property under the option, from \$300,000 to \$50,000. On September 18, 1899, the regular annual meeting of the stockholders of the Putnam Company was held for the election of officers, and such other business pertaining to the business and property of the company as might properly come before it. At that meeting the stockholders present, representing 66,411 shares of the 99,360 shares of the capital stock then issued and outstanding, did, by unanimous vote, adopt and pass a resolution authorizing and instructing the board of directors of the company, by its president and secretary, to execute and deliver to Ferry an instrument in writing changing and modifying the lease and bond in the particulars following: (1) Extending the time of said lease and bond or option to purchase from October 16, 1900, to October 16, 1903. (2) Reducing the amount to be paid for said property, under said option to purchase, from \$300,000 to \$50,000. (3) Permitting Ferry to make such disposition of the lease and bond, by subletting or otherwise, as, in his discretion, he might deem to be for the best advantage in developing the mining claims. And thereafter the president and secretary of the Putnam Company executed and delivered to Ferry, under the seal of the corporation, the instrument thus required by the resolution, modifying the lease and bond in the particulars mentioned. The assignees then proceeded, under the lease and bond, to prosecute the work of mining and developing the claims. They sunk a shaft to the depth of 400 feet, and did other mining work at a cost to them of over \$33,000; and afterwards the lessees, and others associated with them, organized, under the laws of Utah, the defendant Quincy Mining Company, with a capital of \$75,000, and Ferry and his associates assigned the lease and bond to the latter company for

¶ 1. Weyeth, H. & M. Co. v. James-Spencer-Bateman Co., 47 Pac. 604, 15 Utah, 110.

shares of its capital stock. On December 6, 1901, the Quincy Company elected to exercise the option, under the lease and bond, to purchase the mining claims and property for \$50,000, and thereupon paid that sum to the Putnam Company, and received from it a deed to the property, as provided in the lease and bond and the modifications thereof. A part of the sum thus paid to the Putnam Mining Company was used by that company to pay its debts, and out of the entire residue a dividend of 48½ cents per share was declared on its capital stock, which was paid to its stockholders; and the plaintiffs received and accepted the dividends on their shares of stock, the same as did the other stockholders of the company.

The plaintiffs allege in their complaint that all these various transactions by which the property of the Putnam Company was leased, and afterwards sold to the Quincy Company, were fraudulent; that Ferry, being the vice president and a director of the company, was seeking his own profit and advantage, to the disadvantage of the corporation, and to the sequestration and dissipation of its property; that the board of directors were in collusion with him and under his control; that the majority of the stockholders were in collusion with him to defraud the minority; that there was no necessity for leasing the property in order to develop it; that it could have been prospected and developed better by the corporation itself; that Ferry had special knowledge of the richness of the ore bodies which were beneath the surface of the claims; that he and his associates, and those in collusion with him, knew of the great value of the property; that the transactions were had and done with the intent to get for themselves property of the Putnam Mining Company which was worth millions of dollars for the grossly inadequate sum of \$50,000, to the injury of the Putnam Mining Company, and in fraud of the minority stockholders; that plaintiffs did not know of the fraud which had been committed till after it had been done, and until after they had accepted the said dividend out of the \$50,000 purchase money; that, the directors of the Putnam Mining Company being in collusion with Ferry and his associates and with the Quincy Mining Company, to ask them to proceed to have these fraudulent things undone would be to ask a vain thing; that, since the sale by the Putnam Company to the Quincy Company of the property in question, the latter company has sold and conveyed it to the Daly-West Mining Company for 30,000 shares of its capital stock; that before the sale to the Daly-West Company the Quincy Company distributed to its stockholders \$1,200,000 in dividends derived from working said mining claims; that the Quincy Company has on hand in its treasury about \$200,000 derived in the same way; that the plaintiffs are entitled to and should receive .06586 of all of such money and stocks, as their

share of the proceeds which resulted from these alleged fraudulent transactions.

The demands of the plaintiffs are that the lease and bond, and the several instruments of conveyance resulting from the lease and bond, be declared null and void; that an account be taken of all the money and stocks received by the Quincy Mining Company, or due to it, to ascertain the just proportion which should be paid by the defendants to plaintiffs; and that, upon such accounting, judgment be entered in favor of the plaintiffs for the amount due them.

The answer denies the material allegations of the complaint; pleads affirmative matter showing the nature of the transactions of which the plaintiffs complain; and, as a separate affirmative defense, and as a bar to this action, it is averred that heretofore Margaretta V. Rogers, one of the shareholders of the Putnam Mining Company, prosecuted, in the right and for the benefit of the corporation, a suit, in the district court for Summit county, to set aside and annul the said sale and transfer of the same property of the Putnam Company, for the same alleged grounds and the identical dealings and transactions which are alleged and set forth in the complaint herein; that in said action the Putnam Mining Company and the Quincy Mining Company were made parties defendant with Ferry, and as such appeared in that action; that, upon trial thereof in the district court, it was adjudged that neither Mrs. Rogers nor the Putnam Mining Company was entitled to an accounting, nor to any relief on account of the alleged dealings, because the same were in all respects fair and just; that findings and judgment were entered accordingly; and that the same is now a valid and subsisting judgment. To this special and separate defense the plaintiffs demurred upon the ground that it did not state facts sufficient to constitute a defense, and also moved to strike out certain portions of the answer. On October 5, 1903, the demurrer was overruled, the motion to strike out denied, and the further hearing continued to October 10, 1903, on which date, as appears from the findings of fact, this "cause came on regularly for trial" before the court sitting without a jury, and that the "plaintiffs declined to offer any testimony whatever in support of their complaint in this cause," but stated in open court that they would stand upon their complaint, and their exceptions to the rulings of the court, as to their demurrer and motion, and thereupon rested. The defendants then, "to sustain the issues on their part," introduced in evidence the judgment roll in the case of *Rogers v. Ferry et al.*, above referred to as pleaded in the answer, and also the deposition of William M. Ferry, and rested. The plaintiffs introduced no evidence in rebuttal, and thereupon, after submission of the cause for decision, the court found the issues in favor of the defendants upon the merits, and rendered

judgment of dismissal of the complaint and for costs. The plaintiffs appeal.

**Marshall & Royle and C. C. Dey, for appellants. Pierce, Critchlow & Barrette, H. P. Henderson, Ogden Hiles, Arthur Brown, and Andrew Howat, for respondents.**

**BARTCH, J.** (after stating the facts). The decisive question presented in this case is whether the court erred in overruling the demurrer to the special and separate defense set up in the answer, and in denying the motion to strike out that portion of the answer.

The appellants contend that the judgment in the case of *Rogers v. Ferry et al.*, wherein the Putnam Mining Company was made a defendant, constitutes no bar to this suit, and that their demurrer should have been sustained and their motion granted.

The respondents insist not only that this action is barred by the judgment in the *Rogers Case*, but also that these plaintiffs must fail because they have brought and are attempting to maintain this suit in their own right, and not in the right of the Putnam Mining Company, although they claim only as stockholders of the corporation. The position of the respondents seems to be sound. And first as to the suit having been brought for the benefit of the plaintiffs, in their own right, and not that of the Putnam Mining Company: In their complaint the plaintiffs allege the corporate existence of the Putnam Mining Company; that they are stockholders of the corporation; that the corporation owned and operated certain mining property; that, through certain fraudulent dealings and transactions, the directors and agents of the company conveyed all its property to Ferry and his associates; and that, although the property has since been very productive, and has paid large sums in dividends, no accounting has been made to the plaintiffs, nor to the Putnam Mining Company. They then demand that the alleged fraudulent dealings and transactions be set aside, and the instruments of conveyance decreed null and void; that an accounting be had of all the money and stocks received by or due the vendee; that the just proportion to be paid the plaintiffs be ascertained; and that judgment be entered in their favor for the amount found due them. They then ask "for such further or all other relief as plaintiffs may be entitled to in equity and good conscience." They thus sue in their own right and for their own benefit only, notwithstanding the general allegation that the suit is also for the benefit of others who are in like situation, and who may appear as parties. They appear to proceed upon the theory that, because of the alleged fraudulent transactions, they are cestuis que trust of a constructive trust, or a trust created in their favor, *ex maleficio*, by wrongful acts of the defendants, in dealing with the property and

assets of the Putnam Mining Company. Under the facts disclosed by this complaint, no suit can be maintained upon such a theory. As has been seen, the allegations of the complaint clearly show that all the property in controversy was owned by and belonged to the corporation, and not to the plaintiffs, and it is not disputed that the corporation could own and hold its corporate property in absolute right, same as an individual. Nor can it be, for a corporation is a distinct entity, an artificial person, created by law, and, as such, in this state, is capable of suing and being sued, of acquiring, owning, and disposing of property, within the objects of its creation, the same as a natural person; and one may deal with it, respecting its property, the same as with an individual owner, and without any greater danger of being held to have received property into his possession burdened with a direct trust or lien. Being a creature of statute, and having conferred upon it its individuality by law, which has endowed it with a legal existence, independent of any or all of its stockholders, the corporation has the same dominion over its corporate property, with the same right of disposition, as a private person has over his.

In *Weyeth H. & M. Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 121, 122, 47 Pac. 604, it was said: "The natural person has such powers and rights as are conferred upon him by nature, except as restricted by human laws for the good of society. The artificial person or corporation has such powers and rights as are conferred upon it by the law of its creation, and such as are incidental and necessary to its corporate existence. Both the natural and artificial personages act in an individual capacity. Among the most important attributes of a natural person are his absolute dominion over his property and his right of disposition, and the same may be said of a corporation aggregate as to its corporate property. It has the right to contract and be contracted with, to sue and be sued, to implead and be impleaded, the same as a natural person; and it has the right to do all other acts in regard to its property that a natural person may do in regard to his."

Since, then, the corporation was capable of owning, and in fact did own, the property in controversy, absolutely, as a distinct entity, how could that property be held to be property in trust for the benefit of persons who are admittedly not the owners thereof, and who have, at most, but an interest in the fund created by the operation or disposition of the property? The very fact that the plaintiffs were not the owners of the property in dispute precludes the idea of a trust having arisen in their favor, *ex maleficio* or otherwise, for in the existence of every trust there are three essential elements, the absence of any one of which is fatal to the trust. These are a trustee, a beneficiary or

cestui que trust, and property belonging to the cestui que trust. Here the property proposed to be impressed with a trust does not belong to the plaintiffs, and, as to them, is not in trust, they having but an indirect interest therein; and neither the plaintiffs nor any other stockholders have any interest or estate in the property, legal or equitable, which they can enforce in their own right and for their own special benefit. Nor is there any trust relation which enables a stockholder to sue in such a case. "The relation of trustee and cestui que trust, or of debtor and creditor, or of partnership, does not exist between the stockholders of an incorporated company and the corporation itself. But the corporation and the individual shareholder may deal with each other at arm's length, the same as two strangers may, and a shareholder may contract with his corporation, and sue and be sued on his contracts." 1 *Thomp. Corp.* § 1076.

If a right of action exists, because of the alleged fraudulent acts and dealings in relation to the property in controversy, it exists in favor of the corporation, and of necessity the action must be brought in the right of the corporation, and for its benefit. If the defendants must account to any one for the property in litigation, the accounting must be to the corporation, and not to the plaintiffs or any other stockholders. The prayer of this complaint, in effect, asks the court to adjudge that the defendants have obtained for themselves, through fraudulent acts and dealings, the property of the corporation, and, instead of asking that the property so obtained, or its proceeds, be returned to the rightful owner, demands that the plaintiffs, for their own benefit, be decreed a portion of the fruits of the fraud. In other words, according to their prayer, they seek to obtain a portion of the property and assets of a third party, which they say was obtained from such third party by fraud. That a stockholder of a corporation cannot recover corporate property, fraudulently or otherwise disposed of by the officers or agents of the corporation, by suing in his own right and for his own benefit, is settled by the authorities. It is true, where the property or assets of a corporation have been sequestered and dissipated by fraud or otherwise, a stockholder may, if the board of directors will not act, and a suit clearly ought to be brought, sue in the right of the corporation to have its property restored to it, or to obtain for it such other relief as the circumstances may demand, but in no such case can he sue for himself in his own right. This right of a stockholder to sue, in cases of fraud, for the benefit of the corporation, when it will not sue, is an exception to the general rule "that actions to redress wrongs done to a corporation must be brought by the corporation itself, and that such actions cannot be brought by its stockholders." 4 *Thomp. Corp.* § 4483.

In *Gorham v. Gilson*, 28 Cal. 479—a case much like the one at bar—where a mining company was induced by the fraudulent representations of a part of its stockholders to make a conveyance of its property, and the plaintiffs, stockholders, brought suit in their own right to have conveyed back to themselves such part of the property as was proportional to their stock, Mr. Chief Justice Sanderson, speaking for the court, and holding that the innocent stockholders could not maintain an action in equity to compel a conveyance to them of such portion of the corporate property, said: "This action proceeds upon the theory (and it could be maintained upon no other) that, in equity, the defendants, by reason of their fraudulent acts, have become the trustees of the plaintiffs to the extent of an undivided half interest in the property in question. But we think it is clear that the facts set out in the complaint do not sustain that theory. Where, by fraud and deceit, a party is induced to do that which, but for the fraud and deceit, he would not have done, equity will interfere, and, so far as it can be done, restore him to his original rights. If the defrauding party has obtained by such means the title to property, equity will convert him into a trustee for the defrauded party, and will compel the execution of the trust by ordering the deed so obtained to be canceled, or the property reconveyed, thus placing the property and the parties where they were originally; thus undoing what has been done, and putting the title where it was before, or, in other words, adjudging that the title remains unchanged and unaffected by the conveyance, because the same is, in equity, null and void, by reason of the fraud and deceit by which it was obtained. Such relief, however, the plaintiffs are not in a position to claim. They never had any title, legal or equitable, to the property in question. They have not only not conveyed anything to the defendants, but they had nothing to convey. The property belonged to the corporation, and not to them, and the corporation, and not they, conveyed it away under the fraudulent inducements in question. So far as any right to the form of relief sought in this action is concerned, the fraud was committed against the corporation, and not against them."

So, in *Abbott v. Merriam*, 8 Cush. 588, Mr. Chief Justice Shaw, speaking of the rights of stockholders, said: "As stockholders, they have rights undoubtedly and interests in the affairs and management of the concerns of the corporation; but these are derivative and indirect, and are limited and regulated by law. They have no right by any direct suit, legal or equitable, to call the directors or other officers of the corporation to account for mismanagement. Nor, if all the stockholders were to unite in a suit in equity, could they have any better ground to recover. The directors and other officers and agents are amenable only to the corporation,



and to give every individual stockholder a right of action would lead to a multiplicity of suits."

In *Forbes v. Memphis, etc.*, R. R. Co., 2 Woods, 323, Fed. Cas. No. 4,926, Bradley, Circuit Judge, said: "A commercial or other business corporation is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members, considered as individuals. They have only an indirect interest therein. \* \* \* All remedies for injuries to the property must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company, by name, unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions." 4 *Thomp. Corp.* §§ 4443, 4445; 1 *Thomp. Corp.* § 1071; *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 112; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Church v. Citizens' St. Ry. Co.* (C. C.) 78 Fed. 526; *Big Creek G. C. & I. Co. v. American L. & T. Co.* (C. C. A.) 127 Fed. 625; *Mickle v. Rochester Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Spurlock v. Missouri Pac. R. Co.*, 90 Mo. 200, 2 S. W. 219; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

There are instances, however, where a stockholder may apply to a court of equity for a preventive remedy by injunction to restrain those who are administering the affairs of the corporation from doing acts which are ultra vires, or to prevent a misapplication of the corporate funds which might result injuriously to the stockholders, where the acts intended to be performed would amount to a breach of trust. In such and like cases a preventive remedy may be applied at the instance of a stockholder, but such cases are wholly different from those like the one at bar.

Mr. Thompson, in his *Commentaries on the Law of Corporations*, vol. 4, § 4491, states the distinction thus: "Where an action is brought by one or more stockholders to enjoin the performance of ultra vires, fraudulent, or oppressive acts on the part of the directors, the remedy is preventive; consisting of an injunction against the performance of such acts, to which may be superadded, in appropriate cases, other forms of equitable relief. Where, on the other hand, the action is brought to undo frauds and breaches of trust already committed, and to restore to the corporation assets thereby wasted, the action does not, as in the former case, proceed in right of the stockholder, but it proceeds in right of the corporation, and con-

sequently whatever is restored accrues to the corporation." Where, then, as in this case, the acts complained of have been fully consummated, and the title to the property has passed into the hands of third parties, a stockholder has no remedy to recover, in his own right, any specific or proportionate part of the property for his own benefit. And where the corporate property of such a corporation, in whole or in part, has been sold or disposed of in good faith, under the powers of its charter, and not as a result of fraudulent purposes, the minority stockholder has no cause for complaint, for, as we have seen, a corporation of this character may, in the absence of restraint by the law of its creation, lease, sell, or dispose of any or all of its property, the same as an individual may do respecting his property. This may be done by a majority of the members. The principle that the majority must rule in the management of the affairs of a corporation "is rigidly upheld in equity, in the absence of fraud, oppression, and ultra vires acts." 4 *Thomp. Corp.* § 4533; 2 *Kent, Com.* 280-282; *Weyeth H. & M. Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 47 Pac. 604; *Ardesco Oil Co. v. N. A. Min. & Oil Co.*, 66 Pa. 375; *Treadwell v. Sallsbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 50, 11 Sup. Ct. 478, 35 L. Ed. 55; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

But suppose this suit were regarded and treated as brought, not in right of the plaintiffs nor for their own benefit, but in right of all the stockholders, and hence for the corporation, and for its benefit; then could the plaintiffs recover? We think not, because, viewing this suit in that light, they are met at the very threshold with the judgment in the case of *Rogers v. Ferry et al.*, where the Putnam Mining Company was a defendant, and which forms the special plea in the answer herein. The plaintiffs, by their demurrer to that plea, have admitted, for the purposes of this case, all the averments properly pleaded therein to be true. Among such averments, it appears that that suit was brought and tried in a district court of this state—a court of competent jurisdiction; that the plaintiffs therein sued in right of the corporation, the Putnam Mining Company; that the Putnam Mining Company and the Quincy Mining Company were there, same as here, parties defendant; that the identical cause of action and the identical matters which are herein charged as fraudulent were therein pleaded and tried; that the court adjudged and determined that all the transactions and dealings complained of were lawful and made in good faith, and were without any fraud done or intended; and that neither the Putnam Mining Company, nor the plaintiff therein, was entitled to any accounting in respect of the matters charged in that complaint; and that such judgment is of record, and is still in full force and effect.

Thus it clearly appears that the Rogers suit was brought and intended for the purpose of undoing the very transactions complained of in this action as being a fraud on the Putnam Mining Company and its stockholders, and the judgment was that neither the plaintiff nor the corporation was entitled to an accounting. As that suit was brought in the right of the corporation, that judgment is binding upon the corporation, and, by the rule of representation, all the stockholders are equally bound by it. It follows that, since the transactions and dealings complained of in that suit are exactly the same transactions and dealings complained of in this action, that judgment, being in full force and effect, is conclusive against the right of the plaintiffs to recover herein; they being stockholders in the corporation. The court having decided that there was no fraud in the transactions in controversy, and that the corporation has no right of recovery, no stockholder can make the same transactions the basis for complaint.

In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, where the plaintiff in error, who was a stockholder, claimed that a certain order or decree which was binding upon the corporation was void, as against him, because he was not a party to the suit in which the order was made, the Supreme Court of the United States held that, "In the absence of fraud, stockholders are bound by a decree against the corporation in respect to corporate matters, and such a decree is not open to collateral attack." Mr. Chief Justice Fuller, delivering the opinion of the court, said: "Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call, as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." *Freeman on Judgments*, §§ 176, 178; *Glenn v. Williams*, 60 Md. 93; *Kessler v. Ensley Co.* (C. C.) 123 Fed. 546.

The fact that this suit was brought by different parties plaintiff is immaterial, since these plaintiffs, as stockholders, were privy to the proceedings in the former suit, and since both suits were identical as to cause of action, subject-matter, purpose, and object, quality of persons for or against whom claim is made, and as to the thing adjudged. These legal identities existing, and the same questions involved herein having been judicially settled and determined in the Rogers

suit, the judgment in that case is an effectual bar to this action. *Freeman on Judgments*, §§ 252, 253, et seq.; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 681; *Lyon v. Perin & Goff Manufacturing Co.*, 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. Ed. 839.

From the foregoing considerations, and from the authorities, the conclusion is inevitable that the court did not err in overruling the demurrer or denying the motion directed at the special plea, nor in rendering judgment in favor of the defendants on the merits.

We find no reversible error in the record. The judgment is affirmed, with costs.

BASKIN, C. J., and McCARTY, J., concur.

#### TILTON v. STERLING COAL & COKE CO. (Supreme Court of Utah. July 22, 1904.)

CONTRACTS — CONSTRUCTION — OPTION — ACCEPTANCE — IMPOSITION OF CONDITIONS — TIME OF ACCEPTANCE — FRACTIONS OF DAYS — WATER RIGHTS — DAMAGES.

1. Where a contract provided that the first party agreed to give the second party an option to purchase at the expiration of a lease, and in subsequent correspondence the parties considered and treated the contract as granting an option to purchase at the expiration of the lease, it would be so construed by the courts, regardless of what the construction would be under a literal interpretation of the terms of the instrument.

2. An acceptance of an option on conditions not contained in the contract between the parties, and requiring the one giving the option to do more than called for by a contract, amounts to a practical rejection thereof.

3. Where an option is given to a lessee to purchase the leased premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but, when the time for its acceptance is specified, the option, as a general rule, unless it is accepted at that time, terminates, if no further time be granted.

4. While an option to purchase, if based upon a sufficient consideration, binds the party granting it, it is not a contract of purchase until the option is accepted and performed, or tender or performance by the holder is made in proper time; but it is simply a contract granting to the holder of the option the privilege of purchasing, and binds the party by whom it is given to sell and convey the property involved, upon the acceptance of the option in accordance with the terms, and the compliance on the part of the acceptor with its requirements.

5. In the computation of time, fractions of days are not reckoned; and, when an act is required by a contract to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated, and to include the last day of the specified period.

6. Where a lease granting an option to purchase at its expiration terminated on the 1st day of October, the lessee could accept the option at any time during that day, but had no right to do so on any day thereafter.

7. Where, after the lease of water to plaintiff by defendant, a third person was decreed to be

the owner of part of the leased water, so that plaintiff was deprived of such part, plaintiff was entitled to damages for the loss.

Appeal from District Court, San Pete County; Jacob Johnson, Judge.

Action by F. T. Tilton against the Sterling Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed in part, and affirmed in part.

Charles C. Dey and C. W. L. Stevens, for appellant. S. R. Thurman and Hurd & Wedgwood, for respondent.

**BASKIN, C. J.** This is an action for the specific performance of a contract, and for the recovery of damages for an alleged breach of the same by the appellant. The contract contained the following stipulations, viz.:

"In consideration of the sum of one hundred and seventy-five dollars (\$175.00) per annum, payable annually in advance on the first day of October of each year, the party of the first part [appellant] hereby agrees to lease to the said party of the second part [respondent] for a term of five (5) years from the first day of October, 1898, the water flowing from the tunnel of said company at its coal mine at Morrison, San Pete County, Utah, and to grant to said party of the second part a right of way over its land, for a ditch of sufficient capacity to carry the water from said tunnel, subject to said first party's approval of the location of said ditch.

"The said party of the first part further agrees to give to the said party of the second part an option to purchase, at the expiration of this lease, the above-described water for the sum of three thousand dollars (\$3,000).

"The said party of the second part agrees to make the payments as above stated, and to be responsible for any damages that may accrue from an overflow or breaking of said ditch, or otherwise, and to keep said ditch in good repair."

At the trial it was decreed "(1) that the contract made and entered into by and between the plaintiff and the defendant on the 17th day of November, 1898, be specifically performed as hereinafter set forth; (2) that plaintiff have and recover from defendant the sum of eight hundred dollars damages, and his costs in this action, taxed at — dollars; (3) that plaintiff have credit upon the purchase price of the water mentioned in said contract, to wit, upon the said sum of three thousand dollars, for the said sum of eight hundred dollars damages, and the further sum of one thousand dollars, the pro rata value of the two second feet of said water heretofore decreed by this court to be owned by corporations not parties to this action, and which the defendant is therefore unable to convey to the plaintiff in pursuance of said agreement; (4) that within five days after the signing of this decree the said plaintiff shall pay to the clerk of this court

for the use of defendant the sum of twelve hundred dollars, and, within five days after service upon it of a copy of this decree, said defendant shall execute and deliver to the clerk of this court, for the plaintiff, a deed in writing conveying to said plaintiff the water flowing from said tunnel, save and excepting said two second feet thereof." It was further decreed that the appellant, its successors and assigns, and all persons claiming under it since November 17, 1898, the date of the lease, be enjoined from asserting title to the water mentioned in the decree, and from interfering with the respondent in the free use thereof.

It is contended on the part of the appellant that, by the second paragraph of the stipulations, an option, only, to purchase the water at the expiration of the lease, was granted to the respondent. On the other hand, it is contended on behalf of the respondent that, taking the stipulations altogether, they constitute a contract of absolute purchase of the water at the expiration of the lease, and that upon the tender by the respondent of the purchase price he became entitled to a specific performance of the contract. The language of that paragraph is peculiar. By the literal terms of the contract, no option to purchase was given to the respondent. The appellant only agreed to give to the respondent an option to purchase at the termination of the lease. This the appellant failed to do. Whether for that breach the respondent, under a literal interpretation, could maintain an action either for damages or specific performance, is a question which we are relieved from deciding, because it appears from the letters of the parties hereinafter set out that they considered and treated the contract as granting an option to purchase at the expiration of the lease. This being so, we are of the opinion that the construction given to the contract by the parties should prevail, and that we should give to it the force which the letters of the parties show they intended.

Considering, then, as we do, the contract as one which granted an option to purchase, and not, as claimed by respondent, a contract of absolute purchase, we come to the consideration of appellant's contention that the facts shown by the evidence are not sufficient to sustain the decree for specific performance.

It is contended by appellant's counsel that the respondent did not, as found by the trial court, accept the option prior to the expiration of the lease. On the subject of this finding, the following letters of the president of the appellant and of the respondent were introduced, to wit:

"Salt Lake City, Utah, August 2, 1901. F. T. Tilton, Esq., Richfield—Dear Sir: I see the judge has given two second feet of our water to the Gunnison Water thieves, and I do not feel like going to the expense of an appeal or a new trial. I think it is now

time for you to decide whether you will take that water or not. I feel like punishing those men all I can at any rate, and if you will throw up your contract, I think I can do it so they will lose more in the end than they have gained. If you are in the city soon, call and see me, or write and let me know fully in reference to this matter at once. Yours truly, Theodore Bruback, President."

"Richfield, Utah, August 5, 1901. Theodore Bruback, President Sterling Coal & Coke Company, Salt Lake City, Utah—Dear Sir: Replying to your letter of the 2nd inst. in the matter of the suit with the Gunnison Irrigation Company, will say that we can, under no consideration, surrender our contract for the purchase of the water from your company. If your company will pay up the costs of this lawsuit and make the proper allowance to us on our contract of purchase for the loss of this two second feet which the court has decided did not belong to your company, and thereby place us in the same position that we were before the suit was instituted, we will take up, at any time, our option to purchase, providing your company can furnish a good title to the same. Yours truly, Tilton & Weymouth, per F. T. Tilton."

"Salt Lake City, Utah, February 26, 1902. F. T. Tilton, Esq., Axtell, Utah—Dear Sir: I regret to be compelled to state that owing to the inability of the Sterling Coal & Coke Company to pay the interest on their bonded indebtedness, they have been notified that foreclosure proceedings will be instituted and their property sold for the interest and principal of their bonded indebtedness, amounting now to considerable over \$100,000.00. This company, therefore, desires to notify you that after this season they will be unable to furnish you with the water now leased by you, and, of course, as a consequence, the option heretofore given, as it will then become the property of the bondholders. You will, therefore, be compelled to make some other arrangement for water than the one you now have. Yours very truly, Theodore Bruback, President."

"Provo, Utah, March 12, 1902. Mr. Theodore Bruback, Salt Lake City—Dear Sir: Yours of the 2-26 inst. at hand. In answer will say if I don't have the use of the mine water mentioned, I will thoroughly understand the reason why. Yours very truly, F. T. Tilton."

No other evidence on the subject was offered.

These letters, taken together, show that, in contemplation of law, the option granted in the lease was not accepted by the respondent, because he required, as a condition of acceptance, the appellant to do more than called for by the stipulations of the lease. A conditional acceptance of an option amounts to a practical rejection of it. In 1 Parsons on Contracts (8th Ed.) p. 477, the rule is thus stated: "The respondent is at liberty to accept wholly or to reject wholly; but one of

these things he must do, for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer." 1 Warvelle, Vendors (2d Ed.) § 127; 21 Am. & Eng. Ency. Law (2d Ed.) 930; Egger v. Nesbitt, 122 Mo. 675, 27 S. W. 385, 43 Am. St. Rep. 596; Minneapolis & St. L. Ry. Co. v. Columbus R. Mill Co., 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, and cases there cited.

2. The lease terminated on the 1st of October, 1903, and on the 9th of that month respondent tendered for the first time to the appellant \$3,000—the price of the water mentioned in the stipulations of the lease giving the option. It does not appear that the respondent, either on the day on which the lease expired, or afterwards, until the tender of the \$3,000, made any formal acceptance of the option, or did any act from which the appellant could infer that it was his intention to accept the option, and on his part perform its conditions. Appellant's counsel contend, in substance, that it was not bound either by the tender made, or the acceptance of the option implied from the tender, as both occurred several days after the expiration of the lease.

When an option is given to a lessee to purchase the leased premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but when the time for its acceptance, as in the case at bar, is specified, the option, as a general rule, unless it is accepted at that time, terminates, if no further time be granted. While an option to purchase, if based upon a sufficient consideration, binds the party granting it, it is not a contract of purchase, but simply a contract granting to the holder of the option the privilege of purchasing, and binds the party by whom it is given to sell and convey the property involved, upon the acceptance of the option in accordance with the terms, and the compliance on the part of the acceptor with its requirements. There is no contract of purchase, or any obligation to sell and convey, until the option is accepted and performed, or tender of performance by the holder is made in proper time. Until then there is no contract between the parties which can be specifically enforced.

Respondent's counsel contend that he was not required to accept the option or tender performance on his part at the termination of the lease, but had the right to do so within a reasonable time thereafter, because, as the lease terminated the last moment of the 1st day of October, the option contract "must be construed either to require the election and payment to be made at the very moment of its expiration, or else it must be construed to give the respondent a reasonable time thereafter to make his election and payment, and demand a conveyance of the water, and that the parties must either be presumed to have intended that the matter should have

been closed at midnight, October 1st, and the contract to have fixed that time, or else it must be said that they fixed no precise time whatever; and in that case, unquestionably, the law is that a reasonable time thereafter was intended by the parties, and that the contract should be so construed." In support of that view, our special attention has been directed to the case of *Rogers v. Burr* (Ga.) 25 S. E. 339. In that case the contract contained a provision giving to the subscriber of stock the right, at the expiration of three years from a time stated, to elect whether he would keep the stock, or turn it over to the plaintiffs, and require them to pay him therefor its par value. It was held that the subscriber had no right to make this election before the expiration of the time, and that, as the time for such election expired at midnight on November 30th, a reasonable time thereafter in which to make the election was allowable. For the reasons hereinafter stated, we do not think that that decision is correct. A similar provision in a contract was construed in the case of *Magoffin v. Holt*, 62 Ky. 95, and in the opinion it is said that "'at the expiration of three years' means, and was intended to mean, the day on which the period of three years expired. The meaning is as clear, we think, as it would be in the case of an ordinary promissory note for the payment of a sum of money at the expiration of three years from date." A note payable one year from date becomes due in the following year on the same day of the month on which it was dated, and, if it is entitled to days of grace, these should be added to the time which the note has to run. A note dated on the 10th of February, payable two months thereafter, becomes due on the 10th of April, or on the 13th, if it is entitled to days of grace. 2 *Edwards, Bills & Notes*, § 707. It is a general rule of law that, in the computation of time, fractions of days are not reckoned; and when an act is required, by a contract, to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated, and to include the last day of the specified period. 1 *Beach on Contracts*, §§ 630, 631. In the case of *Wiggin v. Peters et al.*, 1 Metc. (Mass.) 127, it is held that the effect of the expressions "at the expiration of 90 days" and "within 90 days" is the same. In that case one of the conditions of a bond for prison limits given on behalf of a debtor was that he, at the expiration of 90 days from the date of his commitment, should surrender himself, etc. He was committed on the 1st of April, and surrendered himself on the 1st of July. In the opinion, written by Mr. Chief Justice Shaw, it is said: "The words in the bond are 'at the expiration of ninety days from the day of his commitment.' The words in the statute are a little different—'if he shall not be discharged within ninety days from the day of his commitment, he will

surrender,' etc. But the effect is the same. 'Ninety days' is a term of time excluding the day of the commitment, and the bond is not forfeited if he obtains his discharge at any time within that term. The case of his not obtaining his discharge cannot happen until the whole of that time has expired, and therefore there can be no breach of this condition till the whole of that time has expired. In the case before us, excluding 'the day of the commitment,' the term of ninety days expired on the last moment of the last day of June; and as, in general, the law does not recognize any division of time less than a day, a surrender on the 1st of July was a surrender at the expiration of the last day of June, and there was a surrender within the time limited by law, and by the condition of the bond, and saved the forfeiture." Under section 2520 of the Political Code of California, the Governor was authorized to appoint three harbor commissioners, and at the expiration of their term to appoint their successors. On the last day of the term of one of the commissioners appointed by him, he appointed his successor. It was contended (*People v. Blanding*, 63 Cal. 333) that this appointment was invalid, because the Governor was not authorized to make it on the day the incumbent's term expired, but the objection was not sustained; the court holding that the word "at," as used in section 2520 of the Political Code, is indefinite in its meaning, and may mean the exact moment of time, or near it. As the law rejects fractions of a day, when an act is required by a contract to be performed on a specified day its performance is not referable to any particular portion of that day, but may be performed at any period within its compass. In the case at bar the lease expired on the 1st day of October, and before the beginning of the following day; and as the law does not, in general, recognize any division of time less than a day, we think that the proper construction of the lease is that the respondent was thereby granted the right to accept the option at any time during the day on which the lease terminated, but had no right to do so on any day thereafter.

It is also contended by the respondent that he had the right, without making a tender of the \$3,000, to bring his action for specific performance within a reasonable time after the termination of the lease, because the appellant, by its letter of February 26, 1902, before quoted, notified the respondent that it would not perform the conditions, on its part, of the option, and that said notice was not subsequently withdrawn. In support of this contention numerous cases are cited which hold that when one of the parties to a contract refuses to perform, or notifies the other party of his determination not to perform, his part of its obligations, a demand for performance, or a tender or offer to perform by the other party, unless the previous notice has been withdrawn, is un-

necessary, and not required before commencing suit. This principle is not applicable to the case at bar, because, as before stated, until the acceptance of an option in accordance with its terms, no contract of purchase exists, and the party giving the option is under no obligation to convey the property mentioned therein.

It appears from the record that the irrigation companies of the towns of Gunnison and Sterling, in an action against the appellant, were decreed to be the owners and entitled to the use of two second feet of the water leased to the respondent, and that after the rendition of said decree the respondent was deprived of two second feet of the water leased to him. For this loss he was awarded \$800 as damages. It is ordered that that portion of the decree awarding damages be affirmed, and that portion requiring a conveyance of the water, and enjoining the appellant, its successors and assigns, and all persons claiming under it, be, and is hereby, reversed and held for naught, and that each party pay their own costs of this appeal.

BARTCH and McCARTY, JJ., concur.

WILLIAMS v. HAWLEY. (L. A. 1,280.)  
(Supreme Court of California. July 9, 1904.)  
MINES—LIENS FOR LABOR—STATUTE—CONSTRUCTION—WATCHMAN'S SERVICES—AGENT—APPEAL—NEW TRIAL—MOTION—PRACTICE.

1. Questions arising on the conclusions of law to be deduced from the facts found by the court cannot be considered on an appeal from an order denying a motion for a new trial.

2. Questions arising on the sufficiency of the facts stated in the complaint to constitute a cause of action cannot be considered on an appeal from an order denying a motion for a new trial.

3. The only questions that can be considered on an appeal from an order denying a motion for a new trial are those arising on the specifications of insufficiency of evidence and of errors of law contained in the bill of exceptions.

4. In making a motion for a new trial, it is not necessary to state the grounds of the motion at length.

5. It is the duty of the clerk to enter a motion for a new trial and the order made thereon in the minutes of the court, stating the grounds on which the motion is based, as stated by the counsel making it, but the grounds need not in all cases be entered in the minutes in full.

6. Where counsel, in making a motion for a new trial, refers to any document filed in the case for a statement of the grounds of the motion, the entry made by the clerk in the minutes should refer to the same document; the reference being sufficient for all purposes of review by the Supreme Court, provided the document referred to is a part of the record properly brought before the Supreme Court on appeal from the order.

7. Where a motion for a new trial is made after the settlement of a statement of the case or bill of exceptions, the motion and entry, instead of stating the grounds at length, may refer to the specifications of errors and insufficiency of evidence set forth in the bill or statement for the particulars.

8. Where a motion for a new trial is made on the minutes of the court, reference may be

made to the notice of intention to move for a new trial for the particulars.

9. Where a motion for a new trial is made after the settlement of a bill or statement, and the notice of intention to move for a new trial has been incorporated in the bill or statement, reference may be made to that notice.

10. Where the entry by the clerk in the minutes stated that the notice of motion for a new trial was read by counsel, after which he made the following motion: "And now, on the notice of motion, on the pleadings and papers filed in this case, and on a bill of exceptions heretofore filed in this court in this case, we move the court for an order granting a new trial"—and the notice of motion referred to in the entry was not made a part of the bill of exceptions, it was no part of the record, though printed in the transcript, and hence could not be examined on appeal for a statement of the grounds of the motion.

11. The bill of exceptions referred to in the entry containing a statement of the insufficiency of the evidence to justify the findings, and of the errors of law occurring at the trial, which stated the grounds of the motion for a new trial with sufficient particularity, an objection that the grounds of the motion for a new trial did not appear in the record, and for that reason the order denying the motion for a new trial was not reviewable on appeal, is untenable.

12. Where incompetent evidence tending to prove a fact is admitted without objection, the question of its competency cannot be considered on a specification that the evidence was insufficient to prove the fact.

13. Where the question of the competency of some of the evidence tending to prove a fact cannot be considered on a specification that the evidence is insufficient to prove the fact, because admitted without objection, but proof of the fact is unsatisfactory, the court, on appeal, is justified in attaching great importance to any other evidence improperly admitted tending to prove the same fact.

14. Under Code Civ. Proc. § 1183, providing that any person who performs labor in any mining claim has a lien on the claim for his work, for which a lien is given, means labor done in the course of the actual work of mining or development in the claim, and hence does not include the services of a watchman engaged in caring for a mine while it is lying idle.

15. Under Code Civ. Proc. § 1183, providing that any person who performs labor in any mining claim has a lien on the claim for his work, and that every person having charge of any mining, or of the construction of any building or other improvement, shall be held to be the agent of the owner, a person not expressly authorized by the owner of the mine to act in his behalf is not the agent of the owner, within the statute, unless he is doing some work on the mine itself for the purpose of extracting ores, and is not merely in possession under a contract by which he was empowered to make improvements and prosecute development work thereon.

Department 1. Appeal from Superior Court, Inyo County; Walter A. Lamar, Judge.

Action by Harry Williams against George T. Hawley. From an order denying a motion for a new trial, defendant appeals. Reversed.

Campbell, Metson & Campbell and William D. Dehy, for appellant. P. H. Mack and P. W. Forbes, for respondent.

SHAW, J. This is an appeal from an order denying the defendant's motion for a new trial. The action is to enforce an alleged lien upon a mining claim belonging to the defendant, for services as a watchman, al-

leged to have been performed by the plaintiff for the defendant, amounting to the sum of \$637.

The defendant attempts to raise the point that a person engaged as a watchman of a mine is not performing "labor in any mining claim," so as to be entitled to a lien under section 1183 of the Code of Civil Procedure, although the work of mining therein or development thereof may be in progress. This question cannot be raised upon this appeal. It depends upon the conclusions of law to be deduced from the facts found by the court, or upon the sufficiency of the facts stated in the complaint to constitute a cause of action, neither of which points can be considered upon an appeal from an order denying a motion for a new trial. The only questions which can be here considered are those arising upon the specifications of insufficiency of evidence and of errors of law contained in the bill of exceptions. None of these specifications involve this particular question.

The plaintiff contends that the grounds of the motion for a new trial do not appear in the record, and for that reason he claims that the order denying the motion for new trial cannot be reviewed by this court, and that for the same reason the motion was properly denied by the court below. It must be conceded that it is necessary for a party moving for a new trial to state to the court to which the motion is addressed the grounds of the motion, otherwise this court cannot review the order made thereon. The statute specifies a number of reasons, upon either of which a motion for a new trial may be granted. There may be ample grounds for granting a new trial upon one reason, and none whatever for another. Parties are not bound to include in their motion all of the reasons given in the statute, and usually they do not do so. To enable this court to review the action of the court below, the record must show precisely what action was invoked in that court, and the precise ruling that was made therein, and consequently it is necessary to state in the motion the particular reasons upon which it will be based. This is the effect of the decisions in *Holverstot v. Bugby*, 13 Cal. 43; *People v. Ah Sam*, 41 Cal. 650; and *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299. A motion is an application for an order. Code Civ. Proc. § 1003. It is usually made orally, and this was the course taken in the present case. It is not necessary, however, for the appellant, in making the motion, to state the grounds at length. He must in some way inform the court what are the grounds of the motion, but this may be done as well by reference to some paper on file in the action in which the grounds are stated as by word of mouth. It is the duty of the clerk to enter the motion and the order made thereon in the minutes of the court, and the entry should state the grounds on which the motion is based, in substance as stated by the counsel making it. These grounds need

not in all cases be entered in the minutes in full. If counsel refers to any document filed in the case for a statement of the grounds of the motion, the entry may, and, for the sake of brevity, should, refer to the same document, and the reference will be a sufficient statement for all purposes of review by this court, provided the document referred to is a part of the record properly brought before us on the appeal from the order. Thus, where the motion for a new trial is made after the settlement of a statement of the case or bill of exceptions, the motion and the entry, instead of stating the grounds at length, may refer to the specifications of errors and insufficiency of evidence, set forth in the bill or statement, for the particulars. If made on the minutes of the court, reference may be made to the notice of intention for the particulars, and, if made after the settlement of a bill or statement, and the notice of intention to move for a new trial has been incorporated into such bill or statement, reference may be made to that notice. In this case the entry of the motion in the minutes was as follows: "Notice of motion for a new trial read by Mr. Dehy, after which he made the following motion: 'And now, upon the notice of motion, upon the pleadings and papers filed in this case, and upon a bill of exceptions heretofore filed in this court in this case, we move the court for an order granting a new trial in this case.'" The notice of motion referred to in this entry, which perhaps means the notice of intention to move for a new trial, is not made a part of the bill of exceptions, and consequently, though printed in the transcript, it is no part of the record, and we cannot examine it for a statement of the grounds of the motion. None of the other papers in the record purport to state anything in the nature of grounds for a new trial, except the bill of exceptions referred to. In the bill we find a statement of the insufficiency of the evidence to justify the findings, and of the errors of law occurring at the trial. These state the grounds with more particularity than would be necessary in the minute entry, and are amply sufficient to present to the court below and to this court the precise reasons upon which the court was asked to grant a new trial. In view of the fact that the notice of intention to move for a new trial was not set out in the bill of exceptions, but was read to the court in making the motion, the clerk, under ordinary circumstances, should have taken that document, and entered in the minutes the grounds of the motion as therein particularized, and thus the grounds to which the attention of the court was called would have appeared in the record. In this case this was not necessary, because the specifications in the bill included all the grounds stated in the notice of intention, and presented them in much greater detail. The grounds of the motion sufficiently appear from these specifications, and for that reason we hold that

the objection of the respondent to the consideration of the motion for a new trial is not well taken.

One of the specifications of error is that the court refused to exclude from the deposition of the defendant two exhibits attached thereto, consisting of two contracts signed by the defendant. In admitting this evidence, we think the court erred to the prejudice of the defendant. It appeared from the evidence that the alleged contract upon which the services were performed was not made by the defendant personally, but that the plaintiff was employed by one Patrick Clinton, who, he alleges, was the agent of the defendant for that purpose. There was no competent evidence introduced to prove the agency of Clinton. Both Clinton and Hawley testified positively that he was not the agent, and was not authorized by Hawley to employ the plaintiff to perform the services sued for. Clinton testified, in substance, that he engaged the plaintiff to perform the services at the request of Allison Wheeler, and not at the request of Hawley. The only evidence of any consequence tending to show the agency of Clinton consisted of the testimony of witnesses to the effect that they supposed that Clinton was such agent, that he was generally reputed in the vicinity to be the agent, and that Wheeler claimed to be, and was supposed to be, such agent. Some of this evidence was admitted without objection, and the objections that were made to other parts of it are in such form that we cannot consider the competency of the evidence. The case, so far as this evidence is concerned, comes within the rule that, where incompetent evidence tending to prove a fact is admitted without objection, the question of its competency cannot be considered upon a specification that the evidence was insufficient to prove the fact. *McCloud v. O'Neill*, 16 Cal. 393; *Pierce v. Jackson*, 21 Cal. 641; *Tebbs v. Weatherwax*, 23 Cal. 60; *Janson v. Brooks*, 29 Cal. 214; *Wright v. Roseberry*, 81 Cal. 91, 22 Pac. 336. But in view of the extremely unsatisfactory state of the evidence upon this branch of the effort to prove the agency of Clinton, this court is justified in attaching great importance to any other evidence improperly admitted tending to prove the same fact. The two documents attached to the deposition consisted of contracts made by the defendant Hawley with Wheeler, whereby he agreed to sell to Wheeler the mining claim in controversy, upon certain terms therein stated, and, in connection therewith, gave Wheeler the right to work the mine and extract ores therefrom during the term covered by the agreements. It was during this term that the plaintiff was employed by Clinton, on behalf of Wheeler, to serve as watchman for the mine. No work whatever had been done upon the mine for many years, and Wheeler did not attempt to do any work therein, either in the way of operation or

development. The only work done by the plaintiff, according to his own testimony, was to look after a house situated on or near the mining claim, and take care of a few tools, of the value of about \$200, situated in the house. He performed no manual labor whatever, and did no work at all upon the mine. The statute in force at the time the contract was made with respect to liens of this character was as follows: "Any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done. \* \* \* And every \* \* \* person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." Code Civ. Proc. § 1183. The only purpose for which the documents under consideration could be considered as competent or material evidence would be to show that Wheeler was in charge of mining upon these claims, so as to become, under the statute above quoted, the agent of the defendant, and as such authorized to make the contract with plaintiff. Under the circumstances shown in this case, and in view of the terms of the statute, we are of the opinion that the contracts were not competent or sufficient for that purpose, and that they should have been excluded. It is clear that the statute implies that the labor to be performed upon any mining claim, and for which a lien is given, is labor performed in the course of the actual work of mining or development in the mining claim, and that it does not include the services of a watchman engaged in caring for the mine while it is lying idle. It is equally clear that a person not expressly authorized by the owner of the mine to act in his behalf cannot be held to be the constructive agent of such owner, under the provisions of the statute, unless he is a person having charge of mining, as provided in the statute. This means that the person thus in charge of the mine shall be doing some work upon the mine itself, for the purpose of extracting ores therefrom. It is not sufficient to show that such person was in possession of the premises under a contract with the owner by which he was empowered to make improvements and prosecute development work thereon. He must be engaged in the actual work of mining, and the services contracted for by him must be services in aid of such mining, in order to constitute the person in charge of the mining the agent of the owner to contract for such services, and in order to give a lien therefor against the mining claim. *Reese v. Bald Mt., etc., Co.*, 133 Cal. 287, 65 Pac. 578. The admission of the documents in question could only have been based upon the theory that they gave to Wheeler sufficient authority, as the



constructive agent of Hawley, to make a contract with the plaintiff, and that therefore Clinton, as subagent of Wheeler, was, in contemplation of law, the agent of the defendant. Being inadmissible and insufficient for this purpose, they should have been excluded. In view of the very meager testimony tending to show that Clinton was the agent of the defendant, and the positive and satisfactory evidence to the contrary, it is obvious that this testimony must have been prejudicial to the defendant. The motion for a new trial should have been granted.

We do not think it necessary to consider the other points in the case.

The order denying the motion for a new trial is reversed, and the cause remanded.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 81

LAMB v. WAHLENMAIER et al. (L. A. 1,233.)

(Supreme Court of California. July 9, 1904.)

JUDGMENT—FACTS IN ISSUE—COUNTERCLAIM—SURETIES—RES JUDICATA.

1. Code Civ. Proc. § 1908, subd. 2, provides that a judgment is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, litigating for the same thing, under the same title, and in the same capacity; and section 1911 provides that that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. Civ. Code, § 2840, declares that a surety is exonerated to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety, or inconsistent with his rights, or which lessens his security. *Held*, that where a building contractor sued the owner for the reasonable value of labor performed and materials furnished, and the answer set up that plaintiff had abandoned the contract, and that defendant had paid a certain sum to protect the property from mechanics' liens, and that a sum was due defendant because of such payments, and judgment was for plaintiff, the judgment was a bar to a subsequent action by the owner against the surety on a bond given by the contractor, and which was conditioned, among other things, that the contractor should save the owner harmless from all mechanics' liens.

2. The fact that a judgment was erroneous does not render it any the less a bar to a subsequent action.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by William A. Lamb against G. H. Wahlenmaier and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Herbert J. Gondge and J. O. Brown, for appellants. T. W. Brotherton and Frank W. Burnett, for respondent.

HARRISON, C. The plaintiff entered into a contract with the defendant Wahlenmaier

for the construction of a building in Los Angeles at the agreed price of \$6,277, and at the same time Wahlenmaier and his codefendant, the Fidelity & Deposit Company of Maryland, as his surety, executed a bond to the plaintiff for the faithful performance by him of his contract. The bond provided that Wahlenmaier should also cancel and release the building from all claims or liens that might accrue against it from the performance of the contract, and should save the plaintiff herein harmless from all damage thereby. Wahlenmaier abandoned work upon the building before it was completed, and thereafter the plaintiff finished its construction. The plaintiff paid to Wahlenmaier \$2,577 before he abandoned the work, and afterwards paid \$4,360 in discharge of liens for materials and labor furnished and employed in its construction at the request of Wahlenmaier. The present action is brought upon the above-named bond to recover the amount paid by the plaintiff in discharge of liens in excess of the contract price for constructing the building.

The contract for the construction of the building was not filed in the recorder's office. Prior to the commencement of this action, but after the building had been completed, Wahlenmaier brought an action against the plaintiff to recover from him the reasonable value of the labor performed and materials furnished by him in its construction, alleging the same to be \$8,448. In his answer to the complaint in that action the plaintiff herein alleged that Wahlenmaier had contracted with him to construct the building for the sum of \$6,277, that the labor and materials furnished by him in its construction were under and by virtue of said contract, and that the said sum was the reasonable value of the labor and materials furnished by him. He also set forth in his answer the abandonment by Wahlenmaier of his contract, and alleged that prior to such abandonment he had paid him the sum of \$2,577, and that, in order to protect his property from mechanics' liens and foreclosure sale for materials and labor, and to complete the building, he had paid and was compelled to pay materialmen and laborers \$4,360; that by reason of such payments there was due and unpaid from Wahlenmaier to him the full sum of \$1,236.69, "said sum being in excess of the contract price and the reasonable value of said labor and materials," for which amount he asked judgment against Wahlenmaier. Upon the trial of that action the court held that the contract for constructing the building was void by reason of the failure of the parties to sign the plans and specifications annexed thereto; that for this reason Wahlenmaier was entitled to recover the expenditures made by him in its construction, and the reasonable value of his services therein, and found that the same amounted to \$2,767.95; that the plaintiff herein had paid to and for him the sum of \$2,925, and had also paid the

sum of \$4,360 in discharge of valid and subsisting liens filed against the building; that Wahlenmaier had thereby been fully paid for the construction of the building. The court thereupon rendered judgment that Wahlenmaier take nothing by his action, and that Lamb, the plaintiff herein, recover his costs from him, but did not render any judgment in favor of Lamb upon his claim to recover from Wahlenmaier the amount paid for the discharge of the liens in excess of the contract price. The defendants herein have pleaded the judgment in that action in bar of the plaintiff's right of recovery. The superior court held that it was a bar in favor of Wahlenmaier, but not in favor of the surety company, and rendered judgment against the latter and in favor of the plaintiff for \$691. The surety company has appealed.

The rule formulated by Lord Chief Justice De Grey in the *Duchess of Kingston* Case, and frequently repeated in other cases, that "the judgment of a court of concurrent jurisdiction directly upon a point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court," has been substantially reproduced in section 1908, subd. 2, of the Code of Civil Procedure of this state. The estoppel thus created is not limited to an action which is identical in form with the former action, or where the same parties are plaintiff and defendant in each of the actions, but may be invoked whenever in the second action the parties are in privity with the parties to the first action, and the same issue is presented for determination which was determined in the former action. As between the parties to the action, the judgment therein is an estoppel as to all matters which are actually and necessarily included in the judgment. Code Civ. Proc. § 1911. The determination in the former action of an issue presented on the part of the defendant therein by way of counterclaim, or in recoupment, or by way of a cross-complaint against the plaintiff, is *res judicata*, as fully as if determined in a separate and independent action brought by the defendant against the plaintiff. *Freeman on Judgments*, § 282; *Black on Judgments*, § 761; *Taylor on Evidence* (9th Ed.) § 1699; *Timmons v. Dunn*, 4 Ohio St. 680; *Howell v. Goodrich*, 69 Ill. 556; *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579; *McNicholas v. Lake*, 13 Colo. App. 164, 56 Pac. 987; *Ehle v. Bingham*, 7 Barb. 494; *Baker v. Stinchfield*, 57 Me. 363; *S. & N. A. W. R. Co. v. Henlein*, 56 Ala. 368; *Jennison v. West Springfield*, 13 Gray, 544.

The liens, for whose payment in excess of the contract price for constructing the building the plaintiff now seeks to recover from the defendants, are the same liens which were set forth by him in the former action in support of his claim against Wahlenmaier. In that action he presented to the court, as an issue to be tried and determined, his right

to recover from Wahlenmaier the amount of money paid by him upon these liens in excess of the contract price for constructing the building, and asked for a judgment therefor against Wahlenmaier. His right to recover this excess was thus brought into judicature, and at the trial evidence was presented by him to the court in support of his demand; and the court found that he had paid the liens to the extent claimed by him, but refused to give him judgment therefor, upon the ground that, as the contract was invalid, Wahlenmaier was entitled to the entire value of the labor and materials used in the construction of the building, irrespective of the price named in the contract. The omission of the court to give him any relief for the payment of this excess was, in its legal effect, an adjudication that he was not entitled to relief therefor. *Thompson v. McKay*, 41 Cal. 221. The court erred in giving this judgment. *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391. But the plaintiff did not appeal therefrom, and the judgment became a final determination of the respective rights of himself and Wahlenmaier upon this issue, and available to Wahlenmaier as a defense to any subsequent action by the plaintiff for a recovery of the excess of the liens so paid by him.

The judgment is none the less a bar for the reason that it was erroneous. "In passing upon the plea of *res judicata*, the question is not whether a court decided the point involved right or wrong, but the question is, did the court decide the point, and is the decision final?" *Chouteau v. Gibson*, 76 Mo. 38. By failing to appeal and seek a correction of the error through a reversal of the judgment, it is as conclusive upon the plaintiff as if at the trial he had omitted to present sufficient evidence to the court in support of his demand. *Collins v. Bennett*, 46 N. Y. 490; *Davis v. Talcott*, 12 N. Y. 184; *Caldwell v. White*, 77 Mo. 471; *Herman on Estoppel*, § 268; *Freeman on Judgments*, § 249.

It must be held, therefore, that, by reason of the judgment in the former action of Wahlenmaier against the plaintiff, the latter is estopped from enforcing any obligation to him on the part of Wahlenmaier arising out of the payment of the liens against the building in excess of the contract price.

The plaintiff's right to recover from the appellant is solely by virtue of its having become the surety for Wahlenmaier for such payment, and it is a familiar principle of suretyship that any act of the creditor by which the principal is discharged from liability will also discharge the surety. The surety is entitled to an immediate right of action against the principal for reimbursement of any payment enforced against him by the creditor; but if, by the act of the creditor, he will be unable to proceed against the principal, he is for that reason discharged from liability to the creditor. It is upon this principle that the surety is discharged, if,

without his consent, the creditor gives to the principal an extension for the time of performance, or surrenders to him securities which he holds for the obligation, or releases him from his obligation. The reason which underlies this rule is the obligation of fidelity—the uberrima fides—which the creditor is under to the surety, and includes every act of his by which the right of the surety to have recourse against the principal may be impaired. If by any act of his the principal is released from the obligation for which the bond was given, the surety is thereby exonerated from his obligation. Section 2840, Civ. Code, declares: "A surety is exonerated \* \* \* (2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety, or inconsistent with his rights, or which lessens his security." In *Trotter v. Strong*, 63 Ill. 272, the creditor agreed with the principal debtor that, upon consideration of his payment of a portion of the obligation, he would not collect any further portion thereof. The court held that, as thereby the debt against the principal was discharged, the surety was also discharged, saying: "If he were held liable, he could not recover over against the principal, because he is discharged from the debt, and owes the creditor nothing, and the surety could not recover for money paid for the use of the principal, as he owes nothing, and, when the surety makes the payment, it cannot be for the use of the principal debtor. To enforce payment from the surety under such circumstances would be to deprive him of his legal right to be reimbursed for the money thus paid. It would change the relations of principal and surety, deprive the latter of a legal right, and would operate unjustly." In *State v. Parker*, 72 Ala. 181, the tax collector had given two official bonds, with different sureties upon the respective bonds. Suits were instituted separately upon each bond, the breaches assigned being identical in each suit. Upon the trial of the first suit, judgment was rendered in favor of the tax collector and his sureties upon that bond. Upon the trial of the suit upon the other bond, it was held that, as this judgment was a bar to any recovery against the tax collector, it was also a bar to any recovery against his sureties upon the second bond. The same rule is declared in *Brown v. Ayer*, 24 Ga. 288; *Brown v. Bradford*, 30 Ga. 927; *Gill v. Morris*, 11 Helsk. 614, 27 Am. Rep. 744; *Dickason v. Bell*, 13 La. Ann. 249.

The judgment by virtue of which Wahlenmaier was exonerated from any obligation to the plaintiff was the direct result of the course of action taken by the plaintiff in that suit. The plaintiff therefore being, as the result of his own act, precluded from resorting to Wahlenmaier, it would be in disregard of all principles of suretyship to allow him to recover from his surety. See *Couch v. Warring*, 9 Conn. 261. It must be held,

therefore, that, by reason of this judgment the appellant was discharged from all liability upon the bond.

We advise that the judgment and order denying a new trial be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 68

SOUTHERN CALIFORNIA INV. CO. v.  
WILSHIRE et al. (L. A. 1,252.)\*

(Supreme Court of California. July 7, 1904.)

WATERS—TITLE—RIPARIAN OWNERS—PRESCRIPTIVE RIGHTS—DIVERSION OF WATER BEYOND WATERSHED—INJUNCTION—PROOF—ADVERSE USER—GOVERNMENT LANDS—APPEAL—FINDINGS—CONCLUSIVENESS.

1. The decision of the trial court on questions of fact depending on conflicting evidence will not be disturbed on appeal.

2. The owner of a prescriptive right to the surface waters of a stream, for the purposes of irrigation and domestic use, has no right to sell the water to a city for its use, necessitating the piping of the water beyond the watershed of the stream, where, by permitting it to flow in its usual way, some of the water would seep into and percolate through the soil, and again reach the stream, to the benefit of riparian owners.

3. Where the owner of a prescriptive right to the use of all the surface waters of a stream for irrigation and domestic purposes attempts to sell the right to a city, necessitating the piping of the water beyond the watershed of the stream, the owner of a riparian right in the stream is entitled to enjoin such use without proof of damages; it appearing that, by permitting the water to flow in the usual way, some of it would seep into and percolate through the soil, and again reach the stream, to the benefit of the riparian owner.

4. The use of the water of a stream on vacant government lands does not deprive the user of an adverse character, nor prevent the acquirement of a right thereby.

5. A prescriptive right to the use of the waters of a stream may be acquired as against a riparian proprietor who holds title by patent from the United States.

Department 1. Appeal from Superior Court, San Bernardino County; John L. Campbell and Benjamin F. Bledsoe, Judges.

Action by the Southern California Investment Company against George Wilshire and others. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Modified.

Byron Waters and Waters & Wylie, for appellant. Otis & Gregg, George E. Otis, and Curtis & Otis (W. S. Goodfellow, of counsel), for respondents.

SHAW, J. The complaint states a cause of action to quiet the alleged title of plaintiff to the use of all the waters of a certain stream in San Bernardino county, known as

\*Rehearing denied August 5, 1904.

"Edgar Creek." The answer denies plaintiff's title, and sets forth the title of defendants. The plaintiff appeals from the judgment, and from an order denying its motion for a new trial.

Upon the appeal from the order denying the motion for a new trial plaintiff assigns as error the insufficiency of the evidence to justify several of the findings. Upon an examination of the record, we find that there is sufficient evidence tending to support the respective findings to bring the case within the rule that this court cannot disturb the decision of the court below upon questions of fact depending upon conflicting evidence. The testimony is voluminous, and of a character usually given upon contests relating to title by prescription. It would serve no useful purpose to discuss it in detail.

We are of the opinion that the judgment, in certain particulars, is not supported by the findings, and that it must, in consequence thereof, be modified.

The prayer of the complaint is that all the adverse claims of the defendants, or either of them, to the water, be determined, and that they, and each of them, be enjoined from asserting any claim to any part of the waters of the stream adverse to the plaintiff. The defendants allege that they and their predecessors in interest are, and for years have been, the owners of a large body of land situate upon the creek, some three or four miles above the land of the plaintiff; that they have the right to use the water thereon as riparian proprietors, by reason of the fact that the creek flows through the land described; and that they have the further right to the use of all of said water flowing through their land for irrigation, domestic use, and the watering of stock upon the said lands, by virtue of an appropriation and continuous adverse use thereunder. The complaint does not state the nature of the plaintiff's right to the water—whether by virtue of a riparian right or a prescriptive right. Upon the issues thus presented, it was the duty of the court to determine, and in its judgment declare, the extent of the right of the defendants, as well as that of the plaintiff.

The court finds that the plaintiff was also the owner of some 320 acres of land situated upon the creek, and, with respect to the riparian rights in the water, it finds that both the plaintiff and the defendants have the right to use the waters of the stream as riparian proprietors, in proportion to the respective ownership of lands on the stream owned by them, respectively, in common with the other owners of land situated along the stream, having similar rights, but that these riparian rights, both of the plaintiff and defendant, are subject to the prescriptive rights in the water found to be owned by the plaintiff and defendants, respectively. It further finds that the plaintiff is the owner and entitled to the use of all that portion of the flow of the creek, and of the waters thereof

rising and customarily flowing in the creek, after the defendants' rights to said stream have been fully satisfied, and not otherwise. This finding, we understand, refers to the plaintiff's right by virtue of appropriation and prescription. With respect to the prescriptive right of the defendants, the court finds that the defendants are the owners of the right to the use of all the surface water of the creek flowing at the upper boundary of their land, for the purpose of irrigation and domestic use upon said land. The judgment declares that plaintiff and defendants are riparian proprietors upon the stream, and have, respectively, the right to use the water of the stream "proportionately to the frontage of their lands upon the said stream, considered with regard to the whole frontage of land upon said stream"; that the defendants are the owners and entitled to the full, free, and uninterrupted use and enjoyment of all the surface waters of the creek flowing at their point of diversion near the north line of their lands; that the plaintiff is entitled to all the waters of the stream customarily flowing in the stream at its dam, a short distance above its land, where the ditch begins by which it acquired the prescriptive right referred to in the findings; and that all the rights of the plaintiff in the waters of the stream are subject and subordinate to the prescriptive rights therein adjudged to be owned by the defendants.

The judgment declaring the measure of the respective riparian rights of the parties is not correct. Where two persons own land along the line of a water course, the measure of their rights is not necessarily controlled solely by the length of their respective frontages on the stream. Many other things may enter into the question. One may have a tract of land of such character that but little use could be made of the water upon it, while the land of the other may all be so situated that it could be irrigated with profit and advantage. In *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 326, it is said: "In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem." And the general rule is there stated to be, in cases where there is not water enough to supply the wants of both, that each owner has the right to the reasonable use of the water, taking into consideration the rights and necessities of the others.

Upon the findings with respect to the water right of the defendants, the court should not have adjudged that the defendants were the absolute and unqualified owners of the right to divert and use all the surface waters of the stream. The owner of a prescriptive right to the waters of a stream has not the unconditional right to change the place of its use at his pleasure. The right to change

the place of use is subject to the qualification that, where there are other persons having subordinate rights to the waters of the stream, the right to change the place of use can only be exercised when and to the extent that such change will not injure the subordinate right. *Kidd v. Laird*, 15 Cal. 181, 70 Am. Dec. 472; *Butte T. M. Co. v. Morgan*, 19 Cal. 616; *Ramelli v. Irish*, 96 Cal. 217, 31 Pac. 41; *Hargrave v. Cook*, 108 Cal. 80, 41 Pac. 18, 30 L. R. A. 390; *North Fork Company v. Edwards*, 121 Cal. 666, 54 Pac. 69; *Last Chance M. Co. v. Bunker Hill M. Co.*, 49 Fed. 430; *Black's Pomeroy on Water Rights*, § 69. That portion of the judgment which purports to vest in the defendants the absolute right to divert the water is erroneous, in that it does not limit such right to the use of the water on the land for the benefit of which it was acquired. When the title to water is acquired by adverse use, the extent of the right is limited by the extent of the use which conferred the title. The findings limit this right, as it should be limited; but the judgment goes further, and gives an absolute right, the effect of which is that the defendants would have the right to take out the water, and make such use of it as they see fit, either on the lands within the watershed for the benefit of which it was appropriated, or upon other lands, or for some use beyond and outside of the watershed. The action was begun in September, 1888. The trial began in June, 1889, but, after the greater part of the evidence was taken, for some reason not appearing, the trial was continued from year to year until June, 1901, when some additional evidence was taken, and thereupon the findings and judgment were made and rendered. From the evidence taken in 1901, it appears that in 1899, long after the action was begun, one of the defendants, who owned the right to use one-third of the water on a certain portion of the lands described in the answer, attempted to sell his water right to the city of Redlands, and that in pursuance thereof the water which he had theretofore been accustomed to use upon the lands within the watershed had been taken through a pipe, over the divide and beyond the watershed of the creek, some 10 or 15 miles, to the city of Redlands, and was there used by the city. This, perhaps, accounts for the form of the judgment, which, if allowed to stand, would secure to the defendants the right to make this disposition of the water. The court finds that, notwithstanding the diversion of all the water of the creek by the defendants at their point of diversion, and its use upon their land for irrigation, a certain percentage thereof seeped into the soil, and percolated through the same until it again reached the stream, and that a portion of this water thus seeping into the soil reached the point of diversion of the plaintiff. From the nature of the soil, and the heavy grade of the lands, it is mani-

fest that this would be the case. The court further finds that, without the addition to the stream thus caused by the seepage of water used by the defendants, there had always been, from other additions and seepages, sufficient water flowing in the stream at the plaintiff's point of diversion to irrigate all the lands actually cultivated by the plaintiff and its predecessors, which the evidence shows was about 25 acres. From this it would appear that the diversion of the water taken by the plaintiff, and the carrying of it beyond the watershed, would not injure the prescriptive right of the plaintiff. If no other rights were involved, the change of the place of use would be without injury. But the plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through his lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received. As such riparian owner, it has the right to have the stream continue to flow through its land in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel of its land—and whether it is or is not as valuable, in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendant will deprive it of a right of property—a valuable part of its estate. *Moore v. Clear Lake W.*, 68 Cal. 146, 8 Pac. 816; *Stanford v. Felt*, 71 Cal. 249, 16 Pac. 900; *Hellbron v. Fowler S. C. Co.*, 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; *Conkling v. Pacific I. Co.*, 87 Cal. 296, 25 Pac. 399; *Walker v. Emerson*, 89 Cal. 456, 26 Pac. 968; *Spargur v. Heard*, 90 Cal. 221, 27 Pac. 198. The taking of the water beyond the watershed would therefore be an injury to the plaintiff's riparian right, which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined. The judgment should enjoin the defendants from using the water otherwise than as the court finds and rightfully adjudges that they are entitled to such use. They were not entitled to the use of the water, except upon the lands described in the answer. The judgment should therefore be modified so as to properly describe the respective rights of the parties as riparian owners, and so as to enjoin the defendants from using the water of the creek, except upon the

lands of the defendants described in the answer, and for the purposes of irrigation and domestic use thereon.

The other alleged errors do not require extended notice. The fact that, during the time the defendants were using the water adversely to the plaintiff, the defendants' lands upon which they were using the water were vacant government lands, did not make their use the less adverse, nor prevent them from acquiring a right thereby. Any lawful use at any place would be sufficient for that purpose, regardless of the title of the defendants to the land on which it was used.

The nature of the plaintiff's title—whether by United States patent or otherwise—is also immaterial. One person may by adverse use divest the title of another, regardless of the source of that title.

In view of the nature of the evidence, we do not perceive how the court could have ascertained and declared the exact amount of water which each party was entitled to use by virtue of their respective riparian rights. The conditions upon which such proportional rights depend do not appear.

It is ordered that the judgment of the superior court be modified so that the first paragraph thereof after the preamble shall read as follows:

"Now, therefore, it is ordered, adjudged, and decreed that the defendants herein, except the defendant Edward Wilshire, who has heretofore filed a disclaimer in this cause, are the owners and entitled to the possession, and full, free, and uninterrupted use and enjoyment of all the surface waters of Little San Geronio creek, sometimes known as 'Edgar Creek' and sometimes known as 'Weaver Creek,' now flowing or accustomed to flow at or above the points of diversion on said stream, now or heretofore made by said defendants, as indicated in findings 14 and 21 herein, for the purpose of using the same for irrigation and domestic use upon the lands belonging to the defendants, respectively, and described in their answers on file herein, and that the said defendants, and each of them, be enjoined from at any time making any use of said waters elsewhere."

And that the second paragraph of said judgment, immediately following the above, be modified, so as to read as follows:

"That said defendants, and each of them, and said plaintiff, are riparian proprietors upon said stream, and that, as such riparian proprietors, they each have the right, respectively, to the reasonable use of the waters of said stream, each considered with regard to the rights and necessities of the other, and of other owners of land fronting upon said stream; the plaintiff's riparian right, however, being subject to the diversion by said defendants of all the surface waters of said stream customarily flowing in the irrigating season of each year at the points indicated by conclusion of law No. 1 herein, which said right of appropriation to all the

surface waters of said stream so flowing is a prior and superior right to said waters to plaintiff's riparian right, or to any right of plaintiff to the waters of said stream, where the same flow through the lands of defendants at or above the points of diversion indicated by conclusion of law No. 1 herein."

The judgment as so modified, and the order denying the motion for a new trial, are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 64

GARRETSON INV. CO. OF SAN DIEGO v. ARNDT et al. (L. A. 1,457.)

(Supreme Court of California. July 6, 1904.)

MORTGAGES—FORECLOSURE—RENTS AND PROFITS—RECEIVER—APPOINTMENT.

1. Where two persons executed a mortgage to secure a note executed by one of them, a judgment in foreclosure decreeing the debt due from both mortgagors was erroneous.

2. Where, in mortgage foreclosure, there was nothing in the complaint authorizing a receiver, an appointment upon the complaint was not warranted notwithstanding a recital in the mortgage authorizing the appointment of a receiver ex parte.

3. Rents and profits in the hands of a receiver appointed in mortgage foreclosure are not to be applied on the debt after foreclosure, unless there has been an adjudication as to them.

4. Code Civ. Proc. § 580, provides that, if there be no answer, the relief granted a plaintiff cannot exceed that demanded in the complaint. *Held*, that where, in mortgage foreclosure, defendants were in default, and there was no prayer or allegation authorizing an adjudication divesting them of rents and profits, such an adjudication could not be made.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the Garretson Investment Company of San Diego against H. R. Arndt and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Puterbaugh & Puterbaugh, for appellants. James E. Wadham and Daney & Lewis, for respondent.

SMITH, C. This is an appeal by the defendants from a judgment entered against them upon default after demurrer overruled. The suit was brought to foreclose a mortgage made by the defendants to secure the payment of the defendant H. R. Arndt's note to the plaintiff for the sum of \$6,000, etc. The judgment recites the previous appointment of a receiver in the case, and that his account rendered subsequently to the default of the defendant shows a balance in his hands of \$142.30, which, it is adjudged, should be allowed as a credit on the mortgage. It is further found, or rather, in effect, adjudged, that there is now due and owing to the plaintiff from the two defendants, after deducting the credit allowed, the sum of \$7,526.76, to-

gether with \$300 allowed as attorney's fee and costs.

The points urged by appellant—or such as require consideration—are that the judgment imposes on the defendant Mrs. Arndt, who was not a party to the note, a personal liability for the debt; and that the appointment of the receiver, and the appropriation of the funds in his hands to the satisfaction of the mortgage debt, was not warranted either by the allegations or by the prayer of the complaint.

As to the first of these objections, there can be no doubt—in the event of the proceeds of the sale proving to be insufficient to satisfy the mortgage—that the plaintiff would be authorized by the judgment, as it stands, to enter a deficiency judgment against the defendant Mrs. Arndt, who is not personally liable. Code Civ. Proc. § 726. Nor is it any answer to this objection for respondent to say that he may not, or even that he will not, avail himself of this power. The judgment should therefore be modified in this regard.

The other objection involves in fact two propositions, the one relating to the jurisdiction of the court to appoint a receiver pending the suit; the other, to the appropriation of the money in his hands to the satisfaction of the debt. With regard to the former, it is assumed in the argument of the appellants' counsel that the order appointing a receiver was made on the complaint, in which, in fact, there is nothing to justify the appointment, unless it be a stipulation in the mortgage providing for the appointment of a receiver on ex parte application; and on this assumption it would be necessary to sustain the appellants' contention. *Baker v. Varney*, 129 Cal. 564, 62 Pac. 100, 79 Am. St. Rep. 140; *Scott v. Hotchkiss*, 115 Cal. 94, 47 Pac. 45. But in support of the judgment it may perhaps be presumed that the order for the receiver was not made upon the complaint, but afterwards on motion, and on affidavits showing the necessary facts to give jurisdiction to the court; and accordingly (for the purposes of the decision) it will be so assumed. It does not follow, however, from this assumption, that the money in the hands of the receiver could be rightly applied to the satisfaction of the mortgage debt; and I am of the opinion, on the record before us, that it could not, for the title of the defendants to the rents and profits was in no way affected by the possession of the receiver. *Von Roun v. Superior Court* 58 Cal. 360; *Skip v. Harwood*, 3 Atk. 564, 565; *Beach on Receivers*, §§ 3, 6. Nor could they be divested of it otherwise than by a valid adjudication; and in this case there is neither any allegation (as there was in *Scott v. Hotchkiss*, supra) nor prayer to justify such an adjudication. Nor, the defendants being in default, was it competent for the court so to adjudge. Code Civ. Proc. § 580; *Brooks v. Forrington*, 117 Cal. 219, 48 Pac. 1073; *Foley v. Foley*, 120 Cal. 42-43, 52 Pac. 122, 65 Am. St. Rep.

147; *Staacke v. Bell*, 125 Cal. 312 et seq., 57 Pac. 1012. The case, it may be added (though it is hardly necessary), differs essentially from that of property taken under attachment, where the law itself provides that it shall be disposed of by the officer to satisfy the judgment (Code Civ. Proc. § 541); and where, consequently, no adjudication with regard to it is necessary. While in the case of the receiver there is no such provision; nor, indeed, is there any personal liability on the mortgagors, with regard to this or other property, until the exhaustion of "the primary fund out of which the mortgage debt must be paid." *Woodward v. Brown*, 119 Cal. 291, 51 Pac. 2, 3, 63 Am. St. Rep. 108. The court, therefore, was not justified in granting this relief, or in otherwise disposing of this money in the hands of the receiver than by directing it to be paid over to the defendants; and the judgment should therefore be modified in this respect also.

We advise that the cause be remanded, with directions to the lower court to modify the judgment as indicated in this opinion, and that, when thus modified, the judgment shall stand affirmed.

I concur: GRAY, C.

For the reasons given in the foregoing opinion, the cause is remanded, with directions to the lower court to modify the judgment as indicated in this opinion; and that, when thus modified, the judgment shall stand affirmed: *McFARLAND, J.*; *HENSHAW, J.*; *LORIGAN, J.*

144 Cal. 81

COBURN et al. v. CALIFORNIA PORTLAND CEMENT CO. (L. A. 1,228.)\*

(Supreme Court of California. July 8, 1904.)

SALES — RAW MATERIALS — SUITABLENESS — REFUSAL TO ACCEPT — DAMAGES.

1. Where, in an action for breach of a contract for the sale of clay, it appeared that there was no market for the clay remaining unaccepted, and defendant's refusal to accept the same damaged the seller by leaving the ground in an uneven condition, etc., the measure of damages was compensation for the actual loss sustained.

2. Where, at the time defendant purchased clay in the ground for the purpose of making cement, the suitability of the clay had not been determined, for which reason the contract provided that defendant should be compelled to take only such clay as was suitable for the manufacture of cement, and it was thereafter discovered that, by a process of mixing with other clay, the clay was capable of being used, but was not of itself suitable for cement making, defendant was not bound to accept or use the same.

3. The fact that defendant accepted and used a part of the clay after discovering that it could be so used did not preclude him from refusing to accept the remainder, after other clay, which was in itself suitable for cement making, had been discovered.

\*Rehearing denied August 5, 1904.

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by J. A. Coburn and another against the California Portland Cement Company. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Walter Rose, Ross T. Hickox, and A. R. Metcalfe, for appellant. H. C. Rolfe and F. B. Daley, for respondents.

ANGELLOTTI, J. This action was brought to recover damages alleged to have been suffered by plaintiffs by reason of the alleged failure of the defendant to comply with the terms of a contract entered into by it with plaintiffs. Plaintiffs had judgment for \$6,397.50, and defendant appealed from the judgment, and from an order denying its motion for a new trial. The appeal from the judgment has heretofore been dismissed for the reason that it was not taken within six months after the entry of the judgment. Upon the appeal from the order denying the motion for a new trial, the questions suggested in defendant's closing brief as to the sufficiency of the complaint, and as to whether the findings sustain the judgment, cannot be considered. *Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 165, 74 Pac. 700; *Sharp v. Bowle* (Cal.) 76 Pac. 62.

It is contended that the evidence is, in several particulars, insufficient to sustain the findings of the trial court.

By the contract between the parties, the defendant agreed to take all the clay on the lands of plaintiffs "that is suitable for the manufacture of cement, the fact of its being suitable to be determined by the chemist of the party of the first part" (defendant). Plaintiffs agreed to deliver the clay at the rate of 18 to 20 cubic yards per day, or as directed, and the price fixed was \$1 per cubic yard; all clay delivered during any month to be paid for on or before the 25th day of the succeeding month. The contract was executed January 25, 1898, and the parties acted thereunder until June 30, 1900—plaintiff delivering clay, and defendant accepting and paying for the same—when defendant refused to accept further clay and notified plaintiffs that it would not take or pay for any more of said clay, and has ever since continued to refuse to accept any of the same. Claiming that this constituted a breach of the contract on defendant's part, plaintiffs brought this action, alleging that there remained on their land more than 12,000 cubic yards of clay, suitable for the manufacture of cement, which the defendant refused to accept or pay for, and that the cost or expense of delivering the same does not exceed 50 cents per cubic yard. They further alleged great damage and injury to their premises by reason of the removal of the clay already delivered, and the necessary excava-

tions and preparations for the delivery of the remaining clay, but there is no evidence in the record which would warrant the allowance of any sum on this account.

The court found all the allegations of the complaint to be true, and found that, by reason of defendant's failure and refusal to comply with its contract, the plaintiffs had been damaged in the sum of \$6,397.50; evidently basing its finding as to the amount of damage upon the testimony of a witness for plaintiffs who testified that there remained on the land 8,530 cubic yards of clay in place; the uncontradicted evidence to the effect that it was the intention of the agreement, as shown by the conduct of the parties thereunder, that the clay should be paid for "by cubic yard as delivered in the wagon bed"; the evidence that 1 cubic yard in place on the ground was equivalent to 1½ cubic yards in the wagon bed; the evidence that the cost to plaintiff of taking out and delivering the clay was only 50 cents per cubic yard; the evidence of one of the plaintiffs to the effect that he knew of no other market for the clay; and the evidence of one of the plaintiffs to the effect that the damage to the ground by reason of the taking out of the clay already delivered is much greater than it would be if all the clay was taken out.

The case thus presents a somewhat peculiar situation, in that the plaintiffs, while retaining their land intact, are allowed to recover from the defendant the full contract price per cubic yard of the clay in place, less only the cost of excavating and delivering the same; the value of the clay in place being excluded from consideration upon the theory that there was no other market for the clay, and that the damage to the ground by reason of the taking out of the clay already delivered is greater than it would be if all the clay were taken out. Such a situation might, however, exist, under well-recognized rules of law. It is true that the measure of damages in actions of this character, where the property has not been sold, is generally the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery. Our Code provides that in such cases the detriment is deemed to be "the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it." Subdivision 2 of section 3311, Civ. Code. Where, however, there is no value, or where, under the terms of the special contract, the market value is not an appropriate or adequate criterion of damages, it has been said that the measure of damages is compensation for the actual loss suffered. See 24 Am. & Eng. Ency. of Law (2d Ed.) 1115, 1116. The law seeks to give the complaining party the value of his



bargain; to prevent a loss which the fulfillment of the contract would have prevented; to put the injured party, so far as money can do it, in the same position as if the contract had been performed. 8 Am. & Eng. Ency. of Law, 632. Accordingly the contract price, less the cost of performing the contract, was held to be the proper measure of damages where the buyer refused to take all the tomatoes grown on a certain tract of land; it appearing that there was no other market for the tomatoes. *Indiana C. Co. v. Priest*, 16 Ind. App. 445, 45 N. E. 618. See, also, *Silkstone, etc., Co. v. Joint Stock Co.*, 35 L. T. (N. S.) 668; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525.

If it is more to the detriment than to the benefit of plaintiffs' land to allow the clay in place to remain thereon, and if there be no other market for the clay, as to both of which elements there is some evidence, perhaps sufficient in character to support a finding, it would appear that the difference between the contract price and the cost of performing the contract, for all clay on plaintiffs' land which should, under the terms of the contract, have been accepted and paid for by defendant, would be a measure of damages of which the defendant could not complain.

The main question on this appeal is, in our judgment, as to whether plaintiffs sufficiently showed that there was any clay remaining on their land, which, under the terms of the contract, defendant was bound to accept. This question must turn upon the proper construction of the contract of the parties—particularly that portion thereof describing the property contracted for. The defendant agreed, in effect, to take only such clay as is "suitable for the manufacture of cement," and expressly stipulated that the fact of its suitability is "to be determined by the chemist of the party of the first part" (defendant). The evidence shows, without conflict, that none of the 5,000 yards and more of clay that have been delivered by plaintiffs was "suitable for the manufacture of cement," in the sense that it could be advantageously used without mixing it with other clay, and there is no claim that any of the undelivered clay is different in this respect from that delivered. If this were all, we should unhesitatingly say that the undelivered clay does not come up to the requirements of the contract, and that defendant was under no obligation to receive the same. The stipulation for such clay as "is suitable for the manufacture of cement" would mean only such clay as was by itself suitable, so far as clay was an ingredient of the cement to be manufactured, and would not include such clay as could only be used in connection with other clay, which might be elsewhere procured. It, however, appears that, at the time the contract was entered into, an experiment had been made by the

chemist of the defendant with some of plaintiff's clay, and it had been found that the clay so examined was not by itself, so far as clay was to be used as an ingredient, suitable for the manufacture of cement, and this fact was made known to the officers of the corporation defendant. It is therefore contended that the defendant was not stipulating for such a clay, but only for a clay that, when mixed with other clay, could be advantageously used in making its cement. But it further indisputably appears that at the time of the execution of the contract no experiment had been made in mixing this clay with other clay, and that it was not known that it could be advantageously so mixed. All that was then known was that the single portion experimented upon was not, by itself, suitable. It does not appear that defendant had any information at all as to remaining clay on plaintiffs' land. So we cannot find warrant in the language of the contract, and the circumstances surrounding the execution of the same, for holding that the contract contemplated the purchase of clay that was suitable only to be used in connection with other clay. The defendant, without knowledge as to what use it could make of plaintiffs' clay—knowing only that the portion experimented on was not by itself suitable, and having made no experiment by mixing—was simply willing to agree and did agree to purchase all the clay that was in fact suitable, and still further indicated that the question of suitability as to any of the clay had not been finally determined by inserting a provision that the question of suitability was to be determined by its own chemist. The acceptance and use of clay delivered by plaintiffs under this contract for a period of over four years, during which some 5,000 yards were delivered, does not, under the circumstances, materially affect the question. It appears from the evidence of the chemist, who was the only witness as to the quality of the clay delivered, that the clay was never satisfactory, but that it was ascertained some six weeks or so after the execution of the contract that by mixing clay delivered by plaintiffs with another clay, procured from Riche Cañon, a clay could be produced that might be held suitable for the manufacture of cement; but the evidence of this witness clearly indicates that he never considered even this mixture suitable, and continued the use of it only because no more satisfactory clay could be found. Finally, when a clay had been discovered that was by itself suitable, defendant notified plaintiffs that it would take no more clay. Under these circumstances, it was the good fortune rather than the right of plaintiffs that the defendant continued to use the clay for so long a period to plaintiffs' profit.

If plaintiffs' clay was not "suitable for the manufacture of cement," within the meaning of the contract, the acceptance of the part delivered did not preclude defendant

from refusing to accept the remainder. *Cook v. Brandels*, 3 Metc. (Ky.) 555; *Hollfield v. Black*, 20 Mo. App. 328; *Am. B. & B. Co. v. Oakes*, 64 Mo. App. 235; *Visscher v. Greenbank Co.*, 11 Hun, 159; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Hubbard v. George*, 49 Ill. 275. As was said in the first of the cases noted, the acceptance of a part was not an acceptance of the whole, and the defendant was only bound to receive an article of the quality stipulated, and was not answerable for any damages resulting solely from its refusal to receive an article of inferior quality.

The burden was on the plaintiffs, in order to sustain a cause of action for damages caused by the refusal of defendant to accept the remaining clay, to show that such remaining clay came up to the requirements of the contract. There was, in our judgment, no evidence to sustain the finding to this effect.

The order appealed from is reversed.

We concur: SHAW, J.; VAN DYKE, J.

144 Cal. 75

PEOPLE v. NOLAN. (Cr. 1,116.)\*

(Supreme Court of California. July 7, 1904.)

CRIMINAL LAW—ROBBERY—ACCESSORIES BEFORE THE FACT—INFORMATION—NOTICE OF ACCUSATION—FEDERAL CONSTITUTION—DUE PROCESS OF LAW—VERDICT—EVIDENCE.

1. Evidence reviewed, and held sufficient to sustain a conviction for robbery.

2. Pen. Code, § 31, and section 971, as amended in 1880, abrogate the distinction between an accessory before the fact and a principal, and declare that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals. Section 971 also provides that no other facts need be alleged in any indictment against an accessory before the fact than are required in an indictment against his principal. Held, that an indictment alleging that defendant and others did unlawfully make an assault, and then and there committed the robbery described, was sufficient, though defendant was not present, and was but an accessory before the fact.

3. Cal. Const. art. 1, § 3, declaring that the state is an inseparable part of the American Union, and that the Constitution of the United States is the supreme law of the land, does not render Const. U. S. Amend. 6, providing that in all criminal proceedings the accused shall be informed of the nature and cause of the accusation against him, applicable to prosecutions in California state courts.

4. Pen. Code, § 971, as amended by Laws 1880, providing that no other facts need be alleged in any indictment or information against an accessory before the fact than are required in an indictment or information against his principal, is not unconstitutional, as depriving accused of his life, liberty, or property without due process of law.

Department 1. Appeal from Superior Court, City and County of San Francisco; Albert G. Burnett, Judge.

Doshia Nolan was convicted of robbery, and she appeals. Affirmed.

William H. Schooler, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was informed against, jointly with Michael Nolan, John Davis, and Bernard Whitelaw, for the crime of robbery, and, on a separate trial, was convicted, and adjudged to suffer imprisonment in the State Prison for the term of eight years. She appeals from the judgment, and from an order denying her motion for a new trial.

It is urged on this appeal that the evidence was insufficient to support the verdict. There was no claim that the appellant was present at the commission of the crime; the theory of the prosecution being simply that, not being present, she advised and encouraged its commission, and was, therefore, under the provisions of sections 30 and 31 of our Penal Code, a principal in such crime.

The contention of appellant as to the insufficiency of the evidence is directed, as we understand it, to the proposition that the evidence is insufficient to sustain a finding that she advised and encouraged the commission of the crime. The evidence very clearly showed that the other defendants actually committed the crime charged, and the evidence of the witness Ruby Grills, taken in connection with the other circumstances of the case, was sufficient to warrant the jury in concluding that the appellant had incited the others to the commission of such crime, or, in the language of our statute, "advised and encouraged its commission." It was apparent that the appellant had received information as to the presence of money and diamonds at the house of Mrs. Mathews and Mrs. Tuttle, at No. 543 Haight street, and that she was the only one of the defendants who had such information, or the means of obtaining the same. It appears that on the next day after she, Nolan (with whom she was then living, and had been so living for four years), Davis, Whitelaw, and Ruby Grills dined together at a restaurant, the three men were in consultation, and Whitelaw went out to the house at 543 Haight street, and, by a ruse, obtained admission to the house and a talk with the inmates, and that on the next day but one the three men committed the crime. Under these circumstances, the jury were not likely to believe the testimony of appellant and that of her codefendants to the effect that she never gave any of them any information as to the Mathews-Tuttle house. It was clear that the information of the men came through appellant, and that the testimony of appellant to the contrary was false. The innocent imparting of such information, without improper motive or intent that the same should

\*Rehearing denied August 5, 1904.

be used by her companions in the commission of a crime, could not, of course, make appellant a party to the crime afterwards committed, but there was no claim that the information was innocently given by appellant; the sole claim being that it was not given at all by her. Under the circumstances, there is nothing unreasonable in the testimony of Ruby Grills to the effect that while all the defendants and she were together, just after coming out of the restaurant, the appellant said: "I know an old woman that has two or three thousand dollars and some diamonds. It would be very easy to get, and the best time to get it is when the children are at school. The woman's husband died a short time ago"—and that she at the same time said to Ruby Grills that she found out about the money and jewelry by reason of Mrs. Tuttle's little girl talking to her sister's little girl, and that she had wanted "Mike" (Nolan) to go out there, but he was too well known. If the jury believed this testimony, they were warranted in finding that the appellant was using the information she had obtained for the purpose of procuring the commission of the crime of robbery for the profit of herself and her companions, and that she was actively engaged in advising and encouraging the commission of such crime by Nolan, Davis, and Whitelaw.

The particular place referred to by the words of appellant was sufficiently identified by the testimony as the Mathews-Tuttle house, and that robbery was the crime contemplated is apparent from the statement that the best time to get the property would be "when the children are at school," and the "old woman" consequently more likely to be alone. There are other circumstances supporting the conclusion of the jury that appellant shared the criminal design of those directly committing the crime, and advised and encouraged the commission thereof, and we can find no warrant for holding that such conclusion is not sufficiently supported by the evidence.

Although the appellant did not directly commit the robbery, and was simply what was formerly called an accessory before the fact, she was informed against as a principal; the information charging that "the said Michael Nolan, John Davis, Bernard Whitelaw, and Doshia Nolan \* \* \* in and upon one Emma Mathews \* \* \* did willfully \* \* \* make an assault," and then and there commit the robbery. It is not claimed that the information was in any way indefinite or uncertain as a charge of robbery against one directly committing the acts constituting the offense, but it is urged that it was not sufficient as against appellant, in that it did not inform her that she was charged solely as an accessory before the fact. Under the provisions of our statutes, the information against appellant was sufficient in form and substance. It is declared by the Penal Code that the distinction between an accessory be-

fore the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. Sections 31 and 971. It is further provided by section 971, Pen. Code, as amended in 1880, that "no other facts need be alleged in any indictment or information against such an accessory [an accessory before the fact] than are required in an indictment or information against his principal."

The intention of the Legislature that the person who is a principal in a crime simply because he has advised and encouraged its commission may properly be charged with having himself directly committed the act is thus made manifest. See *People v. Rozelle*, 78 Cal. 84, 89, 20 Pac. 36. And this is not disputed by counsel for appellant. It is, however, contended that the provision quoted above from section 971, Pen. Code, is in violation of the provisions of the sixth amendment to the Constitution of the United States, which provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him. If it be conceded that an accessory before the fact, charged as principal in the manner prescribed by our statute, is not informed of the nature and cause of the accusation to the extent required by this provision of the Constitution, it remains that the sixth amendment to the Constitution of the United States has no application to proceedings in the state courts of the several states, and was never intended to have any such application. This, also, we understand, would be conceded by appellant, were it not for the fact that section 3 of article 1 of our state Constitution provides that "the state of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land," and it is claimed that by reason of this provision the various provisions of the Constitution of the United States are made parts of our own Constitution. We are satisfied that no such effect can be given to this section of our Constitution. By the part thereof relied on, no more was intended or accomplished than the recognition in terms of the Constitution of the United States as the supreme law of the land as to all matters provided for therein, which was necessarily the fact whether so recognized or not; but, the provisions of article 6 of the amendments not being applicable to state courts, the recognition of them as the supreme law of the land could not affect proceedings in state courts.

We are unable to see how it can be held that section 971, Pen. Code, is in any way violative of any provision of the fourteenth amendment to the Constitution of the Unit-

ed States. Whatever may be said as to the policy of legislation which abolishes all distinction between a principal and an accessory before the fact, and permits such an accessory to be charged as a principal, it cannot be said that such legislation has the effect of depriving any person of life, liberty, or property without due process of law. The state has the right to establish the forms of pleadings to be observed in her own courts, subject only to the provisions of the Constitution of the United States involving the protection of life, liberty, and property in all the states of the Union. *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 29 L. Ed. 250. Where the statute makes an accessory before the fact a principal, and expressly provides that he may be charged as such, one charged as a principal with the commission of an offense has sufficient notice of the accusation against him to satisfy every requirement of the much invoked fourteenth amendment.

The Washington cases relied on by appellant were decided upon a provision of the Constitution of the state of Washington similar to the sixth amendment of the United States Constitution, taken in connection with a statute which did not contain the provision to be found in section 971 of our Penal Code, to the effect that no other facts need be alleged against an accessory than are required in an indictment against his principal.

No other point is made for reversal.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

144 Cal. 87

PERRIN v. HONEYCUTT, Auditor. (Sac. 1,241.)

(Supreme Court of California. July 8, 1904.)

TAXES—REDEMPTION OF LAND FROM SALE—MISTAKE OF COUNTY OFFICER—RELIEF—STATUTES—LIMITATION OF TIME FOR FILING CLAIM—MANDAMUS.

1. Pol. Code, § 3804, provides that any taxes, penalties or costs paid more than once or illegally collected may, by order of the board of supervisors, be refunded by the county treasurer, provided that no order to refund shall be made except on claims filed within six months after the making of the payment. The county government act of 1897 (St. 1897, p. 470, § 40) provides that the board must not allow any claim unless presented within a year after the last item of the claim or account accrued. *Held*, that the board has no power to dispense with the provisions of the statutes, and hence mandamus will not lie to compel the county auditor to draw a warrant for a claim which had been allowed, but which had not been filed with the board for more than one year after the claim accrued.

2. Where, by reason of mistake in the estimate of the amount necessary to redeem land which had been sold to the state for taxes, the plaintiff paid a sum in excess of that required by law to redeem the property, and the mistake was not discovered by plaintiff until after his claim for a refund was barred, whereupon he procured an allowance from the county board of supervisors for the excess, and on the refusal of the auditor to draw a warrant therefor

instituted mandamus proceedings to compel the auditor to issue the warrant, plaintiff is not entitled to relief in such proceedings, under Code Civ. Proc. § 338, providing for granting relief in certain cases on the ground of mistake.

Commissioners' Decision. Department 2 Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Petition by Robert Perrin against A. S. Honeycutt, as auditor of Madera county, for writ of mandamus. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Larew, for appellant. R. B. Fowler, for respondent.

COOPER, C. Defendant's demurrer to the plaintiff's verified petition for a writ of mandate was sustained, and judgment entered in favor of the defendant. Plaintiff appeals from the judgment.

It appears from the petition that the defendant is, and was at all times named therein, the county auditor of Madera county; that on the 2d day of October, 1901, by reason of an error and mistake made by defendant, as auditor, in his estimate of the amount necessary to redeem certain real estate situated in Madera county, and which had been sold to the state for delinquent taxes, the plaintiff paid to the county treasurer of said county \$533.89 in penalties for delinquency in excess of what was required by law, and in excess of what was due, for the purpose of redeeming the said land; that plaintiff did not know of the said error and mistake in the defendant's estimate, and that the said sum was paid by reason of the said mistake in the auditor's estimate, and not otherwise; that the mistake was not discovered by plaintiff, and he did not know of the same, until January, 1903, and immediately upon discovering said mistake in paying said excess plaintiff made a demand upon the board of supervisors of said county that the said sum be refunded to him; that on the 6th day of March, 1903, plaintiff filed his claim, duly itemized, showing in detail the said error or mistake, which claim was duly verified as required by statute, and in due form; that thereupon on said last-named day the board of supervisors made an order that the said sum be refunded to plaintiff, and directing the defendant to draw his warrant upon the county treasurer therefor; that the said order has been duly presented to defendant, and demand made upon him that he draw his warrant in favor of plaintiff, as directed by the said order of the board of supervisors, but defendant refused and still refuses to draw the said warrant or obey the order so made by the said board of supervisors. A copy of the auditor's estimate, showing the total amount necessary to redeem to be \$4,643.80, and the error or excess of \$533.89, is annexed to the claim of plaintiff so filed with the board of supervisors, and is made an exhibit to the petition. The defendant's demurrer to the petition was up-

on the ground "that the petition does not state facts sufficient to show that plaintiff is entitled to the writ and that the proceeding is barred by the provisions of section 3804 of the Political Code, as amended in the year 1901 (St. 1901, p. 648); also by the provisions of section 40 of the county government act of the year 1897."

The defendant, as auditor, was justified in refusing to draw his warrant for the amount if the board had no power to allow the claim. The board of supervisors is an inferior tribunal of limited and special powers. Its sole power to allow claims is that given by statute. Plaintiff's claim is based upon section 3804 of the Political Code, which provides: "Any taxes, penalties or costs thereon paid more than once or erroneously or illegally collected, or any taxes paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor, as to the excess in such cases, or any tax paid upon an erroneous assessment of improvements on real estate not in fact in existence when said tax became a lien, may, by order of the board of supervisors, be refunded by the county treasurer: \* \* \* provided further, however, that no order of the board of supervisors to refund taxes, penalties or costs shall be made except upon a verified claim therefor filed within six months after the making of the payment sought to be refunded, or, in the case of a double payment of taxes within two years after such payment." Section 40 of the county government act of 1897 (St. 1897, p. 470) provides that the board of supervisors must not allow any claim in favor of any person against the county unless upon a properly itemized and verified claim "presented and filed with the clerk of the board within a year after the last item of the account or claim accrued." The claim of plaintiff was filed and presented more than one year after it accrued, and hence the board not only had no power, but was expressly prohibited from allowing it. It had no power to dispense with the express mandates of the statute. It was said by this court in *Carroll v. Siebenthaler*, 37 Cal. 196: "If a claim is barred and extinguished, the board has no more authority to allow it than one that has not accrued. The statute is not merely advisory to the board, but it is peremptory, commanding the board not to allow, and the other officers not to pay, claims that are barred and extinguished. It was not intended that the board should have power under the act to allow the claims of friends and reject those of enemies, which were not presented within the statutory period. The rule of the statute is inflexible and peremptory. The nonpresentation of the claim within the year extinguishes it. It is not only the right, but it is the duty, of the auditor and treasurer to disregard an order which, upon its face, appears to be without the jurisdiction of the board of supervisors."

Appellant claims that the cause of action is one for relief on the ground of mistake, and that it comes within the provisions of section 338, Code Civ. Proc., and he relies upon *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766. That case was an action brought in the superior court to recover money paid without consideration and by mistake. The board of supervisors had rejected the claim, and the power of the board to allow a claim in such case is not discussed. The case is not in conflict with what has here been said. This is a proceeding to obtain a peremptory writ to compel defendant to perform a duty. It was not his duty to draw a warrant for a claim which the board of supervisors had no authority to allow. The writ of mandate cannot be used to obtain relief on the ground of fraud or mistake. When it is applied for, there must be a clear case to "compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

It is not necessary to decide as to the constitutionality of section 3804 of the Political Code, as the board was prohibited from allowing the claim by the county government act. If the section is unconstitutional, it would seem that the plaintiff could not in any case recover upon his claim.

We advise that the judgment be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 48

PEOPLE v. MORAN. (Cr. 1,091.)\*

(Supreme Court of California. July 2, 1904.)

HOMICIDE—CORPUS DELICTI—CONSPIRACY—EVIDENCE—SUFFICIENCY—COMPETENCY—DYING DECLARATIONS—DEPOSITIONS—ON PRELIMINARY EXAMINATION—WITNESSES—CROSS-EXAMINATION—TRIAL—INSTRUCTIONS—MISCONDUCT OF COUNSEL—CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—CAUSE FOR POSTPONEMENT.

1. The corpus delicti in homicide is fully established when it is shown that a human being has been deprived of life by criminal agency.

2. The corpus delicti being established, extrajudicial admissions of defendant that he went with the person who actually did the killing to the scene of the murder are competent to show that he was a participant in the crime.

3. A conspiracy may be proved by circumstances, and, when the circumstances tend to prove a conspiracy, it is for the jury, and not the court, to determine their sufficiency to prove that fact beyond a reasonable doubt.

4. In homicide, evidence held sufficient to sustain a conviction on the theory of a conspiracy between defendant and others with the one who actually did the killing.

5. It is not an unreasonable exercise of the discretion necessarily inherent in a trial court

\*Rehearing denied August 1, 1904.

to set a criminal case for a Monday, rather than for the preceding Saturday, which was the first day on which it could have been set, and on which, owing to the pendency of another case, it could not be assumed with confidence that the trial could proceed; and the court's action in so doing was not a violation of Const. art. 1, § 13, guarantying to every person accused of crime a speedy trial, nor of Pen. Code, § 1382, providing that, unless good cause to the contrary be shown, the court must dismiss the prosecution of a defendant who is not brought to trial within 60 days after the filing of the information, although more than 60 days had elapsed from the filing of the information.

6. Nor is the suspension of criminal trials during the week following Christmas an unreasonable proceeding, or a violation of the rights guarantied by the Constitution and statute.

7. Nor is a defendant whose trial is necessarily delayed by unusual conditions entitled to complain, under the Constitution and Code, that a greater number of the departments of the superior court than usually suffice are not assigned for criminal cases.

8. The fact that a defendant jointly charged with another had demanded and been accorded a separate trial was good cause for the postponement of such trial to a date when the court might safely assume that the trial of the codefendant would be concluded; and the action of the court in granting such postponement did not infringe Const. art. 1, § 13, guarantying to persons accused of crime a speedy trial, or Pen. Code, § 1382, providing that, unless good cause to the contrary be shown, prosecutions must be dismissed when the defendant is not brought to trial for 60 days after the filing of the information, although the case was not brought to trial within the 60 days, where the case of the codefendant was brought to trial within that time.

9. An accomplice may aid and abet in the commission of a crime without taking physical part in the actual violence.

10. An instruction to return a verdict of not guilty in homicide cannot be given under any circumstances.

11. In homicide, a modification of an instruction stating the hypothesis upon which defendant claimed an acquittal, and reminding the jury that it was exclusively for them to determine whether, and for what purpose, and to what extent, if any, defendant was connected with the persons committing the act, was proper.

12. It is not necessary for the court, in instructing the jury in homicide, to charge that the presumption of innocence is "an instrument of proof," and "evidence" in favor of defendant.

13. In homicide, requested instructions fully covered by the charge of the court are properly refused.

14. In homicide, where defendant did not do the killing, but was present with the one who did do it at the time, and there was evidence of a conspiracy connecting him therewith, dying declarations of deceased as to who did the shooting were admissible against defendant.

15. An admission of defendant that he was present at the scene of the murder made his previous denials of that fact evidence against him.

16. In homicide, testimony of deponent's father that he had taken deponent to Mexico for her health, and left her there with her mother, and refused to let her return with him, and his testimony of the intention of the mother with respect to the duration of deponent's stay in Mexico, was material and competent for the purpose of laying a foundation for the introduction of deponent's deposition taken on the preliminary hearing.

17. The presumption is that an official duty, such as the certification of a deposition, has been duly performed; and a defendant who seeks to obtain a review of a ruling admitting the deposition on the ground that the certificate is not in due form must see that the certificate is put into the record.

18. In homicide, where several defendants were jointly indicted, and all were examined and were present at the preliminary hearing, a deposition consisting of the testimony of a witness before the committing magistrate was not rendered inadmissible on the separate trial of one of the defendants because a part of the testimony contained therein was given on cross-examination by counsel for a codefendant.

19. In homicide, where the crime was committed in pursuance of a conspiracy to kill a "scab," testimony of defendant's statement at the time that some one had spoken of going out "to get a scab" was admissible; the words having been spoken in his presence, and he having immediately acted upon the suggestion by going with the others after the scab.

20. In homicide, where a witness had stated that he had never heard anything against defendant's character for peace and quietness, it was proper for the prosecuting attorney to ask, on cross-examination, whether he had heard of defendant's having been arrested for disturbing the peace within the previous 18 months.

21. In homicide, it was not misconduct for the prosecuting attorney, in cross-examining a witness testifying to defendant's character, to ask if he had not heard that defendant had been arrested for vagrancy and disturbing the peace, where, on objection being made, he immediately withdrew so much of the question as related to the arrest for vagrancy.

22. Code Civ. Proc. § 2061, providing that the jury are, on all proper occasions, to be instructed that the testimony of an accomplice should be viewed with distrust, and the evidence of the oral admissions of a party with caution, is repugnant to the constitutional injunction against judges charging as to matters of fact.

Beatty, C. J., and Henshaw, J., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Thomas Moran was convicted of murder, and appeals. Affirmed.

George D. Collins, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen. (P. F. Dunne, of counsel), for the People.

BEATTY, C. J. The defendant and three others—Buckley, Donnolly, and Duncan—were jointly accused of the murder of George W. Rice. They demanded and were accorded separate trials, and, Buckley, Donnolly, and defendant having been convicted, they have prosecuted their separate appeals to this court. The opinions of the court affirming the judgments in the cases of *People v. Buckley* and *People v. Donnolly* are reported in 77 Pac. 169, 177. They show, as does the record in this case, that Rice was deliberately murdered. So far there has never been any doubt or room for controversy, but there has all along been a serious question as to the identity of the slayer, and as to the identity and number of his accomplices. The theory of the prosecution has

been that the murder was committed in pursuance of a conspiracy, that Buckley was the one who inflicted the fatal wounds, and that Donnolly, Duncan, and this defendant were his confederates. In Buckley's case the effort of the defense was to show that not he, but a person called "China Copeland," was the slayer. In the present case, as in the case of Donnolly, the defense was that there was no evidence of a conspiracy to kill Rice, and that, whoever may have been the slayer, the defendant had no share in the crime, or, if there was a conspiracy, that he had no part in it. This defense, which failed before the jury, is strongly reasserted here, and it is contended in behalf of the defendant that there is no evidence in the record which, conceding it to be true, will sustain the verdict convicting him of the murder.

The conceded facts of the case are that Rice was a machinist who during a strike was working at a shop on First street, near Howard, in the city of San Francisco. On October 11, 1901, at 5:30 p. m., he left the shop for the purpose of returning to his home, near Twentieth and Howard. At the corner of First he boarded a Howard street car, and took a seat in the central or inclosed compartment. The man who shot him, with at least two others, boarded the same car at some point on its way to Twentieth street, and took their places outside of the inclosed section. From a point at least as far down town as Tenth street the man who did the shooting and the man who fled in his company from the scene of the murder stood on the step on the left side of the open section in front of the car; the shooter in front, and his companion by the middle stanchion behind him. At a point near Nineteenth street the third man moved from the position he had been occupying to a central position on the step extending along the left side of the open section at the rear of the car. When the car stopped on the intersection of Twentieth and Howard, it was headed south. Rice stepped off on the left or eastern side at the rear of the closed section, and started in a southeasterly direction, on his way to his home. He had reached a point about opposite the center of the closed section of the car, when the man who had posted himself on the rear step rushed up behind him, and commenced beating him over the head with a loaded billy. After receiving several blows, by which his scalp was seriously lacerated, he sunk or fell to the ground. While this beating was in progress, the two men who had been standing on the front step of the car approached the spot where Rice fell, and, when he had fallen, the one who had occupied the front position on the step shot him four times with a pistol. After the second shot the man who did the clubbing ran down Twentieth street towards Shotwell—a street parallel to and east of Howard. After the fourth shot the

other two ran together in the same direction. The course of the first man who ran is not traced beyond the intersection of Shotwell. The others ran together to Shotwell, thence to Nineteenth, and thence to Folsom, where they separated. So far the facts are clear and undisputed, and they leave no room for doubt that Rice was the victim of a deliberate and cruel murder. But as above stated, counsel for defendant contends that there is not a shadow of evidence to connect him with the crime.

We think that in this part of his argument counsel has permitted himself to indulge in some extravagance of statement as to what the evidence shows, or rather as to what it falls to show. He asserts, for instance, in a number of places and in connection with various points of his argument, that there is absolutely no evidence, aside from Moran's admissions, which he claims are incompetent, that he was at the scene of the murder. But the truth is that, besides his own admission of the fact, the competency of which as evidence against him is undoubted, there is the positive evidence of Mr. Piatt and Arthur Cleve that Moran was the person who stood at the middle stanchion on the front step, that Buckley was the man who stood in front of him on the same step, that they left their positions when the clubbing commenced, that Moran stood by while Buckley shot Rice, and that they ran away together. The contention that Moran's admission that he went with Buckley to the scene of the murder was incompetent evidence is based upon the proposition that proof of his presence there was essential to the establishment of the corpus delicti, for which purpose extrajudicial admissions are not received. But the corpus delicti was fully established when it was shown that a human being had been deprived of life by criminal agency, and of that there was never any doubt. The proof that Moran was present at the time of the murder was distinct from the proof of the murder itself, and for the distinct purpose of showing that he was a participant in the crime, and to this point his admissions were entirely competent.

There is, in short, no room for controversy as to the fact that Moran accompanied Buckley to the place where the murder was committed, and there was the clear and positive evidence of two witnesses who had the best opportunity of observing that he left the car at the same time Buckley did, stood by while he fired four shots into the prostrate body of Rice, and fled from the scene in his company. Other testimony showed that they continued together as far as Nineteenth and Folsom. When Buckley was overtaken and arrested, he asserted his innocence, and called upon Moran to exonerate him, but Moran denied being present when the shooting occurred; asserting that at the time of the murder he was at a restaurant downtown. This denial he repeated after-

wards in the presence of Donnolly, but finally he admitted that during the afternoon of the day of the murder he and his three co-defendants had been drinking together at a saloon, corner of Zoe and Brannan streets; that he was well acquainted with Buckley, but only slightly acquainted with Donnolly and Duncan; that while in the saloon something was said about going out to the Mission to "get a scab," or to "do up a scab"; that the four then proceeded to the corner of Second and Howard, where Duncan left them to go home; that he and Donnolly stood on one side of the street, and Buckley on the other; that presently a man was seen running up Howard from First; that he understood this to be the signal that the scab was on the car then coming up from First; that he and Donnolly then boarded that car on the right-hand side, and Buckley on the left; that when the car stopped at Twentieth and Howard he got off on the right-hand side, and when he heard the shooting he ran away, because he did not want to be mixed up in anything like that. This statement, it will be seen, is in important particulars contradicted by the evidence of Platt and Cleve, who testified positively that Moran was on the same side of the car with Buckley, and close to him on the step; that he stood by him while he was shooting, and accompanied him in his flight; and these are all circumstances strongly tending to prove that the two were acting in pursuance of a common purpose. Added to this, there was another circumstance testified to by Arthur Cleve, to which the jury may have attached importance as evidence of a thorough concert between Buckley, Moran, and the unidentified wielder of the club. As the car approached Twentieth street it made occasional stops, and on these occasions Moran, according to Cleve, would leave his position on the step, walk out into the street, take an observation of the rear portion of the car, and then resume his position on the step. Another witness noticed that the man who did the clubbing, after posting himself on the rear step at Nineteenth street, assumed a crouching position for the purpose of observing the situation in front. It may be that the evidence is not conclusive as to a conspiracy between these parties to take Rice's life, but that certainly was its tendency; and it was for the jury, not for this court, to determine its sufficiency to prove the fact beyond a reasonable doubt. A conspiracy may, and generally must, be proved by circumstances; and, if the circumstances tend to prove a conspiracy, it is for the jury, not the court, to determine whether they are consistent with a reasonable hypothesis of innocence. It is certainly possible that Moran accompanied Buckley from Zoe and Brannan to Twentieth and Howard for no other purpose than to witness the beating of a "scab," as he claims; but it cannot be held, as matter of law, that the evidence was wholly insufficient to warrant the jury in putting a worse

construction upon his actions. Counsel cites a number of cases, including *People v. Stevens*, 68 Cal. 114, 8 Pac. 712, *People v. Creggan*, 121 Cal. 500, 53 Pac. 1062, and *Hicks v. United States*, 150 U. S. 442, 14 Sup. Ct. 144, 37 L. Ed. 1137, in which it was held that the evidence was insufficient in law to prove guilt, but in none of the cases cited was the evidence so strong as in this case.

In the foregoing statement it will be observed that Platt's testimony to the effect that Moran did the clubbing is not adverted to. The reason is that I am convinced that in this particular he was mistaken, and it must be conceded that his mistake in this particular is an impeachment of his accuracy in other particulars; but it is a matter of common experience in cases of this character to find witnesses of unquestionable veracity differing in minor, and often in most important, details. In this case I have accepted the evidence of the witness Platt only so far as it is corroborated by Cleve, *i. e.*, as to the identity of Moran with the man who stood on the step next to Buckley, who left the car with him, or just before him, and who fled in his company. That Buckley was the man who stood on the front of the step and who did the shooting was proved by clear, and in this case uncontradicted, testimony.

Most of the legal propositions advanced by counsel for appellant in support of his contention that the verdict in this case is not sustained by the evidence and that it is against law are correct and undeniable, but he ignores several important features of the evidence, which, when considered in connection with the rest, were sufficient, in point of law, to warrant the inference that Moran had conspired with Buckley and others to take Rice's life. We must assume that such was the conclusion of the jury, for otherwise they would have brought in a verdict of not guilty, under the instructions of the court, which contained the substance of every legal proposition for which counsel is here contending, excepting that in relation to the *corpus delicti*, above shown to be untenable. We cannot hold that the verdict of the jury is unsupported by the evidence or that it is against law.

We come next to the various assignments of error in the rulings of the court. The information against appellant and his codefendants was filed December 9, 1901, and he was not brought to trial until February 10, 1902, 63 days later.

The Constitution guarantees to every person accused of crime a speedy trial (article 1, § 13), and this constitutional right is further secured by section 1382 of the Penal Code, which provides that, unless good cause to the contrary be shown, the court must order the prosecution to be dismissed when a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the finding of the indictment or filing of the information. In this case the



trial of the defendant was not postponed on his application. He consented once to a postponement for 1 week of the entry of an order setting the case for trial, but he never consented to a postponement of the trial beyond the 60 days, and the court clearly erred in denying his motion to dismiss the prosecution, unless good cause to the contrary was shown. But we think this was done. The four defendants had demanded separate trials, and, if they were tried in the same court, the trials must follow in succession. The state had elected to try Buckley first, and he was brought to trial in January, within the 60 days. His trial was protracted, and did not end until Friday, the 7th of February. Prior to that time, and when, of course, it could not be certainly known when Buckley's trial would end, this defendant's case was set down for trial on Monday, the 10th, which was the earliest date it could have been commenced, unless it had been put down for the preceding Saturday. But there could have been no certainty when the case was set that Buckley's case would be ended on Friday, and it was not an unreasonable exercise of the discretion necessarily inherent in the trial court to set the case for Monday, rather than for the preceding Saturday, the last day of the week, and a day when it could not be assumed with any confidence that the trial could proceed. It is contended that the trial of Buckley might have been sooner commenced, and therefore sooner concluded, and, in this connection, complaint is made that the court dismissed the jury panel and refused to take up the trial of criminal causes during the week between Christmas and New Year. But it was shown that there was an unusual congestion of criminal causes in that department of the superior court, necessitating the transfer of a number of such causes to other departments. This prevented the Buckley case from being taken up at once, though it might have been reached sooner but for the holiday. We do not think the suspension of criminal trials during the week following Christmas is an unreasonable proceeding. Neither is a defendant whose trial is necessarily delayed by unusual conditions entitled to complain that a greater number of the departments of the superior court than usually suffice are not assigned for criminal causes. The business of the court must be arranged with reference to the conditions ordinarily prevailing, and somewhat with reference to the force of the district attorney's office. If the 12 departments of the superior court in San Francisco were all to undertake the trial of criminal causes at the same time, most of them would have to get along without the assistance of a prosecuting officer. Besides all this, Buckley was brought to trial within the 60 days and the fact that this defendant jointly charged with the same offense had demanded and been accorded a separate trial was good cause for its postponement to a date when

the court might safely assume the Buckley case would be concluded. In the cases cited by appellant (*People v. Morino*, 85 Cal. 515, 24 Pac. 892; *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009; and *Ex parte Bergerow*, 133 Cal. 349, 65 Pac. 823, 56 L. R. A. 513, 85 Am. St. Rep. 178), no good cause was shown for delaying the trial.

The court did not err in modifying, before giving, defendant's requested instruction No. 5. The instruction, as drawn, was to the effect that an accomplice is one who not only aids by his presence or otherwise in the commission of an offense, but is also a participant of the criminal purpose of the perpetrator. The modification was merely a statement to the effect that an accomplice may aid and abet without taking physical part in the actual violence—a perfectly correct statement of the law, which could not possibly have operated to the prejudice of defendant's rights.

Defendant's requested instruction No. 6 was an instruction to return a verdict of not guilty, and was properly refused for the reasons above given in discussing the evidence, and for the additional reason that it is an instruction which our courts are not authorized to give under any circumstances. *People v. Stoll* (Cal.) 77 Pac. 818.

Defendant's requested instruction No. 7, to the effect that there was no evidence of a conspiracy on his part to murder Rice, was properly refused. There was evidence strongly tending to prove the conspiracy, as has been shown in the foregoing statement.

The court, at the request of the defendant, gave the following instruction: "You are instructed that if the evidence in this case does not satisfy your minds beyond all reasonable doubt that the defendant, Moran, was a party to a conspiracy to murder the deceased, George W. Rice, your verdict must be that the defendant is not guilty. And you are further instructed that if the defendant was merely present to witness the murder, if any, or to witness a beating or a fight, and did nothing to aid and abet the person or persons committing the act, then your verdict must be that the defendant is not guilty." To which the following was added by way of qualification: "But it is exclusively for the jury to determine whether the defendant was present, and, if so, for what purpose, if any, and to what extent, if any, he was connected with the person or persons, if any, committing the act, if any was committed." The instruction stated very clearly the hypothesis upon which defendant claimed an acquittal. The modification merely reminded the jury that it was for them to determine whether the hypothesis was consistent with the evidence. This was not error.

Defendant's requested instruction No. 13 contained a correct statement as to the burden of proof, and a correct definition of "reasonable doubt." It was refused by the court

upon the ground that it was covered by the charge of the court. We think this is true. Although the language used by the court in its charge is not identical with that contained in the requested instruction, it embraces everything essential, and states the doctrine with great fullness in the form often approved by this court.

The defendant's requested instructions 16 and 28 were refused by the court on the ground that they were covered by the charge. They related to the presumption of innocence, and contained nothing beyond what was fully, and with some repetition, included in the charge of the court, except that they stated that the presumption of innocence was "an instrument of proof," and was "evidence" in favor of the defendant. It is true that law writers and judges, in discussing the foundation of the doctrine that persons accused of crime are presumed to be innocent until proven guilty, have sometimes said that the presumption is in the nature of evidence, or an instrument of proof, but it has never been deemed necessary to go into a disquisition upon the foundation of the doctrine in instructing a jury. In the case of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, the language cited from the opinion at page 460, 156 U. S., page 460, 15 Sup. Ct., 39 L. Ed. 481, was merely a portion of the court's comment upon the ruling of the trial judge refusing to instruct the jury that the law presumes an accused person to be innocent until proven guilty. There was no such refusal or omission in this case. The court charged the jury as follows: "In the absence of such proof, he must be acquitted. It is the presumption of the law that the defendant is innocent of the crime charged; and that presumption of the law must prevail in favor of defendant's acquittal, if the evidence before you does not entirely satisfy your minds, and beyond all reasonable doubt, that he committed the crime charged." And the substance of this charge was repeated in a different form in other connections. The fault, indeed, if any, to be found with the charge of the court in respect to this and other propositions applicable to criminal trials generally, is that it was too full and elaborate.

Defendant's proposed instructions 30 and 50 were in further elaboration of the presumption of innocence and reasonable doubt. They were fully covered by the charge of the court, for which reason they were properly refused.

The claim that the court erred in modifying defendant's proposed instruction 46 is disposed of by what is above said regarding the modification of his requested instruction 11. The instructions and modifications are mere repetitions, the one of the other.

The claim that the court erred in modifying instruction 47 is based upon counsel's erroneous statement of the evidence, and his

erroneous view as to what constitutes the corpus delicti. It is without merit.

The court did not err in admitting the dying declarations of Rice. The evidence upon which this ruling was based was sufficient to show prima facie that Rice at the time of the declaration was fully persuaded that he was about to die. It tended to prove that Buckley—the man who wore the white hat—did the shooting, and the fact that Buckley did the shooting was material in connection with the other evidence to the case against Moran.

Neither did the court err in admitting the evidence of Moran's admissions. The fact that he at first and repeatedly denied that he was present at the time of the murder does not bring his case within the principle of the *Teshara Case*, 134 Cal. 542, 66 Pac. 798. Teshara, being accused of the murder by the dying man, at once repelled the accusation, and never afterwards made an inconsistent admission. The evidence offered and admitted against him was purely and simply the declaration of the murdered man, made at a time when he was not shown to have resigned all hope of recovery. But Moran finally admitted that he was at the scene of the murder, and this made his previous denials of that fact evidence against him, on the same principle that his flight was evidence against him.

Nor did the court err in admitting those portions of the evidence of Mr. Platt respecting the absence of his daughter from the state, which was objected to by defendant. This evidence was offered for the purpose of laying the necessary foundation for the introduction of the daughter's deposition. It was, in substance, that he had taken her to the City of Mexico for the sake of her health, and left her there in the care of her mother. The matters particularly objected to were his statement as to the intention of the mother with respect to the duration of her stay in Mexico, and his refusal to let his daughter come back with him when he returned. For the purpose for which this evidence was offered, it was material and competent.

The deposition of Erlene Platt was properly admitted. The first objection to its admission was that there was no competent proof that she was beyond the jurisdiction of the court. We think the evidence on this point, independent of the matters above discussed, was quite sufficient to prove her absence at the City of Mexico, and certainly sufficient to show that she could not be found here. It is next objected that the deposition was not properly certified according to the requirements of the Penal Code. It abundantly appears from the record before us that there was a certificate to the deposition, but the certificate has been omitted from the bill of exceptions. Counsel contends that, in view of his objection that the certificate was not in legal form, it was

incumbent upon the people to show affirmatively that it was in proper form, and for that purpose to have it incorporated in the record. In support of this proposition he cites *People v. Fisher*, 51 Cal. 319, and *People v. Buckley*, 118 Cal. 148, 47 Pac. 1009. Those were cases in which it was held that when the defendant in a criminal case has moved for a new trial upon the ground that the evidence does not sustain the verdict, and his motion has been overruled, the order will be reversed on appeal if the record does not contain some evidence to sustain the charge; and the distinction between the question there decided and the question presented here is very plain. There is a presumption of innocence, which cannot be overcome except by proof of guilt. Hence the necessity of evidence of guilt to sustain a finding of guilt. But with reference to the performance of official duty, the presumption is that it has been duly performed, and the party objecting that an official certificate is not in due form, if he seeks to have an adverse ruling reviewed, should see that the certificate goes into the record. In the absence of the certificate, we must presume it was in due form. If he puts it into his proposed bill of exceptions, the court cannot refuse to allow it without a gross violation of his rights. The remaining objection to the deposition is that the evidence which it contains is irrelevant and immaterial. This objection is based upon the assumption that evidence tending to prove that Buckley fired the fatal shots is not material to the charge against Moran, but it has been shown that in connection with the other evidence it is highly material. A separate objection to a part of the deposition is that it was given upon cross-examination by counsel for appellant's co-defendants. The deposition consisted of the testimony of the witness before the committing magistrate. All the defendants were jointly examined, and all were present. The direct testimony of the witness was confined to what occurred on the car as it approached the scene of the murder, and what occurred at that spot. It was all of the *res gestæ*, and the cross-examination, so far as it went beyond the *res gestæ*, was confined to an effort to show that the witness was inaccurate and forgetful as to details, and uncertain as to the identity of the persons accused. It was in no manner directed against Moran, but, to the extent that it may have succeeded in weakening the force of the direct evidence, was for his advantage. And besides, if the cross-examination by a codefendant had brought out any material evidence against him, it cannot be perceived that he would have any more right to complain than if the same fact had been elicited by a question put by the district attorney.

The court did not err in admitting evidence of Moran's statement that some one in the saloon spoke of going out "to get a

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scab." The words were spoken in his presence, and he immediately acted upon the suggestion. He went with the others to wait for the car conveying the scab, and at the concerted signal boarded that car. Enough has already been said to show the competency and materiality of this evidence. Counsel cites *People v. Irwin*, 77 Cal. 502, 20 Pac. 56, *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71, and *People v. Colburn*, 105 Cal. 648, 38 Pac. 1105, to sustain his contention on this point, but we cannot see that those cases have the slightest bearing on the question.

A witness for defendant, who testified to his good reputation for peace and quietness, stated that he had never heard anything against his character in that particular. On cross-examination he was asked if he had not heard within the previous 18 months that defendant had been arrested for vagrancy and disturbing the peace. After the witness had answered in the negative, counsel for defendant objected, and took an exception to the conduct of the prosecuting attorney in putting the question. The prosecuting attorney immediately withdrew so much of the question as related to an arrest for vagrancy, but insisted on an answer as to an arrest for disturbing the peace, and the defendant's objection to the question in its modified form was overruled by the court. The ruling was clearly correct; the question, as modified, being strictly in the line of cross-examination. The cases cited by counsel to the proposition that it was misconduct in the prosecuting attorney to ask about the arrest for vagrancy do not sustain him; the one nearest in point—*People v. Crandall*, 125 Cal. 134, 57 Pac. 785—being distinctly against him.

Finally it is contended that the court erred in refusing to instruct the jury that evidence of verbal admissions is to be received with caution. Three instructions were requested by defendant embracing this proposition, but each one of them embraced something in substantial addition to the language of the statute enjoining upon the courts the duty of giving this instruction upon all proper occasions. By section 2061 of the Code of Civil Procedure, it is enacted, in strict conformity with the Constitution, that the jury, subject to the control of the court in certain specified cases, are the judges of the effect and value of all evidence addressed to them. But it is further provided in the same section that on all proper occasions they are to be instructed by the court upon certain enumerated matters affecting the weight of evidence. These enumerated cases are exceptions to the general rule prohibiting the court to instruct upon matters of fact, and, as exceptions, cannot be extended or enlarged. In the enumerated cases only can the court instruct as to the weight of evidence, and nothing of substance can be added to the instruction which the statute prescribes.

The statute does not say the jury are to be instructed that evidence of verbal admissions is to be received with great caution, but only with caution, nor does it authorize the court to enter into any argument or disquisition as to the reasons why this caution should be exercised. When an instruction on this point is asked in the language of the statute, or in language substantially the same, without material addition, and the case is a proper one, it is my unalterable opinion, notwithstanding the decision in *People v. Wardrip*, 141 Cal. 233, 74 Pac. 744, that the court is bound to give it, and that its refusal is cause for reversal, on appeal of the party preferring the request. This was clearly decided in *People v. Bonney*, 98 Cal. 278, 33 Pac. 98, and I can see no reason for departing from that decision. But the court is not only not bound, it has no right, to give an instruction which goes beyond the statute in terms and substance, as all the requested instructions in this case did. *Kauffman v. Maier*, 94 Cal. 282, 29 Pac. 481, 18 L. R. A. 124, is direct authority on this point, and what is said in *People v. Rodley*, 131 Cal. 258, 63 Pac. 351, is an intimation to the same effect.

Upon this review of all the points urged by the appellant, we discover no error in the record, and the judgment and order denying a new trial are affirmed.

I concur: HENSHAW, J.

ANGELLOTTI, VAN DYKE, SHAW, and McFARLAND, JJ. We concur in the judgment, and in the opinion of the Chief Justice, except as to what is said therein upon the subject of instructing the jury under the provisions of section 2061 of the Code of Civil Procedure. Upon that subject we adhere to the views expressed in the opinion filed in denying a rehearing in *People v. Wardrip*, 141 Cal. 233, 74 Pac. 744.

LORIGAN, J. I concur in the judgment. As far, however, as the constitutional point is concerned, relative to instructing the jury as to verbal admissions, I wish to go no further than is stated in *People v. Wardrip*, 141 Cal. 233, 74 Pac. 744, that such an instruction "states a mere commonplace within the general knowledge of jurors, and we do not think that either the giving or refusing of such an instruction would warrant a reversal."

#### JOHNSON v. HURST.

(Supreme Court of Idaho. July 6, 1904.)

PUBLIC LANDS—MEANDER LINES—BOUNDARIES  
—PATENT—QUIETING TITLE—COLOR  
OF TITLE.

1. Where it appears from the notes and official plat founded thereon that all the lands within the legal subdivisions, as authorized to be laid out by section 2395, Rev. St. U. S. [U.

S. Comp. St. 1901, p. 1471], have been returned to the government as surveyed, and the remainder of the subdivision is shown to be the waters of a navigable stream, and the government issues its patent to a settler or purchaser for fractional subdivisions thereof abutting on a line which purports to meander such stream, the meander line will not be the true boundary line, but the patentee will take title to the stream.

2. Where the government has parted with a larger acreage than it has received pay for by a patent to fractional lots abutting on a meandered stream, and the patentee takes possession, under his patent, of the lands between the meander line and the stream, he is entitled to be protected in his title and possession as against any and all third persons who do not claim title from the government.

3. In such a case no one but the government or its grantee can be heard to question the title or right of possession.

4. Under section 4538, Rev. St. 1887, an action may be maintained to quiet the title to any interest or estate a person may have in lands of which the law takes cognizance.

5. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title.

(Syllabus by the Court.)

Appeal from District Court, Lincoln County; Lytleton Price, Judge.

Action by O. P. Johnson against William R. Hurst. Judgment for defendant, and plaintiff appeals. Reversed.

After the trial of this case the district judge filed an opinion in writing, from which we take the following statement as to the issues made in the court below:

"This action was commenced February 8th, this year, to quiet title to certain lands mentioned and referred to as lots 7 and 8 of section 6, and lots 5, 6, and 7 of section 5, T. 9 S., of range 15 E., county of Lincoln, containing 111.38 acres. Plaintiff alleges ownership of the premises, and sets forth his deraignment of title from the United States. He also alleges his open and notorious possession and cultivation and farming of the premises since January, 1887, the date of his succession to the title by conveyance from the patentee from the government. He alleges that about November 1, 1903, the defendant stealthily took possession of the premises during the temporary absence of the plaintiff therefrom. He further alleges that about October 14, 1903, the defendant first made a claim of title to the premises, and that he ever since and now maintains and claims title thereto and to the exclusion of the plaintiff's title, and asserts that defendant's said claim is without right, and that he has no estate in or right to the premises. Plaintiff alleges further that ever since defendant so obtained possession of the premises he has maintained such possession by threats of personal violence, refuses to quit such possession, and threatens to continue such possession. Plaintiff further alleges that at the time defendant took possession, the plain-

tiff had on the premises valuable growing crops and several hundred tons of hay, which defendant refuses to permit plaintiff to use for feeding his sheep. Then follow allegations intended to show the necessity for the immediate restoration of the premises to the plaintiff for preparation of the same for farming and irrigating them the present year; also an allegation of the defendant's insolvency and inability to respond in damages, and of consequent irreparable injury from the facts alleged. Plaintiff prays that defendant may be required to set forth the nature of his claim, and that it may be determined, and that it be decreed that defendant has no estate nor interest in the land, and that the plaintiff's title is good, and that defendant be enjoined and debarred from asserting any adverse claim of title thereto. He also asks that a writ of injunction or restitution be issued ejecting the defendant and restoring the possession to the plaintiff. To this complaint the defendant answered, denying the plaintiff's ownership of the several lots mentioned for want of sufficient information. Defendant further denies that he first made claim to the premises on October 14, 1903, or that he made claim to them at any other time, or that on November 1st, or at any other time, he stealthily or at all took possession of the same, or that he ever refused to quit or deliver up the same to the plaintiff. Defendant pleads also by cross-complaint, in which he sets up that on October 15, 1903; he, being a citizen of the United States, entered upon certain unoccupied, unsurveyed lands of the United States in said county, describing them by metes and bounds, containing not more than 160 acres, and recorded a notice of possessory claim, and posted it on the land, and entered into possession, and still holds the same, and that within ninety days afterward he built a house and other improvements thereon of the value of \$200, and that he marked and staked the corners, and that he, therefore, is entitled to the possession of such land, subject only to the paramount title of the United States. He alleges that those lands so taken by him lie immediately south of the lands described in the complaint, and between said lands claimed by the plaintiff and the north bank of Snake river; and in his said cross-complaint he states that plaintiff claims and maintains title thereto adverse and to the exclusion of the defendant. He prays that plaintiff be declared to have no estate or interest in the land claimed by the defendant, and that defendant be adjudged to be the owner of the land so taken by him.

"It will be observed that the lands claimed by plaintiff are fractional subdivisions designated by lot numbers; also that defendant does not claim any part of them, but asserts that the land which he claims is other and different land, lying between said lots and Snake river. During the trial, and before defendant had offered any evidence, the

plaintiff asked and obtained leave to amend his complaint, which he did by interlineation, adding to the description of the land by lot numbers, as stated, the words, 'according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General,' and then further describing the said lots by the boundary line which would make the north bank of Snake river the southern boundary line of said lots. To this amended complaint the defendant forthwith answered, denying plaintiff's ownership of said lots (by number) for want of sufficient information, and further specially denying that they are bounded as set forth in the said amendment, and alleging that, if they were so bounded, the land contained therein would amount to over four hundred acres. In other particulars defendant's answer to the amended complaint is substantially the same as to the original. At the same time the defendant abandoned his cross-complaint, and announced that he stood on the answer to the amended complaint alone."

From the same opinion we quote the following as the statement of evidence introduced upon the trial:

"The evidence shows that Granville Brown entered the lots mentioned, and afterward, in October, 1889, secured a patent from the United States for them, in which they are described substantially as in the original complaint in this action, by number, section, and township, and 'according to the official plat,' etc. The patent and a certified copy of the official plat are in evidence. On the plat these lots are shown as and appear to be bounded on the south side by what purports to be Snake river. Each of the lots, as platted thereon, is marked with the area in acres contained therein, and together they aggregate the area stated in the complaint, 111.38 acres. From the plat it appears that there is no land between these lots and the river bank. This constitutes the plaintiff's case, as far as this branch of it is concerned. The defendant put in evidence a certified copy of the field notes of the survey, and, in connection therewith, testimony as to the situation of natural land marks and roads relative to the river bank and a bluff or declivity of lava rocks on the premises, from which it must be concluded that, notwithstanding appearances from an inspection of the plat, there is in fact a larger area of land between the river bank as it really exists and the meander line river margin as it is shown on the plat than the total area of the lots conveyed by the patent. This evidence is not specific as to courses and distances and area of land, and it is not from qualified surveyors. But the description of the premises by the witnesses with relation to established and recognized lines of public survey, roads, and the bluff mentioned in the field notes in section 5, and the actual width of the river between its banks, makes it

sufficiently clear that there is at least 160 acres of land between the south boundary line of the plaintiff's lots, as surveyed and shown on the plat, and the real river bank. Besides, the plaintiff practically concedes such to be the fact, and rests his claim of ownership of it upon legal conclusions from the other facts in the case discussed below. It is further shown in the evidence that the plaintiff has been in possession of all the land to the river, cultivating and growing alfalfa upon it and making hay for many years; that he did not, and does not now, live upon it as his place of residence, but has a house there, which is most of the time occupied by certain employes, and used in the farm work carried on there; that it is fenced, and by means of the fences and the river and certain rock barriers is inclosed against the encroachments of stock; that there is a bluff or steep declivity or cliff of lava rock running through the land easterly and westerly some distance back from the river, forming the southerly edge of the bench of higher land, whereon, though within his boundaries, plaintiff has not attempted any cultivation. All the land cultivated by the plaintiff lies on the lower ground between this bench and the river. It is claimed by the defendant, and is shown in the field notes, and is undoubtedly true, that in making and platting the survey the meander line on the north side of the river is run along the top of this bench at and near its edge, and that the lower land between it and the river is not included in the survey. From the plat the lowland south of the meander line appears to be in the river. However this may be, the lots, if they extend to the river bank, would probably cover and contain at least twice the area called for by the patent and plat. This lower land, under the bench, is the land inclosed and cultivated by the plaintiff, and upon this land the defendant entered, and he admits that the land taken by him and staked out covers and includes at least twenty acres of plaintiff's alfalfa field. It appears that there is a road through this bottom land, traveled more or less by the public, but that there are gates, maintained by plaintiff, across the road, on both sides of the land, which have been kept closed, and one of them nailed up. There is no evidence that this is a public highway, though there is some testimony to the effect that a road overseer opened the gates or fence about the time of or since this controversy arose. This constitutes, in substance, all the material evidence in the case."

The findings of fact and conclusions of law made by the trial judge are as follows:

"(1) That plaintiff is the owner of lots 7 and 8, section 6, and lots 5, 6, and 7 of section 5, township 5 south, range 15 east. (2) That said lots are not bounded as set forth in plaintiff's amended complaint. (3) That defendant herein did not, on or about October 14, 1903, or at any other time, claim

title to said lots, or any part thereof, nor now claims title by right of possession to any part thereof. (4) That defendant did not fraudulently or stealthily take possession of said land, or any other land, or maintain possession of said land, or any other land, by threats of personal violence. (5) That said lots extend to the meander line on the south, which is the edge of the bluff north of Snake river, and no further. (6) That there is a body of land in excess of the area of said lots lying between the southern boundary thereof and the north bank of Snake river. (7) That plaintiff has no title to the land lying south of the southern boundary of said lots. (8) That said last-mentioned land is unsurveyed. (9) That defendant is occupying a part of such unsurveyed land. (10) That defendant is occupying or claiming no part of the lots in plaintiff's complaint mentioned.

"Conclusions of Law: (1) Plaintiff did not, by virtue of his patent to said lots, acquire title to the land lying between said lots and the north bank of Snake river. (2) That plaintiff takes nothing by this action, and defendant is entitled to judgment for his costs herein; such judgment to be without prejudice at another action for possession."

After making and filing the findings of fact and conclusions of law above set out, judgment was entered that the plaintiff take nothing by the action, and that defendant recover his costs. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Reversed.

E. A. Walters and E. M. Wolfe, for appellant. McFadden & Broadhead, for respondent.

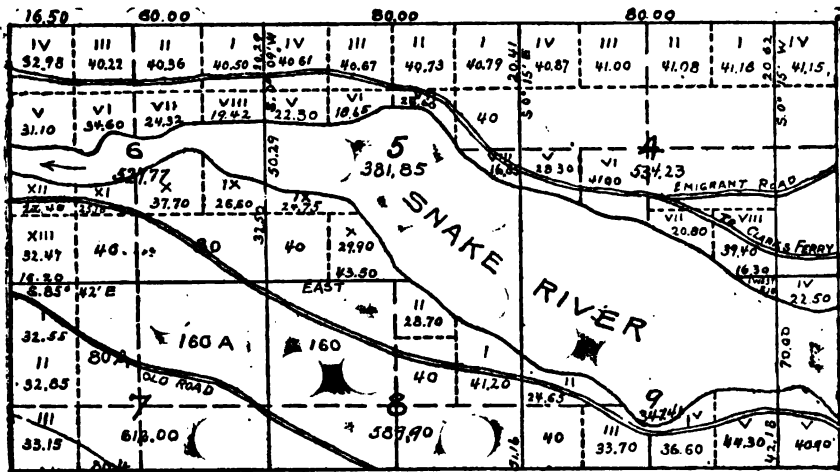
AILSHIE, J. (after making the statement). The learned trial judge, after an exhaustive review of the authorities bearing upon the questions at issue in the case, announced the following propositions, which seem to us to have controlled his opinion and judgment in this case, and which we therefore quote in full from his opinion:

"If these authorities are to be followed, and the principle adduced from them applied to the facts here, it must be held that the plaintiff's lots are bounded by the south line shown on the plat, and that by the patent the government did not convey to the plaintiff's grantor any of the lands south of that line; and the court holds that under the facts in this case the patent to the lots mentioned does not give the plaintiff title to the land to the margin of the river which lies opposite to and between them and the stream, amounting, as it is shown, to a quantity in itself exceeding the acreage bought and paid for by the patentee of the lots. Regarding the long-continued occupation and use by the plaintiff of the land under the south line of his lots, there is nothing in the evidence tending to show that his possession was of

such a character as in any way to connect him with the government title to unsurveyed land, nor to initiate right or title or privilege to purchase from the government. He has never resided upon it. He inclosed and cultivated it, founding his right to do so upon his understanding and belief that, because the plat shows his lots to be bounded by the river on the south, and having bought it and the government having sold it upon these appearances, the patent covered and included it. This, perhaps, is color of title; but, whether it is or not, there is nothing tangible which a court can grasp, or which is appreciable to the mind, as title to the land within the scope and meaning of the word 'title' which the courts can reach and quiet as title. He has a possession not connected with any right except such as a bare possession gives him. In brief, he has no title which may be quieted, and his action to quiet title must fail."

In order to obtain a more thorough and comprehensive view of the situation and facts surrounding this case it will be necessary to examine the official plat of the government survey as filed in the office of the Surveyor General, the certified copy of which was introduced upon the trial of this case. A copy thereof showing sections 4, 5, and 6 and the north half of sections 7, 8, and 9 will therefore be reproduced here, and is as follows:

13.04 chains to "top of bluff 200 feet above river." Again we find in the field notes the surveyor leaving the corner to sections 5, 6, 7, and 8, and "descending gradually" 43.50 chains "to left bank of Snake River Canyon 600 feet above the water course," where he establishes a meander corner between sections 5 and 8. And again, upon proceeding north between sections 5 and 6, he "descends gradually" from southwest corner of section 5, "32.50 chains to left bank of Snake river, 600 feet above the water course," where he establishes a meander corner between sections 5 and 6. Thence he crosses the river "to right bank of Snake river 800 feet above the water course, west," where he establishes another meander corner between sections 5 and 6. In the notes of the meanders in sections 5 and 6 the surveyor starts from the meander corner on the north bank of the river where the township line crosses the stream; thence he apparently proceeds up the river, but upon arriving at the line between sections 5 and 6 he notes that he proceeds "thence in section 5 along bluff." After reaching the meander corner between sections 4 and 5, he crosses the stream to the meander corner between sections 5 and 8, and proceeds to run the meander line down the stream on the left bank thereof, and notes, "I run in section 5 along high bluff," but upon reaching the meander corner on the left bank of the river between sections



Office of Surveyor General, Boise City, Idaho.

I certify this to be a correct copy of part of the official plat of T. 9 S., R. 18 E., on file in this office.

U. S. Surveyor General for Idaho.

From the field notes it appears that the surveyor started from the southwest corner of section 6, ran his line north, and upon reaching the "left bank of Snake river" established a meander corner for section 6, and thereupon crosses the river, a distance of 7.60 chains, "to right bank of Snake river," and there established another meander corner for section 6. From thence he ascended

5 and 6, and as he is about to proceed on down the river, he notes, "Thence in section 6," but makes no mention as to whether he is proceeding along the bluff or bank or the water's edge. It should be observed in the outset that, according to the field notes and the official plat founded thereon, all the lands contained in sections 5 and 6 appear to have been surveyed both upon the north side as

well as the south side of the Snake river. The plat shows 381.85 acres of land contained in the fractional section 5, and 527.77 acres in fractional section 6. The plat shows the remainder of those fractional sections as being taken up or covered by the Snake river. It is therefore clear that, so far as the government is concerned, and the General Land Office, which represents that branch of the government, all the lands lying within sections 5 and 6 have been surveyed and returned to the land office, and the lands therein contained have been thrown on the market for settlement and sale. No other survey has ever been made by or on account of the government, and it appears in evidence in this case that the defendant went to the land office and applied to file upon the lands which he now occupies and was informed by the proper officials that there was no vacant land within those sections, and his application to file was thereupon rejected. The government has at no time complained of the plaintiff having or occupying more land than belongs to him, nor has it ever asserted any right to any part thereof. In this connection it should be further observed that upon the official plat no distinction is made between the lines meandering the Snake river through sections 5 and 6 and the lines representing the right and left banks of the Snake river through those same sections. The conclusion would necessarily follow that the meander line on the right bank of the river is the same as, and coincides with, the water line on that side of the river; and the same is true of the meander line and water line on the left bank. This same conclusion is deducible from the field notes except as to the meander lines through section 5. Considering the field notes and plat themselves, separate and apart from any oral testimony in the case, the conclusion would necessarily be that the meander lines run through section 5 are on the banks of the river, and that the banks are precipitous bluffs ranging from 200 to 800 feet above the water.

The primary question which arises in this case is: Has the plaintiff any such title to the land in controversy that he can maintain his action under section 4538, Rev. St. 1887, to determine and quiet the same? The principal contention made by the defendant, and that upon which the trial court apparently decided the case, is that the plaintiff, by his patent from the government, only acquired title to the meander line, and that all the lands between that line and the water line of the river are the public unsurveyed and unappropriated lands of the United States, to which the plaintiff has no title or right. It is conceded as the general rule of law that the meander line run in surveying public lands bordering upon a navigable river is not a line of boundary, but one designed merely to point out the sinuosity of the bank of the stream, and as a means only of ascertaining the quantity of land in the fraction that

is to be paid for by the purchaser; and that the water course, and not the meander line as actually run on the land, becomes the true boundary line. *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; *St. Paul R. R. Co. v. Schurmeler*, 7 Wall. 272, 19 L. Ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 833, 35 L. Ed. 428; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; *Fuller v. Dauphin*, 124 Ill. 542, 10 N. E. 917, 7 Am. St. Rep. 388; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614; *Ridgway v. Ludlow*, 58 Ind. 249; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Schurmeler v. St. Paul R. R. Co.*, 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; *Stoner v. Rice* (Ind. Sup.) 22 N. E. 968, 6 L. R. A. 387.

It is claimed, however, by the respondent in this case, that there is an exception to the general rule, and that, where the quantity of land between the meander line and the water line is equal to or in excess of the amount contained in the fraction up to the meander line, then the rule ceases, and the exception prevails, and in such case the meander line is also the boundary line. In support of this proposition we are cited to the following authorities: *Barnhart v. Ehrhart* (Or.) 54 Pac. 195; *Little v. Pherson* (Or.) 56 Pac. 807; *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 174; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Bissell v. Fletcher* (Neb.) 28 N. W. 303; *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; *Fulton v. Frandolig*, 63 Tex. 330; *Lammers v. Nissen*, 4 Neb. 245.

*Barnhart v. Ehrhart* was an action for trespass. The plaintiff alleged that he was the owner of certain lots in fractional sections in Umatilla county, adjoining the Umatilla Indian reservation. It appeared in that case that a couple of surveys had been ordered of the tract of land, and that each new plat made differed from the other. The original survey, as shown by the field notes and plat, appeared to have meandered "the dry bed of a creek" called "Wild Horse Creek." It appeared quite conclusively that the line in that case did not purport to meander a navigable stream as meander lines are authorized by section 2395, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1471]. The meander line there, however, appears to have been run under the provisions of that section authorizing such lines where a survey abuts on an Indian reservation. The real difficulty in that case appears to have been that the line did not really meander the line of the Indian reservation, and vacant land was therefore left between the two. It is true that the court in that case announced the general exception contended for by the respondent in this case. The opinion, however, concludes with this significant language: "The field



notes of the survey of 1871 do not purport to be a meander of Wild Horse creek, nor does the amended plat contain the name of that stream, and, as the original field notes showed 'the dry bed of a creek' at the section lines crossed by Wild Horse creek, it may be that the surveyor erred in locating the boundary of the Indian reservation, in view of which the instruction requested became important; and hence it follows that the judgment is reversed, and a new trial ordered." *Little v. Pherson* rests entirely for its authority upon *Barnhart v. Ehrhart*.

In the case of *Horne v. Smith*, the appellant, who owned fractional sections abutting on a bayou or savannah opening into the Indian river in Florida, claimed that the true boundary of his land was the main stream of Indian river. The facts in that case are well illustrated by the language used by Mr. Justice Brewer, as follows: "But the question in this case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned; but that the meander line of the plat is the water line of the bayou, rather than that of the main body of the river, is evident from the facts. In the first place, the area of the lots is given, and when that area is stated to be 170 acres it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section of the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27. These considerations are conclusive that the water line which was surveyed and made the boundary of the lots was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou and between it and the main body of the Indian river." It is significant that in that case the lots claimed were portions of sections 23 and 26, and the meander lines thereof were within those sections, while the water line of the river was about a mile and a quarter to the west, and in sections 22 and 27. It was, therefore, clear that the lots claimed by the plaintiff in that case were not to be found within the confines of the sections containing the lots for which he had received patent. This was one of the strong considerations which moved the court to hold that the lots claimed by the plaintiff had never been surveyed, and had

never been intended to belong to or become a part of those legal subdivisions. It was held, however, that his line should go to a water line. That line was the water line of the bayou, and not of the main stream.

*Niles v. Cedar Point Club* was a "marsh" case. It appears that the notes and official plat to which the patent referred showed that the survey ended at the marsh, and did not purport to be a river, stream, or other navigable body of water, and the court held that the plaintiff took his title with notice that he was not securing the marsh, but only to the marsh. The following language from that opinion shows clearly the principle upon which it is founded: "The meander line run by Surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary (*St. Paul & P. R. Co. v. Schurmeier*, 7 Wall. 272, 19 L. Ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 380, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, 432; *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68), but it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements the actual determination of the line of separation between the land conveyed and that which the government did not propose to convey. Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Here it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh,' as he called it. These surveys were approved, and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh."

*Glenn v. Jeffery* was a "bayou" case, and very similar in principle to the *Niles* case.

In *Bissell v. Fletcher* it appears that at the time of the original survey there were two channels to the Republican river, in Nebraska, and that the meander line followed the north channel of the river. After the plaintiff secured his patent for the fractional lots meandered on the north channel, the government appears to have caused a survey to be made of the lands between the north channel and the main channel of the stream, and a patent was issued to the defendant for fractional lots therein. The controversy thus arose between the two grantees; the first claiming the lands to the main channel of the river, and the court holding that the original survey only extended to the north channel, and that the patentee to those fractions did not acquire title to any of the lands south of the channel. That case, we do not think, throws any light upon the question under consideration.

In *Fuller v. Shedd* the Supreme Court of Illinois reviewed the authorities upon this question quite exhaustively, after which it said: "From these cases it will be seen, if there is such a mistake by the omission of lands in the survey between the meander line and the water that the proportion to that sold is great, it may be corrected by a resurvey. In the case here before the court the field notes show the running of the meander line was across the ridge, and at both the south and north sides of the lake. There was not such an omission of land from the survey that it is apparent a mistake was made, nor is there in the survey any evidence of fraud in the manner in which it was done."

*Fulton v. Frandolig* was an action for trespass, and the only question considered there was that of accretion and reliction, and is no guide for this case.

*Lammers v. Nissen* was a controversy between two patentees from the government, where the original survey had left out a large tract of land between the meander line and the Missouri river. The government had thereafter recognized the mistake, and had a survey made of the unsurveyed portion, and thereafter patented it to the defendant. The court in that case held that the plaintiff could not recover beyond the meander line.

A careful examination of all these authorities discloses the fact that in no case considered have the facts been similar to those in the case at bar. In no case called to our attention, where the court has refused to allow the grantee's true boundary line to extend to the main stream or water line, has it appeared that the strip or tract of land claimed was within the section that contained the fractional lots patented; nor does it appear in any of those cases that the lands were returned as surveyed on all sides of the tract claimed. In other words, wherever it has appeared from the notes and official plats that all the lands within the legal subdivision as directed to be surveyed by the United States statutes has been returned as surveyed and the remainder of those subdivisions is shown to be the waters of a navigable stream, the courts have uniformly held that the grantee to lots or fractional subdivisions abutting on the meander line takes title to the stream. The grantee would be at least entitled to take to the extent of the entire subdivision of which he has obtained patent to the fractional part. *Stoner v. Rice* (Ind. Sup.) 22 N. E. 968, 6 L. R. A. 387. Here there is no definite or satisfactory evidence showing the amount of land between the meander line and the stream. Indeed, the true location on the ground of the meander line as traced from the field notes is not shown or attempted to be shown. No surveyor testified in the case, and it does not appear that any surveyor ever attempted to locate the meander line. Some measurements were testified to by the defendant and his father-in-law, and a map was introduced

(by whom made does not appear) which contains a yellow line drawn along the general course of Snake river purporting to show the true location of the north bank of the river as it actually flows through those sections. That bears on its face some suspicion, however, by reason of the fact that it shows lots located by the official survey on the south bank of the river as actually north of the river. An official plat and survey cannot be impeached in this manner, so as to transport a settler across the stream from the place of his actual settlement. *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566, and authorities there cited. It is, however, an admitted fact in this case that the tract between the meander line and the water line comprises approximately as many acres as the patent recites as being in the lots themselves.

In this case the government, by its patent, has granted all its title to the five lots or fractional subdivisions in question to plaintiff's grantor, and by that patent, which refers to the official plat in aid of the description contained in the patent, from an inspection, it appears that those lots comprise all the land between their northern boundary and the water line of the river. The government has never complained of any fraud having been practiced, or any mistake having been made. It has never ordered a resurvey nor an additional survey, and has never been heard to complain of the claims of the plaintiff. On the contrary, the plaintiff entered under his conveyance, and took possession of the lands in question, and has improved, cultivated, and occupied the same for more than 17 years under color of title deraigned through the patent issued to his grantor. We know of no principle of law whereby any third party can now be heard to complain. If the government has parted with title to a larger acreage than it received pay for, that fact cannot concern the defendant, nor any other third person who does not claim title from the government. Indeed, there is doubt if the government itself, under the facts in this case, could now be heard to question the plaintiff's title; but with that issue we have nothing to do in this case.

If it were conceded as a legal proposition that the plaintiff derived no title through the patent which was issued to these lots, still, having entered upon the land in controversy situated between the bluffs and the meander line of the river, and having improved, cultivated, and exercised complete dominion and control over that land for a period of 17 years, and in the meanwhile never having had his title questioned, he would still, in our judgment, be able to maintain his action under section 4538, Rev. St. 1887, as against the defendant to quiet his title. By that section it is provided: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of deter-

mining such adverse claim." Sections 16 and 2825, Rev. St. 1887, recognize possessory rights to land as real property. Taking, in connection with these statutes, the legal presumption of title, which always accompanies possession, we think the action to quiet title may be maintained, although the plaintiff failed to show a fee-simple title. It is clear that a person occupying premises under the circumstances surrounding this case, although his title from the government should entirely fail, still has a "color of title." In *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280, it is said: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is not title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title. The inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith. \* \* \* A claim to property, under a conveyance however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title." In *Cameron v. United States*, 148 U. S. 308, 18 Sup. Ct. 595, 37 L. Ed. 462, Justice Brown, speaking for the court, said: "It is true there are cases to the effect that color of title by deed cannot exist as to lands beyond what the deed purports to convey; but where the deed is fairly open to construction as to what it does purport to convey, and at the time it was executed the land was officially surveyed according to the theory of the party claiming under such deed, it is manifest these authorities have no application. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title." In California it has been held that the action to quiet title under section 738 of the Code of Civil Procedure, and which is identical with our section 4538, embraces "every interest or estate in land of which the law takes cognizance." *Pierce v. Felter*, 53 Cal. 18; *Wilson v. Madison*, 55 Cal. 5; *Orr v. Stewart*, 67 Cal. 277, 7 Pac. 693; *Pennie v. Hildreth*, 81 Cal. 180, 22 Pac. 399; last two cases cited with approval in *Pioneer Land Co. v. Maddux*, 109 Cal. 640, 42 Pac. 295, 50 Am. St. Rep. 67. This court held to the same effect in *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118. The plaintiff made a showing which entitled him to recover. The defendant was a naked trespasser, and established no right either at law or in equity. Entertaining the

views of this case as herein expressed, we see no reason for ordering a new trial.

The judgment will be reversed, and the cause remanded, with direction to the trial court to make findings upon the evidence heretofore introduced in harmony with the law of the case as herein announced, and render judgment in accordance therewith. Costs awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

### DODDS et al. v. GREGSON.

(Supreme Court of Washington. July 19, 1904.)

ATTORNEY AND CLIENT—FEES—SECURITIES—ACTIONS — PLEADING—REPLY—INCONSISTENCY—EVIDENCE—RELEVANCY—PREJUDICIAL ERROR—APPEAL—STATEMENT OF FACTS—SETTLEMENT—TIME—EXTENSION—STIPULATION—ORDER OF COURT—NOTICE—JUDGMENT—INVOLUNTARY PAYMENT—GARNISHMENT.

1. Under 2 Ballinger's Ann. Codes & St. § 5062, providing that the time within which a statement of facts on appeal must be filed may be enlarged either before or after the expiration of the time specified "by stipulation of the parties, or for good cause shown, and on such terms as may be just, by an order of the court or judge," etc., an order of the court is not required where the time is extended by stipulation.

2. 2 Ballinger's Ann. Codes & St. § 5058, providing that a party desiring to have a bill of exceptions or statement of facts certified must file the same, and serve a copy of his proposed statement on the adverse party as required thereby, does not limit the time for the settlement of such statement.

3. Where notice was once regularly given of the proposed settlement of a statement of facts, and the matter was continued from time to time until it was set for a specified date, to which respondents' counsel objected in open court on the ground only that he desired to raise the point that the settlement could not be made after 90 days, and respondents' counsel appeared at the time of the settlement and proposed amendments, many of which were allowed, a motion to strike such statement on the ground that further formal notice of the time of settlement was not given will not be granted.

4. Where, pending appeal, no supersedeas bond having been filed, respondents sued out a garnishment, on which judgment was entered against appellant that a certain sum held by the garnishee should be paid to respondents, notwithstanding appellant's opposition, the application of such sum to the judgment did not constitute a voluntary payment on the judgment, so as to deprive appellant of right of appeal.

5. Where, in an action against an attorney to recover the value of certain securities, the complaint averred that a certain \$400 note and mortgage came into defendant's possession through his employment as attorney for plaintiff in a suit against her husband for divorce, and the answer averred that it was turned over to defendant in payment of attorney's fees, a reply admitting that it was first turned over to defendant as fees, but alleging that by a subsequent agreement defendant accepted another note for \$750 in payment of all fees, and agreed to return the \$400 note to plaintiff, was not inconsistent with the complaint.

6. An instruction not excepted to at the trial cannot be reviewed on appeal.

7. Where an action against an attorney to recover securities which he claimed to hold as fees was tried to a jury, and it was admitted that defendant was a member of the bar, it was prejudicial error to permit defendant, over objection, to be asked a series of questions with reference to his admission to the bar, and suggesting that such admission had been procured by corrupt and unlawful practices.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by Eliza Dodds and another against Thomas Graves Gregson. From a judgment for plaintiffs, defendant appeals. Reversed.

Ballinger, Ronald & Battle, for appellant. James A. Snoddy, for respondents.

HADLEY, J. Respondents, being husband and wife, brought this suit as plaintiffs against appellant as defendant. They allege that the defendant is an attorney at law, and a member of the bar of Washington; that the wife plaintiff employed defendant as such attorney to collect for her a sum of \$165, due to her upon a note and mortgage from one Meyer; that he collected thereon \$175 principal and interest and \$15 as attorney's fees, but has refused to pay the same to said plaintiff, and has converted it to his own use. It is further alleged that while defendant was employed by the wife plaintiff as the latter's attorney in an action to procure a divorce for her from her said husband a certain note and mortgage for \$400, belonging to said wife, came into the possession of the defendant by and through his said employment, and which he promised to return to said wife; that he sold said note for the sum of \$200, and converted the proceeds to his own use. Judgment is demanded for \$375. The answer first denies the material allegations of the complaint, and then affirmatively avers that said wife employed defendant to institute for her an action for divorce from her said husband, and for the recovery of alimony, which suit was brought by him; that said wife agreed to pay defendant as a fee for his services one-third of the amount of money and property which should be allowed by the court as alimony, or, in the event of a settlement in any manner, such sum was to be paid as attorney's fees; that pending the action the settlement of the claim for alimony was effected through defendant's efforts, the settlement being in the sum of \$2,000, to be paid by the husband to the wife; that under the agreement as to attorney's fees defendant was entitled to \$665 of said sum; that in part payment thereof said wife transferred to him the \$165 note and mortgage mentioned in the complaint, and that in further payment she also transferred to him the other note and mortgage named in the complaint in the sum of \$400, which note had been given by the husband to the wife as a part of the \$2,000 settlement; that the said notes and mortgages thereby became the absolute property of defendant; that thereafter said wife delivered back to the hus-

band a \$1,600 note received by her in said settlement, and that she, claiming that the husband had perpetrated a fraud upon her by procuring the surrender of said note, again employed defendant to take the necessary steps to protect her rights and to effect a settlement with the husband; that for the services to be so rendered she agreed to pay defendant one-fourth of the amount of the property and money that should be thereafter realized from any settlement, which one-fourth should be in addition to the sums hereinbefore alleged as paid for services up to and including the first settlement; that an adjustment of the alleged fraud was afterwards effected through the efforts of defendant, by which the husband executed and delivered to the wife a note for the sum of \$2,250, and agreed to execute to her an additional note for \$750, but that by direction of the wife the latter note was made directly to defendant in payment of his fees, the new settlement being for \$3,000 and the last-named note representing one-fourth thereof, the alleged agreed amount of the attorney's fees for the later services. The reply denies that defendant was entitled to receive \$665 as fees under the first settlement, but avers that he agreed to accept and did accept said \$400 note and mortgage in full for all services rendered. It is denied that the Meyer note of \$165 was transferred to the defendant as a part payment on attorney's fees. It is further averred in reply that the agreement as to fees the second time was not for one-fourth of what should be thereafter recovered in addition to what had been theretofore paid, but that said \$750 note should be in full for all services rendered from the beginning of the entire employment, and that defendant then agreed to surrender and return the said \$400 note. Upon issues in effect as above stated, the cause was tried before the court and a jury, and a verdict was returned for the plaintiffs in the action in the sum of \$375 and interest. Motion for new trial having been denied, judgment was entered for the amount of the verdict, and the defendant has appealed.

Respondents move to strike the statement of facts and to dismiss the appeal. The motion to strike the statement is based upon several grounds. The first ground stated is that the proposed statement was not filed within the time allowed by law after judgment, and that no order granting an extension of time was ever made by the court. It is true the proposed statement was not filed within 30 days after judgment, but there is in the record a written stipulation signed by counsel representing the respective parties, whereby it was agreed that the time should be extended "for an additional thirty days after the expiration of the first thirty days after the time begins to run within which an appeal may be taken from the judgment rendered in this cause; that is, until the 16th day of August, 1903." The proposed

statement was filed August 15, 1903, which was clearly within the extended time under the stipulation. Respondents' counsel, however, argues that a order of court was absolutely necessary to effect an extension of time, and cites the following decisions of this court: *Zindorf Construction Co. v. Western Amer. Co.*, 27 Wash. 31, 67 Pac. 374; *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561; *Crowley v. McDonough*, 30 Wash. 57, 70 Pac. 261; *Lamona v. Cowley*, 31 Wash. 297, 71 Pac. 1040. It is true, expressions are used in those opinions to the effect that an order of court is necessary; but there was no stipulation involved in any of those cases, and the remarks of the court were intended to apply to such conditions as were then under consideration. The extension by the stipulation is authorized by section 5062, 2 Ballinger's Ann. Codes & St., wherein it is provided that the time may be enlarged either before or after the expiration of 30 days "by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge," etc. Thus the extension may be made either by stipulation or by order of court, and when by stipulation no order is necessary.

The second ground urged for striking the statement is that it was not presented and settled by the court within the time required by law. It is counsel's position that it must, in any event, be settled within 90 days, the period within which it may be filed under extension. Counsel cites *Loos v. Rondema*, 10 Wash. 164, 38 Pac. 1012, and *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56. Again, expressions are used in those opinions which at first glance seem to treat both the filing and settlement of a statement of facts as being governed by the fixed time. It is manifest, however, that the real subject under discussion was the time for filing. That time is fixed by statute, but no such limit is fixed for the settlement under the terms of section 5058, 2 Ballinger's Ann. Codes & St.

The third point alleged on the motion to strike the statement is that the settlement was made without notice, the respondents having filed proposed amendments. The record shows that notice was once regularly given, and several continuances were thereafter noted on the journal for definite times, and it was then continued indefinitely. Later, counsel for both parties were in court when appellant's counsel asked the court to set a time for settlement. Respondents' counsel simply objected, but stated no reason to the court other than that he wished to raise the point that the settlement could not be made after 90 days. The court set the hearing for two days thereafter. The point was not made that the objection was for want of sufficient notice, and the record shows that at the time of the settlement respondents' counsel appeared, and that many of the proposed amendments were allowed. Under such circumstances the court was au-

thorized to settle the statement, and the motion to strike it is denied.

The motion to dismiss the appeal is based upon the contention that since the appeal was taken appellant has made a payment upon the judgment, and thereby acknowledged its validity. The facts, as shown by the record, are as follows: No supersedeas bond was filed by appellant, and respondents proceeded by authority of the judgment to garnish a debtor of appellant. The answer of the garnishee was controverted by appellant in part, and he also claimed that \$19.88 in the garnishee's hands was exempt. A hearing was had, and judgment entered to the effect that the \$19.88 was all which the garnishee held as the property of appellant; that the same was not exempt, and should be paid to respondents. This was not a voluntary payment upon the judgment which amounted to an acknowledgment of its validity. Some effort is made by way of affidavits to show that appellant voluntarily consented to the garnishment judgment, but the record of the garnishment proceedings shows a contest and a judgment thereon, with no consent of appellant appearing. The motion to dismiss the appeal is denied.

Appellant assigns that the court erred in not granting his motion for judgment on the pleadings, for the reason, as alleged, that the reply admits the correctness of the affirmative defense, and that the complaint and reply taken together show that respondents had no cause of action. Objection was also made to the introduction of any evidence for the same reason. It will be remembered that the complaint avers that the \$400 note and mortgage came into appellant's possession by and through his employment as attorney for this wife respondent. The answer avers that it was turned over to him in payment of attorney's fees. The reply admits that it was first so turned over to him, but alleges that by subsequent agreement appellant accepted another \$750 note in payment of all fees, and then agreed to turn back the \$400 note to the wife respondent. We do not think the reply is inconsistent with the complaint. The reply still makes it clear on respondents' theory that the note did not belong to appellant when he sold it, but did belong to the wife respondent. It still remains true, even under the reply, that the note belonging to said respondent came into appellant's possession in the course of the latter's employment as her attorney. The court did not err in denying the motion for judgment upon the pleadings and in overruling the objection to the introduction of any evidence.

Errors are assigned upon the court's instructions. One instruction with reference to the burden of proof is criticised, but no exception to it is disclosed by the record, and we shall therefore not discuss it. We think the other instructions discussed by counsel were not erroneous under the is-

sues and testimony, and we believe it is unnecessary to extend this opinion as would be required for their discussion.

There was conflict in the testimony, and it is argued that neither the general nor special verdict returned was supported by the evidence. We have read all the evidence. It is much in conflict, but it was for the jury to pass upon the conflicting testimony, and upon that ground we find no reason to disturb the verdict. There is, however, another assignment of error which we regard as serious. The record discloses the following in the cross-examination of appellant: "Q. How long have you been a member of the bar? Mr. Battle: Don't make any difference. They have alleged he is and it is admitted. The Court: Objection overruled. A. I have been a member of the bar for four years—this and the Oregon bar. Q. You were admitted to the bar of this state upon examination or upon certificate from some other state? A. I was admitted to the bar of this state on a certificate from the Supreme Court of Oregon. Q. Did you bring in those certificates? A. I have got them. Q. Will you produce them? A. Certainly. Q. What is the date of the original certificate? A. 25th of September in the year of our Lord 1899. Q. What is the date of the Washington certificate? A. 27th day of March, A. D. 1901. Q. Were you admitted to the Supreme Court of the State of Oregon on examination? A. Yes. Q. In open court? A. In open court, by the full bench. Q. By the full bench? A. Yes, sir; as my certificate states. Q. Were you there? A. Oh, yes. Q. Are you acquainted with the firm of Joseph, Slager & Watson, of Portland? A. I am. Q. Did you make them a note of \$750, payable on condition that you get admitted to the Supreme Court of the State of Oregon? A. No. Q. Hasn't one been in Seattle for collection in the last year for collection? A. No. Do you mean to tell me that I could bribe the Supreme Court of Oregon? You have no more respect for American courts? Q. I am talking about Joseph, Slager & Company. Did you give Joseph, Slager & Company a note? A. No, sir. Q. Indorsed on the back in your own handwriting that it should be payable when you got admission to the Supreme Court of Oregon? A. I never gave a note for any such purpose, nor yet have I ever had a note presented to me. Q. There was no such a note as that presented to you for payment in the last year? A. At no time. Q. Did Joseph, Slager & Watson procure your admission to the bar? A. No, sir. Q. You didn't give any note in connection with your admission? A. Oh, no, sir; not at all." It is urged that appellant was highly prejudiced by the foregoing examination. We think it must be so held. That he was a member of the bar of this state was a fact alleged by respondents in their complaint and admitted by the answer. It was, there-

fore, wholly immaterial how long he had been such a member, or what circumstances had attended his admission to the bar. If any irregularity attended his admission to the bar, corrupt or otherwise, that was not a matter for investigation in this case, and it was not for the jury to try. The whole of the above cross-examination was immaterial and irrelevant, and its natural effect must have been to arouse the passions of the jury against appellant. His acts as an attorney were under examination, and this sensational and purely collateral matter must have been highly inflammatory and prejudicial. It is suggested that the examination proceeded without objection. Appellant did, however, object in the beginning to any examination touching his membership of the bar, for the reason that it was an admitted fact. The objection was overruled, and the examination proceeded. Appellant was placed in a peculiar position. The court having once ruled that the examination was pertinent, further objection to it might have had the effect to increase the jury's prejudice by lodging in their minds the belief that he was endeavoring to prevent a disclosure of the truth. We think the examination was erroneously permitted.

The judgment is reversed, and the cause remanded, with instructions to the lower court to grant a new trial.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

(35 Wash. 422)

# FRIEND v. RALSTON et al.

(Supreme Court of Washington. July 19, 1904.)

## BUILDING CONTRACT—BOND—SURETY—LIABILITY—ACTION—JUDGMENT—ESTOPPEL.

1. Where a contract for the erection of a building required the contractors, at their own expense, to supply all materials and labor, and they furnished a bond to secure the performance of the conditions of the contract, the owner is entitled to maintain an action on the bond without having first paid or suffered judgments for the claims of materialmen asserting liens against the property because of the failure of the contractors to pay them for material furnished.

2. In an action on a bond to secure the performance of a contract for the erection of a building, a compensated surety is liable thereon, notwithstanding the failure of the owner to pay the contractors in full for their work; the contractors having received due credit for the balance due, which inured to the benefit of the surety.

3. Where a judgment is obtained in good faith, without fraud or collusion, by the owner of a building, against the contractors, for breach of the conditions of the contract, the surety on the bond of the contractors is estopped thereby in an action by the owner to recover on the bond.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Carrie B. Friend against F. H. Ralston and another and the United States Fidelity & Guaranty Company. From a

judgment for plaintiff, the guaranty company appeals. Affirmed.

James B. Murphy, for appellant. Ralph Simon, for respondents.

**PER CURIAM.** This action was begun in the superior court of King county by Carrie B. Friend, plaintiff, against F. H. Ralston and D. A. Royea, copartners doing business under the firm name and style of Ralston & Royea, and the United States Fidelity & Guaranty Company, defendants. On the trial of the issues between the plaintiff and the defendant United States Fidelity & Guaranty Company before the court below and a jury, a verdict was rendered in favor of plaintiff for \$1,206.41, under direction of the trial court, April 10, 1902. Judgment was entered on this verdict April 29, 1902, from which the United States Fidelity & Guaranty Company appeals.

On the 21st day of January, 1901, at the city of Seattle, respondent Carrie B. Friend entered into a written contract with the respondents Ralston & Royea for the construction in said city, on the real estate of Mrs. Friend, of a certain two-story frame building, for the consideration of \$7,753. On the 25th day of January, 1902, Ralston & Royea, as principals, with appellant company as surety, executed a bond to Carrie B. Friend in the penal sum of \$3,000. Such bond, by recitals, referred to this building contract, and contained the following condition:

"Now, therefore, the condition of the foregoing obligation is such that if the said principals shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on their part to be kept and performed according to its tenor, then this obligation to be null and void, otherwise to be and remain in full force and virtue in law."

The above contract, among other things, provided that the contractors, at their own expense, should provide and supply all manner of materials and labor for the construction of this building, and complete the same on or before May 1, 1901. The provisions of the third and fifth paragraphs of the contract are as follows:

"Third. Should the owner at any time during the progress of said building require any alterations, deviations, additions to or omissions from the said contract, specifications or plans, she shall be at liberty to have such changes made, and the same shall in no way affect or avoid the contract, but the additional costs (if any) of such changes will be added to the amount of such contract price, and deductions shall be made from said contract price for all omissions of work specified, at a fair and reasonable valuation."

"Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications the same shall be

decided by McManus & Walker, architects and their decision shall be final and conclusive, and should any dispute arise respecting the true value of any extra work, or omitted work, the same shall be valued by two competent persons, one employed by the owner and the other by the contractors, who, in case they cannot agree as to the value of such extra work or omitted work, shall name an umpire, whose decision shall be binding on all parties."

These contractors, Ralston & Royea, purchased from the Kerry Mill Company lumber and material which were used in the construction of this building. The balance remaining due therefor was \$1,179.49. On June 15, 1901, the architects, McManus & Walker, issued their final certificate with regard to the completion of the building under the contract. The Kerry Mill Company on August 21, 1901, filed a lien upon said property, and brought action in the court below to foreclose same, making Carrie B. Friend and Ralston & Royea defendants therein. Ralston & Royea also filed a lien on said premises for \$152, balance due on contract, and also for \$1,410.25 on account of extra work and materials, and brought suit to foreclose such lien. Mrs. Friend answered the complaint of the contractors, denying the material allegations thereof, except an item of \$8. She further alleged in her answer a demand for \$599.90 for work and materials omitted; also a claim for demurrage in delaying the completion of the building till June 16, 1901, and the filing of the lien of the Kerry Mill Company, and the action instituted for the foreclosure thereof. The reply of the contractors admitted that the building was not completed till June 16, 1901, and denied allegations regarding the omission of any work or materials. The contractors' bond provides "that any suits at law or proceedings in equity brought against this bond \* \* \* must be instituted within six months after the first breach of said contract"; that a registered letter mailed to the president of appellant company, at its principal office, in Baltimore City, Md., shall be deemed sufficient notice. On September 18, 1901, Mrs. Friend, by her attorney, notified appellant, by registered letter, of the bringing of the Kerry Mill Company's lien suit, and tendered the defense thereof to appellant. It appears from the recitals in such notice that Mrs. Friend was served with the summons and complaint in such action on September 17, 1901. The appellant disregarded such notice, and failed to take any part in such defense. Those two lien cases were consolidated and tried together. The lower court found in favor of the Kerry Mill Company, in the sum of \$1,280.04, and also decreed that its lien therefor, together with an attorney's fee and costs, be foreclosed against said premises. The court further found that Mrs. Friend was indebted to the contractors in the sums of \$28 for extra work, and \$152 for balance due on

the contract price, and on February 13, 1902, rendered judgment in her favor against Ralston & Royea for \$1,100.04 and costs. This action was instituted by Carrie B. Friend to recover damages on the bond for the failure on the part of Ralston & Royea to perform their part of said contract, and by reason of the foregoing facts and judicial proceedings. On the 3d day of March, 1902, respondent Carrie B. Friend, by order of the trial court, based on the stipulation of the parties, filed her amended and supplemental complaint in the action, wherein, among other things, she alleged notice to appellant to defend as above stated, the rendition of said judgment against the contractors, Ralston & Royea, and appellant company's knowledge of the matters litigated; limiting her demand for judgment to the amount of the judgment recovered by her against Ralston & Royea. Appellant answered the complaint, in which answer it denied certain allegations thereof, admitted the execution of the contract and bond, and set forth several affirmative defenses. The first affirmative defense, in substance, alleges that certain changes, deviations, and alterations were made by the mutual consent of the contractors and Mrs. Friend, as outlined in the plans and specifications; that the reasonable value of such extra work and material was greater than the amount sought to be recovered in this action and the penalty of the contractors' bond; that no allowance was made to the contractors for such material and labor; and that Mrs. Friend was still indebted to them for the same. The second affirmative defense alleges matters with regard to extra work and material furnished pursuant to oral agreements made between the contractors and owner, contrary to the plans and specifications, which were a part of the building contract. The provision claimed to have been violated is as follows: "No bills or accounts for extra work will be allowed or paid unless authority for contracting same can be shown by a certificate from the owner countersigned by the architect." It is further charged in this defense that such charges were made without the knowledge or consent of appellant. The third separate defense, after alleging that there were extra work and material furnished in the construction of this building, charges that the contractors and owner were unable to agree upon the allowance therefor; that the contractors, pursuant to the provisions of the above paragraph 5 of the building contract offered to submit the value of such extras to arbitration; and that Carrie B. Friend refused to select an arbitrator or submit such dispute to arbitration. The fourth and last of these affirmative defenses charges that respondent Mrs. Friend failed and refused to make payments to the contractors as provided in the building contract, and withholds the same.

After respondent had submitted her evidence at the trial, including the notice to

defend and judgment roll above mentioned, appellant insisted that the complaint did not state facts sufficient to constitute a cause of action, and further that the evidence in behalf of respondent Friend was insufficient to entitle her to any relief. The trial court denied each of appellant's motions, to each of which rulings it duly excepted. The trial court excluded all evidence in support of the affirmative defenses, respectively, and appellant excepted. Thereafter the following written stipulation between the parties to this action was filed in the trial court:

"Whereas, upon the trial of this cause, no opportunity was given to the United States Fidelity & Guaranty Company, one of the defendants herein, to introduce testimony in support of its denials, and in answer to the evidence introduced on behalf of the plaintiff after the motion to exclude testimony under the affirmative defenses set out in its answer were passed upon by the court:

"It is now stipulated that under the order offered in evidence by the plaintiff, given by Ralston & Royea to Calhoun, Denny & Ewing, dated —, the said plaintiff paid the sums represented by the receipts from said agents, and did not pay nor offer to pay to them any other, or further sum, and that she, the said plaintiff, did withhold from the said Ralston & Royea and the said agents, the sum of \$152.00 on the original contract price as named in the building contract which is an exhibit herein, and the \$28.00 for extra work, these being the same amounts found by the court to be due Ralston & Royea according to the findings of fact offered in evidence and marked 'Plaintiff's Exhibit —.'

"And it is further stipulated that the defendant aside from testimony to the above effect, had no testimony to offer in support of its denials or in answer to the testimony offered on behalf of the said plaintiff, except in support of the matters set out in its separate affirmative defenses; and the said defendant hereby waives any claim or error which it might have predicated upon the action of the court above referred to and that if said cause be appealed to the supreme court no error will be claimed or assigned by reason thereof.

"Dated at Seattle, Washington, this 24th day of April, A. D. 1902."

Under direction of the lower court, the jury returned a verdict in behalf of respondent Carrie B. Friend, on which the judgment appealed from was entered.

After the perfection of the present appeal, Carrie B. Friend died. On suggestion of her death, by order of this court, her executor, Ralph Simon, was substituted herein as respondent in her stead. The propositions of law arising upon this record, under the assignments of error, are (1) that the original and supplemental complaints fail to state a cause of action; (2) that the court below erred in denying appellant's motion for a



nonsuit; and (3) error in excluding the evidence in support of appellant's four affirmative defenses respectively.

In support of the first assignment, it is urged that, in order to entitle respondent Friend, to recover in the present controversy, she must have paid the judgment of the Kerry Mill Company against Ralston & Royea, which, as we understand by appellant's contention, includes the original demand constituting the consideration of such judgment, as the action at bar was originally begun prior to the rendition of that judgment; that, therefore, both the original and supplemental complaints, failing to allege such payment prior to the commencement of this action, do not state facts sufficient to constitute a cause of action against this appellant company. The building contract was made a part of the bond in question. The contractors, among other things, undertook, by the express terms of their contract, to provide and supply at their own cost and expense all the materials necessary for the completion of said building and the fulfillment of such contract. The appellant company, for a consideration, guaranteed that these contractors should well, truly, and faithfully comply with all the terms, covenants, and conditions of such agreement on their part to be performed. These complaints respectively allege that Ralston & Royea purchased materials for this building of the Kerry Mill Company in furtherance of their said contract with Mrs. Friend, the owner of the premises; that, by their (contractors') failure to pay for the same, Mrs. Friend's property became subject to a lien at the instance of the Kerry Mill Company. "Where the contractor for the erection of a building gave a bond with sureties to 'faithfully perform all the covenants and agreements contained in the building contract,' etc., and the building contract provided that he was 'to furnish all the material, such as lumber, hardware, brick, lime, sand, paints, oils, etc.,' 'as per specifications,' held, that a failure to pay for such materials, whereby a mechanic's lien was filed on the building and lot, was a breach of the condition of the bond, and rendered the builder and his sureties liable thereon." *Klewit v. Carter*, 25 Neb. 460, 41 N. W. 286.

The learned counsel for appellant cites numerous authorities with reference to the nonliability of sureties on bonds or covenants of indemnity "to save and keep harmless" the obligee from certain outstanding debts, or that the party indemnified shall not sustain damage incurred through the omissions or acts of the principal, etc., until the obligee shall have paid or discharged such debts, or may have otherwise sustained financial loss. *Miller v. Fries* (N. J. Sup.) 49 Atl. 674. But there is a marked distinction between covenants of that description and agreements that the obligors shall perform specific acts. *Litchfield v. Cowley* (Wash.) 70 Pac.

83; *Wright v. Whiting*, 40 Barb. 235. The covenant in the building contract on the part of the contractors with Mrs. Friend is, as between them, equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractor suffered the obligation to become a charge on her property. At least, she was entitled to treat the same as a breach. It may be true that she was not obligated to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the onus of establishing at the trial the validity of such lien and the amount of the indebtedness. But she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such incumbrance as a breach of the contract. Therefore the position of appellant's counsel that this action was prematurely brought is untenable. In the light of the above authorities relative to primary and affirmative covenants to perform some particular act, we conclude that the original and supplemental complaints state sufficient facts to constitute a cause of action.

The assignments of error pertaining to the refusal of the lower court to grant appellant's motion for a nonsuit, and in excluding its evidence in support of the several affirmative defenses, may properly be treated and considered under one head, and in the same connection.

The appellant contends that the testimony in respondent's behalf disclosed that she had not fulfilled her agreement with her contractors, in that she had refused to pay them the above items—\$152, balance on contract price, and \$48 for extra work—and that therefore the lower court erred in denying the nonsuit. The case of *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, was similar in many of its salient features to the action at bar, respecting the propositions of law presented by this record arising on the rulings of the trial court in the denial of the nonsuit, and the exclusion of appellant's testimony in support of its affirmative defenses. In that case this court held (quoting from the syllabus, which tersely presents the points decided): "A guaranty company, which, for a compensation, becomes surety upon the bond given by a building contractor for the faithful performance of his contract, cannot escape liability by reason of deviations from the exact terms of the contract, where such provisions were waived by the contractor, and no damage is shown as resulting to the surety by reason thereof." In the consolidated actions above noted, it fully appeared that the contractors, Ralston & Royea, received due credits for the two items of \$152, balance of contract price, and \$48 for extra work, which inured to the benefit of this

appellant. The stipulation as to these credits in terms related to the action of the lower court regarding its decision denying the nonsuit; still it contained admissions which were properly in the case for all purposes, and it is questionable whether appellant could, in any event, be permitted to controvert such admissions as to these several amounts withheld from the contractors by Mrs. Friend, when it thereafter undertook to sustain any of the averments of these affirmative defenses at variance with such stipulation. *Sherman v. Sweeny*, 29 Wash. 331, 69 Pac. 1117. However, we consider that the vital question with regard to the sufficiency of such defenses is whether the judgment in the consolidated lien cases above noted, which is described in the supplemental complaint, estops the appellant. It had due notice of the pendency of the Kerry Mill lien suit—one of the cases consolidated—and it was offered the defense thereof on the part of this respondent Mrs. Friend. Such action was instituted to recover on a demand for materials purchased by the contractors in furtherance of their said building contract, the faithful performance of which on the part of Ralston & Royea was guaranteed by the appellant company. The judgment in favor of Mrs. Friend against her contractors was obtained in good faith, without fraud or collusion. This judgment related exclusively to matters connected with the contract and bond, in which appellant was closely identified and directly interested. The following language is quoted from the opinion of the court in *Cowles v. United States Fidelity & Guaranty Company*, supra: "It is the contract, instead of the bond, which is primarily to be construed, and the construction of the contract cannot be affected by the fact that a bond is given for its performance. It must be construed with reference to the gathered intention of the parties to the contract, and whatever is binding upon them is binding upon the surety, who becomes a party to the contract, identified with the contractor." We are of the opinion that, under the facts appearing in this record, the appellant company is bound by the judgment recovered against the contractors in favor of the owner, Mrs. Friend; that this case, in that regard, falls within the principles of law enunciated in *Douthitt v. McCulsky*, 11 Wash. 601, 40 Pac. 186, and *Doremus v. Root*, 23 Wash. 711, 716, 63 Pac. 572, 54 L. R. A. 649. See *Lovejoy v. Murray*, 3 Wall. 1, 18, 18 L. Ed. 129; 6 *Rose's Notes U. S. Sup. Ct. Decisions*, p. 458; *Prichard v. Farrar*, 116 Mass. 221.

Appellant's counsel has directed our attention to many authorities in support of his position that a judgment rendered against the principal on a bond does not estop the surety from relitigating the merits of the controversy, where such judgment was obtained in an action on the original contract,

as distinct from the bond for its faithful performance, without making the surety a party defendant. The case of *McConnell v. Poor*, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312, is an authority upon which appellant places its principal reliance, but we fail to discover wherein it is in conflict with the conclusions heretofore declared respecting this feature of the present controversy. Notwithstanding the statement in the syllabus, the case fails to show that the surety had notice of the prior suit against his principal, or was given any opportunity to appear and defend such action, and it further appeared that the plaintiff had elected to treat the bond and contract as separate instruments for the purposes of the litigation. The able court properly held that a judgment rendered in favor of the obligee for breach of the contract against the principal did not estop the surety, when sued on the contractor's bond. Again, in this Iowa case, the record fails to show that the surety had any further interest in the contract of his principal, other than that of a mere surety without compensation. The facts in the case before us, as we have shown, are entirely dissimilar, and render the rule of the Iowa case inapplicable.

No reversible error appearing in the record, it follows that the judgment of the lower court must be affirmed, with costs, and it is so ordered.

#### JONES et ux. v. HERRICK et al.

(Supreme Court of Washington. July 19, 1904.)

QUIETING TITLE—MORTGAGES—FORECLOSURE—PARTIES—PURCHASERS—BONA FIDE HOLDER—EXECUTION SALE—REDEMPTION—SPECIAL DEFENSES—SUFFICIENCY—LIMITATIONS—COLOR OF TITLE—APPEAL—AMENDMENTS.

1. Where other defenses were clearly sufficient to support a judgment in favor of defendant, the failure of the court to rule correctly on a demurrer to two defenses on which the judgment was not founded was harmless.

2. Where an answer in a suit to quiet title alleged title in defendants through foreclosure proceedings, based on an instrument antedating any rights plaintiffs may have obtained by virtue of an execution under which they claimed, and the answer averred that there was nothing in the record at the time of the foreclosure proceedings showing either that plaintiffs or their grantors had any claim to or interest in the property, and that the purchasers under the foreclosure proceedings had no actual or constructive notice of the claims or interests of plaintiffs or their grantors, such defense was not objectionable for failure to allege that plaintiffs or their grantors were parties to the foreclosure proceedings, since a purchaser under such proceedings is an innocent purchaser for value, and is bound only by such outstanding unrecorded liens or claims as he has actual notice of.

3. Under 2 Ballinger's Ann. Codes & St. § 5504, providing that every person having color of title made in good faith to vacant and unoccupied land, who shall pay taxes regularly assessed thereon for seven successive years, shall be deemed the legal owner, according to the

purport of his paper title, a defense to a suit to quiet title to such land, alleging that defendants held under a warranty deed "from the owner," and had paid taxes, etc., sufficiently alleged that they held under color of title, as against a general demurrer.

4. Where, in a suit to quiet title, the answer alleged possession and payment of taxes for seven years under a warranty deed from the owner, instead of alleging a holding under "color of title," as required by Ballinger's Ann. Codes & St. § 5504, such defect was one capable of being cured by amendment, which would be regarded as made on appeal in support of a judgment for defendants, provided the findings of fact justified the holding that defendants had title to the property under such section.

5. Where, prior to an execution sale, under which plaintiffs claimed title to land, the debtor had conveyed the legal title to another by a warranty deed, under which defendants claimed title, and the debtor retained only a right of redemption, which was the only right plaintiffs acquired under such execution sale, and plaintiffs did not attempt to exercise such right until after the time to redeem had expired, their rights in the property were barred.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Frank A. Jones and wife against Josephine C. Herrick and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

See 74 Pac. 332.

S. S. Langland, for appellants. Mitchell Gilliam, for respondents.

FULLERTON, C. J. The appellants brought this action against the respondents to quiet title in themselves to some 80 acres of vacant and unoccupied land situated in King county in this state. They alleged title by virtue of a judgment of the Circuit Court of the United States for the District of Washington against one W. P. Sayward, an execution sale of the property as the property of Sayward, its purchase at such sale by one A. A. Johnson, and the subsequent conveyance of the property to themselves by Johnson. The answer of the respondents consisted of a general denial of the allegations of the complaint and some five separate defenses. In three of these the respondents claimed title in themselves, first, by a warranty deed from the common owner antedating the inception of the proceedings through which the appellants claimed title; second, through a foreclosure proceeding in which the rights of the appellants, if any they had, were foreclosed and sold; and, third, by virtue of the statute of limitations. The fourth was a partial defense only, being a claim for taxes paid, which they prayed to have adjudged to be a lien on the land in case it should be found that the appellants had a superior title. The fifth defense was in the nature of a cross-complaint, asking that the respondents' instruments of title be adjudged to be liens upon the land for the amounts advanced by them and their predecessor in interest in acquiring the same, if such instruments of title should not be adjudged to convey title in fee, and that such

liens be foreclosed as against the appellants, and the property sold in satisfaction of the amount found due. To these separate answers, with the exception of the first, general demurrers were interposed, which were overruled by the trial court, whereupon an answer was filed, denying generally the affirmative matter pleaded therein, and pleading new matter by way of defense and estoppel thereto. Subsequently a motion was made to require the respondents to elect between their first and second defenses, on the ground that they were inconsistent. This motion was also overruled, and thereafter a trial had on the merits of the controversy, resulting in findings of fact, conclusions of law, and a judgment in favor of the respondents.

The statement of facts certified to this court was stricken prior to the hearing. The cause, however, was retained on the suggestion that there were questions presented by the record not dependent upon the statement of facts. The appellants now insist that the court erred in overruling the demurrers to the separate defenses, but we think those of them necessary to uphold the judgment were clearly sufficient. The court found that the respondents were the owners in fee of the premises; hence it makes no difference whether or not the matters alleged in the fourth or fifth of the separate defenses were sufficient to entitle the respondents to relief. The fourth, as we have stated, only purported to be a partial defense, and could only be material in case the court should hold the respondents to be without title. The fifth was material only under a like condition. The failure, therefore, of the court to rule correctly on the demurrer to these defenses would not require a reversal of the case, as the judgment was not founded on the allegations of either of them. As to the other defenses demurred to, we think they were clearly sufficient. The second separate defense was a derangement of title through foreclosure proceedings based on an instrument antedating any right the appellants may have obtained by virtue of the execution sale under which they claim. The precise objection to the pleading is that it does not appear that the appellants or their grantor was made a party to the foreclosure proceedings, and that they were not, for that reason, bound by them; but the answer avers that there was nothing of record at the time of the foreclosure proceedings showing that either the appellants or their grantor had any claim to or interest in the property, and that the purchasers under that proceeding had no notice, actual or constructive, of such claims or interests. If this be true, the interests of the appellants were as effectually cut off by the foreclosure proceedings as they would have been had their claims been of record, and they had been made parties to the proceedings. A purchaser at a sale had under foreclosure of a mortgage or other lien holds as an innocent purchaser for value, and

is bound by only such outstanding unrecorded liens or claims to the property as he has actual notice. The defense, therefore, as a pleading, could not be objectionable, for the reason stated. The third defense was a plea of the statute of limitations under section 5504 of the Code (Ballinger's Ann. Codes & St.). The objection to it is that it is not alleged that the respondents had "color of title" to the property during the time they paid taxes thereon. But the allegation is that they held under a warranty deed from the owner, which we think is equivalent to alleging they held under "color of title," and, this being true, the pleading was sufficient as against a general demurrer. Moreover, this was such a defect as could be cured by amendment, and, if the findings of fact justified holding that the respondents had title to the property by virtue of having paid taxes thereon for seven consecutive years, having color of title thereto made in good faith, this court would treat the pleading as amended to correspond therewith.

The appellants contend further, however, that the findings made by the trial court are not as broad as the pleadings, and argue that, if the pleadings do support the judgment, the findings of fact do not. But here again we think the appellants are mistaken. The facts as found show that Sayward at the time of the execution sale under which the appellants purchased had in the property only a right of redemption, the legal title having passed from him by the warranty deed under which the respondents claim. This being true, the appellants could have acquired by the execution sale no greater right than Sayward had, namely, the right to redeem, and could not, under any circumstances, have the title conveyed to them, and quieted in themselves, without first redeeming from the respondents. This they did not do, nor proffer to do, and there could be no recovery by them in this action in any event. But we think the court did not err in quieting the title in the respondents. Lapse of time alone has now barred any right the appellants may have had to redeem the property, and they have never possessed any other remedy. The respondents' right, therefore, to have the litigation ended, and their title put at rest, is absolute.

The judgment appealed from is affirmed.

MOUNT, ANDERS, and HADLEY, JJ., concur.

#### CASEY v. JAMISON.

(Supreme Court of Washington. July 26, 1904.)

FOREIGN JUDGMENTS—ACTIONS—RECORD—CERTIFICATE—SUFFICIENCY—TRIAL—DIRECTION OF VERDICT—VERDICT NON OBSTANTE.

1. Where a certificate attached to the transcript of a foreign judgment sued on recited that the clerk had carefully compared the fore-

going papers with the original complaint, summons, notice, and judgment in the action therein entitled, remaining of record in his office, and that the same was a true and correct copy and transcript of such original papers and the whole thereof, the sheriff's return showing personal service on the defendant being a part of the summons, the certificate was not objectionable for failure to specify that the transcript of the return was correct.

2. Where, in an action on a foreign judgment, there was no disputed question of fact, and the court, at the conclusion of all of the evidence, would have been justified in directing a verdict for plaintiff for the full amount sued for, it could, after the return of an improper verdict, direct the entry of such a judgment as the law of the case required, notwithstanding such verdict.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by E. J. Casey against Arthur C. Jamison. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Hamblen & Lund, for appellant. Ellis G. Soule, for respondent.

FULLERTON, C. J. The respondent brought this action upon a personal judgment recovered by him against the appellant in the municipal court of the city of Duluth, in the state of Minnesota. The appellant filed an answer, putting in issue the existence of the judgment, and a trial was had resulting in a judgment for the respondent for the full amount demanded.

The only question raised at the trial by the respondent was the sufficiency of the certificate to the transcript of the record of the Minnesota court by which it was sought to establish the existence of the judgment. The transcript consisted of a copy of the complaint, the summons and sheriff's return thereon, showing personal service on the defendant, a notice of the withdrawal of certain attorneys who had purported to appear for the respondent, and the entry of final judgment. The clerk's certificate thereto recited that he had "carefully compared the foregoing papers writing with the original complaint, summons, notice, and judgment in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers, and the whole thereof." It is insisted that this certificate is insufficient to permit the introduction of the sheriff's return on the summons, because it makes no mention of such return; the contention being that it was necessary, in order to show jurisdiction in the Minnesota court to enter a personal judgment against the appellant, to show personal service on him within the jurisdiction of that court. Inasmuch as the judgment, which is conceded to be properly certified, recites that personal service of summons was made upon the appellant, we think it may fairly be questioned whether the return of the sheriff on the summons is material. *Ritchie v. Carpenter*, 2 Wash. St. 512, 521, 28 Pac. 380, 26 Am. St. Rep. 877.

But, conceding the rule to be otherwise, we think the certificate sufficient. At common law, and under the statute of this state (and we must presume the law of Minnesota to be the same), an officer's return of a summons is a certificate of the officer indorsed upon or attached to the summons, reciting what he has done by virtue of its commands. When so indorsed upon or attached thereto, the return becomes a part of the summons, and a copy of the summons, in order to be a true copy, must contain a copy of such return. The return being a part of the summons, it is, of course, sufficiently described by the word "summons." The trial was had before a jury, which returned a verdict in favor of the respondent, but did not assess the amount of the recovery therein. The verdict was insufficient under Ballinger's Ann. Codes & St. § 5023, and, were there a conflict in the evidence as to the amount the respondent was entitled to recover, this irregularity would require a reversal of the judgment. But there was no disputed question of fact in the case, and there was nothing to submit to the jury for their determination. Under our practice the court was authorized at the conclusion of the evidence to either direct a verdict for the full amount sued for or discharge the jury and enter a judgment for such amount. Its rights in these respects were not changed because the jury returned an irregular and insufficient verdict. It still had the power to direct the entry of such a judgment as the justice and law of the case required, and, as it did no more than this, the judgment ought not to be disturbed by this court.

The judgment appealed from is affirmed.

MOUNT, HADLEY, and ANDERS, JJ., concur.

### BERTELSON v. HOFFMAN.

(Supreme Court of Washington. July 26, 1904.)

AL ESTATE AGENTS—ACTION FOR COMMISSIONS—COMPLAINT—DISCLOSING IDENTITY OF PROPOSED PURCHASER—LIMITING RIGHT TO EXPRESS PROMISE—EVIDENCE OF VALUE OF PROPERTY—CROSS-EXAMINATION.

1. A complaint in an action for a broker's commission for procuring a purchaser ready and willing to buy does not fail to state a cause of action by not alleging that plaintiff communicated to defendant the identity of the proposed purchaser; it not appearing therefrom that defendant ever demanded of plaintiff, or that plaintiff ever refused to disclose, the name of such purchaser, or that defendant suffered any injury from such concealment.

2. Refusal to allow defendant in an action for a broker's commission to ask plaintiff, on cross-examination, whether defendant asked him to sell any other property, is not error; this not relating to any testimony on the direct examination, and not being pertinent at that stage of the trial to any matter connected with the subject of the action.

3. Defendant in an action on an alleged contract of employment to sell, for a commission

of \$500, real estate for \$18,000, of which \$5,000 was to be cash, and the balance to bear 6 per cent. interest, may not show the actual value of the property was \$20,000, and that its annual rental was \$1,500; disparity between such value and the alleged contract price not being so great as to tend to show the improbability of the contract having been made.

4. Plaintiff in an action for commissions on his employment by defendant to sell real estate having alleged both that he became entitled to receive the usual commission, which was a certain sum, and that defendant agreed to pay such sum, and defendant not having moved for an election, and evidence having been received in support of both allegations, it was not error to refuse defendant's request restricting plaintiff's right to recover to the finding by the jury of an express promise by defendant to pay the commission.

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Action by B. Bertelson against D. M. Hoffman. Judgment for plaintiff. Defendant appeals. Affirmed.

B. F. Heuston, for appellant. J. W. A. Nichols, for respondent.

PER CURIAM. B. Bertelson, plaintiff, commenced an action in the superior court of Pierce county against D. M. Hoffman, defendant, to recover \$500, alleged to have been earned by Bertelson as a broker's commission in procuring a purchaser for defendant Hoffman's real estate, situate in the city of Tacoma, known as the "Board of Trade Saloon." The complaint alleges the listing of the property on the part of defendant with plaintiff for sale upon terms fixed by Hoffman, being \$5,000 in hand, or to be paid on consummation of sale, and the balance, \$13,000, to be paid on or before five years from date of sale, with 6 per cent. interest on such deferred payment; "that plaintiff did procure a purchaser for said property at the said price and upon the said terms fixed by defendant as aforesaid, who was ready, able, and willing to buy the same at the said price and terms, and who did accept from plaintiff his said offer of said property; that on or about the 29th day of May, 1902, plaintiff notified defendant that the said property was sold according to defendant's directions, and upon the terms and at the price fixed by defendant as aforesaid, and the said sum of five thousand dollars was ready for payment." The complaint further alleges that the defendant declined and refused to make said contract of sale, and still refuses so to do; that "plaintiff became entitled to receive his commission at the usual and customary rate for like sales, and which defendant had agreed to pay plaintiff for procuring such purchaser, to wit, in the sum of five hundred dollars." The answer was a general denial. There was a jury trial. A verdict was rendered in plaintiff's favor for \$500, the amount claimed. The defendant made and filed his motion for a new trial, which was denied, and judgment was entered on the verdict. Defendant appeals.

1. Appellant contends (quoting from the language used in the brief of his counsel) that "the complaint is defective in failing to allege that appellant knew or that knowledge of the identity of the proposed purchaser was communicated to him by respondent. Our contention in this respect is that it is not enough for a broker to find a purchaser ready and willing to buy, but that he must bring the parties together, that it may be fairly said that the principal has also found the buyer." This is undoubtedly the general rule, which has been frequently recognized and affirmed by text-book writers and the decisions of the courts. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Barnes v. German Savings & Loan Society*, 21 Wash. 448, 58 Pac. 509; *Baars v. Hyland* (Minn.) 67 N. W. 1148. The question to be decided is how far this general rule applies to the facts presented in the action at bar. In *Veasey v. Carson*, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241, the court decided that the concealment of the name of the actual purchaser of land, and the substitution of the name of a fictitious vendee, is not the concealment of such a material fact as will prevent the broker from recovering his commission, unless it appears that the owner was in some manner prejudiced by such concealment; that the court could not in such case declare, as a matter of law, that the broker had forfeited his right to recover his commission. "Even if ordinarily a broker is required to furnish the name of the purchaser, as a condition precedent to his right to claim commissions on the sale, as the defendants interposed no objection on that ground, and absolutely disavowed the sale, they waived the right to insist upon any such condition. The rule, no doubt, is that when a broker employed to effect a sale has found a purchaser willing to take upon the terms named, and of sufficient responsibility, he has performed his contract, and is entitled to the commissions agreed upon; and the rule claimed, that the minds of the parties did not meet, has no application." *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790. In the above complaint it nowhere appears that the appellant ever demanded of respondent that he furnish the name of the would-be purchaser, or that respondent ever refused to disclose the name of such purchaser, or that appellant suffered any injury from the fact of such concealment. Testing the complaint by the propositions of law enunciated in the two cases last cited, we are of the opinion that the complaint states a cause of action, and that our position in this respect is not inconsistent with the other authorities cited, and the general principles of law applicable to real estate brokers.

2. It is next urged that the evidence was insufficient to sustain the verdict of the jury. The record shows that, regarding the material issues in this controversy, the testimony was squarely in conflict. It was the

peculiar province of the jury to determine these issues arising on such conflict. The learned counsel for appellant does not dispute this proposition of law, but argues that the uncontradicted testimony fails to sustain such verdict. We think that the contentions of the counsel in this respect are untenable. The principal argument of appellant under this head has been answered in the preceding paragraph of this opinion, wherein we considered the attack upon the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The other points made by appellant on this branch of the case relate chiefly to the good faith of the respondent in the transaction, and the credibility that should be attached to the testimony adduced in his behalf at the trial. These are questions of fact, which were settled by the verdict. This record shows that there was substantial evidence tending to support the material averments of the complaint.

3. It is further assigned and argued that the lower court committed reversible error in ruling out certain testimony offered by appellant at the trial. The respondent testified regarding the listing of the property with him for sale, and the refusal of appellant to sell on the terms fixed. The latter's counsel, after having asked respondent some preliminary questions on his cross-examination, proceeded as follows: "Q. Did you ever do any other business for Mr. Hoffman in the real estate line? A. No, sir. Q. Did he ask you to sell any other property? A. Yes, sir. Q. What other property? (Objected to as immaterial.) The Court: What is the object of this? Mr. Heuston: The object is to show the status of the parties with reference to one another, and to show that they have a bearing as to whether or not Mr. Hoffman entered into this contract. The Court: I think you can do that so far as this contract is concerned with reference to this property. Mr. Heuston: We want to show that this plaintiff was the agent of the other party, instead of the agent of Mr. Hoffman. The Court: That is a matter of defense, and does not belong to this cross-examination. (Objection sustained. Exception noted.)" It is to be borne in mind that this cross-examination did not relate to any matter brought out on the direct examination. We fail to discover how this offer could have any bearing on the contract upon which suit was brought, or that such offer was at that stage of the proceedings pertinent to any matter connected with the subject of the action. We therefore conclude that the trial court committed no error in excluding such testimony. The contention of appellant that the court below erred in not permitting him to introduce testimony with regard to the value and rentals of this property cannot be successfully maintained. Such offer tended to show that the actual value of this property was \$20,000, and the annual rental thereof \$1,500, at the

time respondent claimed that it was placed in his hands to sell. Therefore, according to appellant's theory, this evidence, if admitted, would tend to show the improbability of appellant having entered into this agreement fixing a definite compensation to be paid respondent, as alleged in the complaint, on the basis of the valuation contended for by respondent. In the case of *Wheeler v. F. A. Buck & Co.*, 23 Wash. 688, 63 Pac. 569, this court held that, "in an action on a contract for work, when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time the contract was made, as tending to show what the agreed price was." In support of this proposition the case of *Allison v. Horning*, 22 Ohio St. 138, is cited in the opinion, "in which the plaintiff claimed that the agreed price for the work was \$1.50 a perch, the defendant claimed that the contract price was \$1.35 a perch, and the plaintiff was permitted to prove what it was worth to do the work embraced in the contract." The ruling in this Ohio case seems to have been based upon *Kidder v. Smith*, 34 Vt. 294, in which the court decided that, "when the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property at the time of sale, as tending to show what the real contract was." The judge delivering the opinion of the court in this case uses the following language: "Where the disparity between the value of the property and what is claimed to have been the contract price is small, and within the fair range of what different persons might esteem to be a fair value, such evidence would be very slight—perhaps too slight to be admissible—but when the difference is very great, and beyond the range of fair difference in judgment, it might be entitled to much weight, and, the wider the difference, proportionally stronger would be the evidence furnished by it." The significance of this language is very apparent when applied to the appellant's position regarding this assignment of error. The difference between the contentions of the respective parties to this litigation as to the valuation of this property was not sufficient to justify the trial judge in admitting this class of testimony, which we think was properly excluded.

4. Appellant urges that the trial court erred in refusing to give the following instruction to the jury: "Under the pleadings in this case, plaintiff cannot recover unless you find an express promise by defendant to pay the commission." The allegations of the complaint are predicated upon both an express promise, and an agreement to pay the usual and customary commission for like sales as above noted. The record fails to show that the appellant ever moved against the complaint on the ground that respondent alleged therein duplicate causes of action, or in any other manner. Moreover, it has been

held in actions of this kind that it is not error to admit evidence as to the reasonable value of services performed under allegations of an express promise. *Sussdorff v. Schmidt*, 55 N. Y. 320; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817. Evidence having been introduced and received on behalf of respondent in support of those allegations, no error was committed in the refusal of the court below to grant appellant's request restricting the jury's consideration to the alleged express promise to pay respondent for services rendered.

No reversible error appearing in the record, the judgment of the superior court must be affirmed.

### MINNESOTA SANDSTONE CO. v. CLARK.

(Supreme Court of Washington. July 26, 1904.)

#### SALE — WRITTEN CONTRACT — ILLEGAL PROVISIONS — PAROL EVIDENCE.

1. Any illegality in the provision of a contract for sale of stone at a certain price, that the seller would pay over to the buyer any rebate in the freight made by the carrier, does not affect the rest of the contract; such provision being separable, and not malum in se.

2. Where a written contract for sale of stone at certain prices provides, "We [the purchasers] will pay the freight charges, as agreed on between you and I, the above prices being f. o. b.," parol evidence that the seller agreed to pay any freight in excess of a certain rate contradicts the writing, and is inadmissible.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by the Minnesota Sandstone Company against F. Lewis Clark. Judgment for plaintiff. Defendant appeals. Affirmed.

Thayer & Belt, for appellant. Moore & Corbett, for respondent.

**PER CURIAM.** The Minnesota Sandstone Company, plaintiff, commenced this action against F. Lewis Clark, defendant, in the superior court of Spokane county, to recover a balance due said company on a written contract. Judgment was rendered herein in favor of plaintiff, and defendant appeals.

Respondent company's cause of action is founded upon a written contract executed to it by appellant, which is as follows:

"September 13, 1900.

"Mr. W. W. Butler, Agent Minnesota Sandstone Co., Spokane, Washington. Dear Sir: We accept your proposal for the sum of Five Thousand and Two hundred and fifty dollars for the cut stone for the Spokane Club Building, to be erected at the corner of Washington St. and Riverside Ave., Spokane, Washington.

"With the following conditions: The Stone is to be the Kettle River Sandstone, from the quarries of the Minnesota Sandstone Co., at Sandstone, Minnesota; the stone to be cut; fitted and finished ready for placing in the wall; the finish to be ten cut, patent ham-

mered face, all stone to be of the best quality and free from flaws, seams or streaks, and as good as sample submitted and now on file at this office.

"The work to be done in accordance with the plans, specifications, sections and details prepared by John K. Dow, architect, and such further drawings as may be necessary to illustrate the work to be done, so far as they may be consistent with the original drawings, and to the satisfaction of the architect; the work to be finished and delivered complete on or before the 5th day of October, 1900.

"We will pay the freight charges, as agreed upon between you and I, the above price being f. o. b. Sandstone, Minnesota.

"Respectfully yours,

"John K. Dow, Architect.

"The above conditions accepted.

"W. W. Butler, Agent."

The complaint alleges that respondent furnished and delivered to appellant the aforesaid stone at the agreed price of \$5,250, and that appellant has paid respondent on account of this contract \$4,500, leaving a balance due of \$750, for which, with legal interest from January 1, 1901, respondent asks judgment. Appellant, in his answer, admitted the execution of the contract, but alleged that it comprehended other stipulations pertaining to the payment of the freight on said stone from Sandstone, Minn., to Spokane, Wash.; alleged that it was agreed, as a part of said contract, that respondent would guaranty that the freight rate to be charged by the Great Northern Railway Company for transporting said stone from the above point in Minnesota to Spokane, Wash., should not exceed 30 cents per hundredweight; that, "if said railway company should charge and defendant should pay more than said rate, then that plaintiff would refund to defendant any excess that defendant should be obliged to pay said railway company in excess of said rate; and that, if said railway company should refund or rebate any moneys paid by defendant to it in excess of said rate, then that such moneys so refunded should belong to defendant, and be delivered and paid over by plaintiff to defendant." The first affirmative defense reiterates this alleged agreement pertaining to the refunding of the excess of freight charges which were paid by appellant at the rate of 85 cents per hundredweight, amounting to the sum total of \$2,501.00. This defense further alleges that "thereafter said railway company paid to plaintiff, through its said agent, W. W. Butler, as a rebate on said freight, so as to make the freight charges amount to 30 cents per hundredweight, the sum of \$1,657.70, and said plaintiff received said sum of \$1,657.70 from said railway company on or about the 1st day of January, 1901, and still retains and holds the same, but the plaintiff refuses to pay same to defendant, and wrongfully withholds same, although payment thereof

has been demanded of it." It is further alleged that appellant was obliged to recut and refit a portion of the stone furnished, at an expense of \$121.38. The second affirmative defense alleges that respondent company received from the Great Northern Railway Company the sum of \$1,657.70 for the use and benefit of appellant, which it refused to pay over to appellant. Appellant demanded judgment in accordance with the allegations of his said answer. Respondent, by its reply, denies the new matter alleged in the answer, except as to the above credit of \$121.38, which it admits.

There is very little dispute between the parties to this controversy with regard to its salient features. There was no showing made in the court below at the trial that respondent ever received from the railway company the rebates alleged on the part of appellant. It appears from the transcript that appellant offered evidence tending to show that respondent guaranteed that the above freight charges on this stone between the above points should not exceed 30 cents per hundredweight, and that respondent would repay appellant the excess over and above such rate, if he should be compelled to pay the carrier company a greater rate; that appellant was compelled to, and did, pay the railway company, as freight charges for transporting such stone, 85 cents per hundredweight. Respondent company objected to the introduction of this evidence on two grounds: (1) That such testimony tended to prove an oral agreement inconsistent and at variance with the above written contract; (2) that such oral agreement was in violation of the federal statute commonly known as the "Interstate Commerce Law." This evidence was admitted tentatively, but after all of the evidence was submitted the trial court discharged the jury, and entered judgment in favor of respondent for the amount claimed in its complaint, less the above credit of \$121.38. It would seem from the remarks of the trial judge as noted in the statement of facts that both of the foregoing objections on the part of respondent were sustained.

The material questions raised on this record, necessary to the proper disposition of this appeal, from appellant's standpoint, are presented by the first assignment of error: "The court erred in discharging the jury and ordering judgment for plaintiff." The theory of appellant, as stated in his answer, on which he seeks to maintain his counterclaim, is that respondent had collected certain rebates from the railway company, for which it had refused to account to appellant, in violation of the alleged oral agreement referred to in the written contract with regard to the payment of freight charges. From the testimony adduced at the trial, it would seem that appellant shifted his ground, and undertook to prove an oral guaranty on the part of respondent company whereby it



agreed to refund to appellant the amount of freight charges paid by him for the transportation of this stone, over and above the 30 cents per hundredweight. The testimony appearing in this record touching the question of the illegality of this alleged oral contract or guaranty with reference to these freight charges is very meager. After giving careful consideration to all the testimony regarding this feature of the transaction, we entertain grave doubts whether it tends to show that there was any intent or sinister purpose on the part of both or either of the parties to violate the law. It would seem to possess less strength in that behalf than the allegations appearing in the answer of appellant, who denies that such alleged oral agreement was illegal; contends that it is perfectly consistent with the written contract, and that, if this oral contract were unlawful, and if the appellant could not recover on his counterclaim, the respondent is precluded from maintaining the present action, because the taint of illegality affects the entire contract. On the other hand, respondent argues that this written contract is complete in all of its terms; that therefore no oral testimony is permissible to vary or add to its provisions, in the absence of allegations of accident, fraud, or mistake; that the law will not presume that parties have entered into the unlawful arrangement upon which appellant bases his claims respecting these freight charges; and that, in any event, the illegal portion of this written contract may be eliminated and disregarded, and the respondent permitted to recover on the remaining provisions of the agreement. There is no question about the correctness of the proposition of law that, notwithstanding the general rule that parol evidence is inadmissible to contradict, vary, or add to a written contract, such rule does not preclude the admissibility of such evidence to show the illegality of a contract, or that it was the result of accident, fraud, or mistake. It is also true, as a general rule, that none of these matters can be proven in the absence of pleadings tendering appropriate issues, where the party claiming relief in that respect has had the opportunity of so pleading, and failed so to do. It is also true that "whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons." *Coppell v. Hall*, 7 Wall. 558, 19 L. Ed. 244. See 6 *Rose's Notes on U. S. Supreme Court Decisions*, p. 1033; *Ah Doon v. Smith* (Or.) 34 Pac. 1093; *Sampson v. Shaw, Executor*, 101 Mass. 145, 8 Am. Rep. 327. The allegations in appellant's answer with reference to this alleged oral agreement respecting freight charges being denied by respondent in its reply, we are

not inclined to indulge in any forced construction of the facts, and hold from mere innuendo that there was testimony tending to show that either of these litigants intended to evade or violate the law in entering into the alleged arrangement concerning these freight charges. If, however, we were of the contrary opinion, we would not be warranted in holding the entire contract illegal. The illegality would affect only that portion of the transaction relating to the refunding of the excess of freight charges. That part relating to the sale and purchase of this stone is plainly severable from and independent of that part respecting the freight charges, which brings this feature of the case at bar within the rule that, where the consideration of an agreement is legal, a separable illegal provision, free from the imputation of *malum in se*, may be rejected. *Gelpcke v. City of Dubuque*, 1 Wall. 221, 17 L. Ed. 519; *Webb v. Allington & Anderson*, 27 Mo. App. 570.

The last proposition presented for our consideration is whether the court below erred in deciding that this written contract is complete in itself, and whether the reception of oral testimony was permissible to explain the meaning of this provision in the instrument: "We will pay the freight charges, as agreed upon between you and I, the above price being *f. o. b. Sandstone, Minnesota*." "The rule as to the inadmissibility of parol evidence which tends to vary, alter, or modify a written contract is not infringed by proof of any collateral parol agreement which does not interfere with the terms of the written contract, although it may relate to the same subject-matter." This quotation is taken from the syllabus formulated by the court in the case of *King v. Dahl* (Minn.) 84 N. W. 737, and is one of the numerous authorities to which our attention has been directed by the learned counsel for appellant, bearing on this feature of the transaction. All of appellant's citations in that behalf seem to be of the same general import. If the written contract involved in this controversy were silent on the matter of the payment of freight rates, counsel's contention would be entitled to great weight. But does this alleged oral contract, on which appellant bases his counterclaim, come within the purview of this rule of law enunciated in the *Minnesota Case*? We think not. This stipulation provides that the appellant was to pay the freight charges for the transportation of this stone unconditionally—not a portion thereof. The price of the stone was definitely fixed by the terms of the written agreement "free on board" the cars of the carrier company at Sandstone, Minn. We are of the opinion that, to allow appellant to prove the verbal agreement for which he contends respecting the payment of these transportation charges, in the absence of allegations of accident, fraud, or mistake,

would be inconsistent with the express provisions of the written agreement, and in violation of well-settled principles of law, recognized and applied by the courts from time immemorial, relative to the interpretation of written agreements. The words found in the written instrument, "as agreed upon between you and I," do not add to or take from such instrument, in any legal sense, and may be rejected as surplusage. This language denotes on its face that the payment of the freight charges had theretofore been agreed upon between these parties, and that appellant would pay the same as agreed upon prior to the execution of the original contract on which respondent bases its cause of action. In other words, appellant employs his own language to advise respondent that he will pay the stipulated price for the stone, and also the freight charges thereon from Sandstone to Spokane. "Of course, if the testimony was for the purpose of contradicting the written instrument, or to defeat the operative effect of it, in the absence of fraud or mistake, it would not be admissible." *Wright v. Stewart*, 19 Wash. 184, 52 Pac. 1020. See, further, *Pacific National Bank v. S. F. Bridge Co.*, 23 Wash. 425, 63 Pac. 207, wherein this court quotes with approval the following language from the opinion in the case of *Elghmie v. Taylor*, 98 N. Y. 288: "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself." We think that the principle of law embraced in this language applies with full force to the facts presented in the case at bar, and that, if we should hold with appellant, and decide that oral testimony should have been received in the trial court in support of his contentions above noted, we would, in effect, have to ignore and discredit this salutary proposition of law, many times enunciated by this and other courts, and long recognized by jurists.

Testing the facts in the present controversy by the foregoing propositions of law, no reversible error appearing in the record, we are of the opinion that the judgment of the superior court is correct, and must be affirmed.

#### O'SULLIVAN v. O'SULLIVAN.

(Supreme Court of Washington. July 26, 1904.)

DIVORCE—CRUEL AND INHUMAN TREATMENT—EVIDENCE—APPEAL—FINDINGS—COMMUNITY PROPERTY—PRESUMPTIONS.

1. Where, in an action for divorce on the ground of cruel and inhuman treatment, the evidence adduced at the trial is evenly balanced, or not clearly in appellant's favor, the finding of the trial judge will be sustained on appeal.

2. In an action for divorce on the ground of cruel and inhuman treatment, evidence held to sustain a finding in favor of plaintiff.

3. All property accumulated by husband and wife during the continuance of the marriage relation is presumed to be community property.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by David O'Sullivan against Margaret O'Sullivan. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James Hamilton Lewis, Thomas B. Hardin, John E. Humphries, and Leroy V. Newcomb, for appellant. John Arthur, for respondent.

PER CURIAM. This was an action for divorce, instituted by David O'Sullivan, plaintiff, against Margaret O'Sullivan, defendant, in the superior court of King county. Defendant appeals from the following judgment entered in the trial court in such action: "This cause having been regularly tried on the 4th day of August, 1902, upon the issues framed by the complaint, the answer, and the reply of the respective parties, the plaintiff in person and by his attorney of record, and the defendant appearing in person and by her attorneys of record, and the testimony of witnesses in behalf of the respective parties having been duly submitted to the court, and the court having heretofore made its findings of fact and conclusions of law herein, making and stating the same separately, and having filed the same herein, from which it appears that all the material allegations of the complaint are sustained by the testimony, that there is no issue of the marriage between the plaintiff, David O'Sullivan, and the defendant, Margaret O'Sullivan, and that all the property held by them, with the exception of lots numbered one (1) and two (2) in block numbered thirty (30) in Burke's Second Addition to the city of Seattle, is community property, and all and singular the law and the premises being by the court understood and fully considered, it is hereby ordered, adjudged, and decreed, and this does order, adjudge, and decree, that the marriage between the plaintiff, David O'Sullivan, and the defendant, Margaret O'Sullivan, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, free and absolutely released from the bonds of matrimony and all the obligations thereof; and the said parties are, and each of them is, expressly prohibited from contracting any marriage with a third party within the period of six months from the date of the entry of this decree, or, if an appeal is taken, not until after the said appeal is finally determined. It is further ordered, adjudged, and decreed that the property held by them be divided and awarded as follows: The plaintiff shall have his personal clothing and personal effects; also lots numbered severally one (1) and two

¶ 1. See Divorce, vol. 17, Cent. Dig. § 572.

(2) in block numbered thirty (30) in Burke's Second Addition to the city of Seattle; also that portion of lot numbered one (1) in block numbered four (4) in W. R. Brawley's Addition to the city of Seattle, commencing at the northeast corner of said lot and running thence south sixty-eight (68) feet, thence west fifty-three (53) feet, thence north sixty-eight (68) feet to the north line of said lot, being the place of beginning; also that portion of lot numbered two (2) in block numbered four (4) of said W. R. Brawley's Addition to the city of Seattle, described as follows, to wit: Beginning at the northwest corner of said lot, and running thence south one hundred and twenty (120) feet, thence east thirty-four (34) feet, thence north one hundred and twenty (120) feet to the north line of said lot, thence west thirty-four (34) feet to the northwest corner of said lot, being the place of beginning; also all the rights and interests in mining claims in the Yukon Territory, Dominion of Canada, mentioned in said findings of fact. The defendant shall have all the personal property other than the personal clothing and personal effects of the plaintiff; said personal property for her including all the household furniture and the pianoforte; also all the remaining portion of said lots numbered severally one (1) and two (2) in block numbered four (4) in W. R. Brawley's Addition to the city of Seattle; also the west thirty (30) feet of the east sixty (60) feet of lot numbered five (5) in block numbered seven (7) in Terry's fifth addition to the city of Seattle. It is further ordered, adjudged, and decreed that the plaintiff shall pay to the defendant, within one year from the date of this decree, the sum of seven hundred and fifty dollars (\$750), with interest thereon at the legal rate until paid, which said sum of seven hundred and fifty dollars (\$750) shall be, until paid, a lien upon all of said real property awarded to the plaintiff. The costs of this suit and the attorney's fees shall be paid by the respective parties. It is further ordered that each party to this action shall have right of access over any alleys now existing to the several parcels of real property above mentioned, which right may be taken away, restricted, or modified by order of the court if the privilege granted be abused by either party to the injury of the other."

The assignments of error practically present but two questions for our consideration on this appeal.

1. It is contended that the court below erred in granting respondent a divorce from appellant on the grounds of cruelty as alleged in the complaint. The trial court found on this branch of the present controversy that: "The defendant has for several years last past treated the plaintiff with great cruelty, and inflicted upon him indignities which have rendered his life burdensome. She has habitually called him improper and degrading names, and fre-

quently scolded him in a loud and boisterous manner. The plaintiff and the defendant can no longer live together as husband and wife. The plaintiff has used improper language in the presence of the defendant and her family; but offenses in this regard have been principally committed by the defendant." This court has held in numerous decisions that, where we deemed the evidence adduced in the trial court as evenly balanced, or not clearly in appellant's favor, we were inclined to sustain the findings of the judge who saw and heard the witnesses. *Hamar v. Peterson*, 9 Wash. 152, 37 Pac. 309; *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466; *Washington Dredging, etc. Co. v. Partridge*, 19 Wash. 62, 52 Pac. 523; *Cullen v. Whitham*, 74 Pac. 581; *Cochran v. Yoho*, 75 Pac. 815. Applying this rule to the facts in the case at bar, we are not prepared to hold that the trial court erred in finding appellant guilty of acts of cruelty towards respondent, as charged in the complaint. The testimony abundantly shows that respondent and appellant were industrious and frugal individuals; that respondent was a person of even temper, possessed the faculty of getting along smoothly with his employers, and was generally considered a good neighbor. There was also testimony in respondent's behalf tending to show that appellant was in the habit of applying vile and opprobrious epithets to her husband without cause or reason; that respondent did not retaliate, but remained passive. Witness Jonathan Gifford testified that about one year before the trial he took appellant off the street one evening and carried her into the house at a time when she was under the influence of liquor, and somewhat disorderly; that when in such condition she was quite abusive, and had a good command of rough language. Mrs. O'Sullivan, while on the witness stand, denied that she had ever called her husband vulgar names and applied to him opprobrious epithets, and emphatically contradicted all the statements of Gifford about having been drunk and disorderly, or that he had ever picked her up off the street and carried her into the house. There was also some evidence in appellant's behalf tending to show that respondent had used improper language in the presence and hearing of Mrs. O'Sullivan and her family. We feel, after a careful examination of the record, that we would not be justified in setting aside the above finding, or in reversing the decision of the lower court on the main issues of the present controversy.

2. The more serious contentions respecting this litigation arise over the adjustment of the property rights between the parties. The able counsel for appellant contend vigorously that their client was treated very inequitably in this respect; that Mrs. O'Sullivan should have been awarded the premises designated in the record as No. 925 Wash-

ington street, in the city of Seattle, in addition to other property given her. The valuation placed on this property by competent witnesses who testified at the hearing was \$4,250, and it constituted a part of the property awarded respondent in the division made by the superior court. It appears from the evidence that at the time respondent and appellant intermarried in 1888 he was the owner of lots 1 and 2 in block 30, Burke's Second Addition to Seattle, which was of the value of \$400. These lots were set over to respondent. The trial court found, among other things, that all the real estate and household furniture described in the above decree, save these two lots in Burke's Second Addition, were acquired by the community (O'Sullivan and wife) since their marriage, and in its decree divided the same approximately equally between the parties, giving to each property of the value of about \$8,000. The appellant urges that the testimony showed that her individual earnings, accumulated prior to her marriage with respondent, constituted the sole and exclusive consideration for the purchase of the property described as the west 30 feet of east 60 feet of lot No. 5, block 7, in Terry's Fifth Addition to Seattle. The value of this property, as shown by the testimony, was \$1,300. It appears, however, that this property was purchased by appellant a little over one year after her marriage with Mr. O'Sullivan, and that both members of the community were frugal and industrious and accumulated money. All property accumulated by husband and wife during the continuance of the marriage relation is presumed to be community property, and we fail to find sufficient evidence to overcome such presumption with regard to the property in question. Under the showing made we think we would not be warranted in taking from respondent and setting off to appellant the property known as 925 Washington street, Seattle, in addition to the property and interests which had already been awarded to her.

As we find no reversible error in the record, the judgment of the court below must be affirmed, and it is so ordered

HILL v. GARDNER, Sheriff, et al.  
(Supreme Court of Washington. Aug. 3, 1904.)

REPLEVIN -- JUDGMENT -- INTERESTS -- STATUTES -- CONSTRUCTION -- HUSBAND AND WIFE -- COMMUNITY PROPERTY -- EVIDENCE -- SUFFICIENCY -- VALUE OF PROPERTY -- ESTOPPEL -- APPEAL.

1. Property received by either spouse after marriage is prima facie community property.

2. In an action by a married woman to compel delivery to her of certain horses levied on for the debt of her husband, evidence examined, and held sufficient to sustain a finding that the horses were community property.

3. Where, in an action by a married woman, predicated on Ballinger's Ann. Codes & St. §

5262, to compel delivery to her of certain horses levied on for the debt of her husband, the plaintiff alleged in her affidavit that their value was \$300, and the undertaking of herself and sureties also recited that, if she should fail to make good her title, she would return the property or pay its value as stated in the affidavit, both the plaintiff and sureties are estopped to dispute the value of the horses as being \$300.

4. In an action to compel delivery of personal property taken by attachment, where the judgment was simply for the recovery of a specific amount as the value of the property, it will be presumed on appeal, in aid of the judgment, that the value of property was not less than the recovery allowed by the judgment, under Ballinger's Ann. Codes & St. § 5266, providing that a judgment in such case shall be for the value of the property, or such less amount as shall not exceed the amount due on the attachment; there being nothing in the record to show whether the amount due on the attachment was less or more than the value of the property.

5. Ballinger's Ann. Codes & St. § 5266, provides that the judgment in an action to compel the delivery of personal property shall be for the value of the property, or for such less amount as shall not exceed the amount due on the original execution or attachment. Section 5262 provides that the judgment in such case shall be in the alternative for return of the property or payment of the value thereof. Held, that the sections are in pari materia, and hence a judgment simply for the recovery of a specific amount as the value of the property is erroneous.

6. In an action predicated on Ballinger's Ann. Codes & St. § 5262, to compel the delivery of personal property, a judgment for the value of the property, with interest, is erroneous; no authority existing for the recovery of interest.

Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by Eliza A. Hill against J. H. Gardner, sheriff, and another. From a judgment for defendants, plaintiff appeals. Reversed.

Martin & Grant, for appellant. Myers & Warren, for respondents.

HADLEY, J. This is an action to compel the delivery of personal property levied upon by the sheriff. The appellant, Eliza A. Hill, is the claimant. In pursuance of section 5262, Ballinger's Ann. Codes & St., she filed an affidavit which alleges that the respondent Parrish commenced an action against E. Hill, and caused a writ of attachment to issue therein, which writ was delivered to respondent Gardner, as sheriff, and that the latter was directed to immediately levy upon the property of said E. Hill; that under said writ of attachment said sheriff levied upon and took possession of four horses, which are described in the affidavit; that said property was and is the sole and separate property of said Eliza A. Hill, and that no one else had or has any right to the possession thereof; that said E. Hill had neither any interest therein, nor right of possession thereto. The value of the property is laid at \$300, and it is alleged that a demand was made upon the sheriff and said Parrish for its delivery to said claimant, which was refused. The claimant, Eliza A. Hill, is the wife of said E. Hill. The cause was tried before the court

without a jury, and resulted in a finding by the court that the property was the community property of the husband and wife, and judgment was entered against the claimant, from which she has appealed.

Respondents moved to dismiss the appeal for the alleged reason that the notice of appeal was not served upon the sureties upon the redelivery bond. The record shows a service purporting to have been acknowledged in writing by the sureties themselves. Their signatures to the acceptance of service are witnessed by the signature of H. N. Martin, an attorney of this court, and the counsel for appellant. We also find in the record an affidavit of said Martin showing due service made by him upon the bondsmen. The service is sufficiently shown, and the motion to dismiss the appeal is denied.

It is argued that the court erred in finding that the property levied upon was at the time of the levy the community property of appellant and her husband, and was not the separate property of appellant. The only witnesses offered in behalf of appellant upon the question of ownership were her son and husband. The former simply testified in a general way that he had always understood that the horses belonged to his mother, and that he had always heard them referred to in the family as her property. The husband testified that near 30 years ago the appellant received about \$1,000 from her father, and that she has since kept that money separately invested. He undertook to trace the investment of the money down to and including the horses in question; following it through a number of investments, sales, and reinvestments. At the close of the testimony for appellant, respondents moved for a nonsuit upon the ground that appellant had failed to show that the property belonged to her separately. The motion was denied, and respondents introduced no evidence. The case was then argued, and the court announced that the matter would be taken under advisement. The court must have changed its mind as to the force of the testimony after the ruling upon the motion for nonsuit, as no further evidence was introduced. The argument of counsel, however, followed that ruling; and doubtless features of the testimony, cross-examination of witnesses, and circumstances were analyzed and emphasized by the argument to the extent that the court felt impelled to find for respondents as aforesaid. Appellant complains that the court reversed its own ruling upon the motion for a nonsuit. We think, under the circumstances, that it had a right to further consider the evidence and enter its findings thereon. No order or judgment had been entered upon the motion for nonsuit. There was simply a hasty oral announcement that the motion would be denied. The testimony of the husband is not wholly consistent, even upon his theory, and we are not prepared to say that the court, who saw and heard him testify,

observing his manner, was not justified in disbelieving him. A further circumstance is shown by the record which we think the court had a right to consider along with the spoken testimony and other circumstances. The appellant herself sat in the courtroom during the examination of her son and husband, but she did not offer herself as a witness. It seems almost incredible that she should have owned these horses as the result of a long series of investments of her separate property received from her father, and that she should have managed the investments herself, as the husband testified, and yet not have offered herself as a witness upon the subject when she sat in the courtroom and was able to testify. Under the circumstances detailed by the husband, the appellant, of all persons, was the one who should have been able to tell the true story. We shall therefore not hold that the court should have found the horses to be her separate property. Property received by either spouse after marriage is *prima facie* community property. *Lemon v. Waterman*, 2 Wash. T. 485, 7 Pac. 899; *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398; *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; *Woodland Lumber Co. v. Link*, 16 Wash. 72, 47 Pac. 222. The finding that the property in question was the community property of appellant and her husband will therefore not be disturbed.

It is next complained that judgment was entered for \$300 as the value of the property. The only evidence upon the subject of value was that of the husband, who said: "I am not posted on the prices of horses now. They are probably worth \$50 apiece." Under that statement the four horses were not worth to exceed \$200. But inasmuch as the appellant herself alleged in her affidavit that the value was \$300, we think she is bound thereby, and cannot now show a less value. The undertaking of herself and sureties also recited that, if she should fail to make good her title, she would return the property, "or pay its value as stated in said affidavit." Both appellant and the sureties have therefore fixed the value at \$300, and cannot now be heard to dispute it.

It is contended that the court was not authorized to enter the kind of judgment which was entered. It is simply for the recovery of \$300, as the value of the property, with interest thereon. Section 5206, Ballinger's Ann. Codes & St., provides that the judgment shall be for the value, "or for such less amount as shall not exceed the amount due on the original execution or attachment." There is nothing in the record to show whether the amount due under the attachment was less or more than the value of the property, but, in aid of the judgment, it will be presumed that it was not a less sum.

It is further urged that the judgment does not provide in the alternative that appellant shall return the property or pay its value.

Section 5262, *supra*, shows that such is her right, and section 5266, *supra*, must be construed in connection with the former one. In said particular, we think the judgment was erroneous.

Further complaint is made of the judgment in that it provides for the recovery of 6 per cent. per annum interest upon the amount of the judgment from the date of the affidavit made by appellant when she sought possession of the property. The judgment was entered more than a year after said date, and there was thus added to the value of the property more than \$18 as interest. We believe no authority exists in this special proceeding for the recovery of interest. The statute does not so provide. It merely contemplates the return of the property or the payment of its value, and that is all that the sureties undertook to do. This judgment is against them as well as against appellant. The only theory upon which interest could be allowed would be that it is in the nature of compensation as damages for the detention of the property, but the statute does not provide for the adjustment of damages in this proceeding. We think it was error to include interest in the judgment which accrued prior to its date.

It is therefore the order of this court that the judgment shall be modified so as to eliminate the provision for recovery of interest prior to the date of the judgment, and so as to further provide in the alternative for the return of the property or the payment of its value. In all other respects the judgment shall remain as it now is. Appellant shall recover the costs of the appeal. The cause is remanded, with instructions to proceed as above indicated.

MOUNT and ANDERS, JJ., concur.

#### ROBE v. SNOHOMISH COUNTY.

(Supreme Court of Washington. July 26, 1904.)

#### BRIDGES — DEFECTS — INJURIES — COUNTIES — LIABILITY — NEGLIGENCE — ACTIONS — INSTRUCTIONS.

1. In an action for injuries from a defective bridge, the court charged that, before plaintiff could recover, the county must have been notified of the condition of the bridge for a reasonable time prior to the accident, or the bridge must have been so notoriously unsafe as to amount to constructive notice; that it was the duty of the county to use ordinary care in keeping the bridge in a safe condition; that the county was charged with knowledge of the natural tendency of timber to decay, and that the county was bound to exercise ordinary care to guard against any decay that might exist, and a failure to exercise such care would render the county liable, though it might have no actual notice of the condition of the bridge; that notice that the bridge was out of repair might be inferred, if the defect was of such a character and had continued for such a length of time that the county's officers charged with the supervision of bridges might have discovered the

same if they had used ordinary care in the discharge of their duties; and that the county was liable if it negligently suffered decayed timbers to remain in the bridge, thus rendering it dangerous. *Held*, that such instruction was not objectionable as conflicting and misleading.

2. In the absence of negligence on the part of the officials of a county charged with the maintenance of county bridges in ascertaining and remedying the defective condition of a bridge, the county is not liable for injuries resulting therefrom.

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Action by T. K. Robe against Snohomish county. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

Brady & Gay and John Francis McLean, for appellant. H. D. Cooley, for respondent.

FULLERTON, C. J. The appellant sought by this action to recover damages for personal injuries, and for injuries to his personal property, caused by the collapse of a bridge over which he was crossing. The bridge was on a public road in the respondent county, and the action was based on the alleged failure of the county to keep the bridge in repair. The defect was found to consist of decayed timbers, not visible from a casual inspection of the bridge. The jury, along with a general verdict in favor of the county, returned a special verdict in which they found that the county officers charged with the maintenance of the bridge had no knowledge of its defective condition prior to the accident, although they had used due diligence in its care and maintenance. Judgment was entered on the verdict in favor of the county, and this appeal is taken therefrom.

Among other assignments of error, it is contended that the court erred in its instruction to the jury on the question of what constituted notice to the county of the defective condition of the bridge; the contention being that the instructions were conflicting and misleading. On this branch of the case the court gave the following: "You are instructed: That, before you can return a verdict in favor of plaintiff upon either of the causes of action set forth in plaintiff's complaint, you must find from a preponderance of the evidence \* \* \* that the authorities of said defendant county had been notified of such condition for a reasonable time prior to the happening of said accident, or that such bridge had been so notoriously unsafe as to amount to constructive notice to the authorities of said county; and by 'reasonable time' is meant such length of time as would have allowed the repair of said bridge, or prevention of its use, by said county. \* \* \* That it is the duty of the county not only to construct its bridges in such a manner as that they shall be safe, but to use ordinary care in keeping them in a safe condition for travelers and all persons passing over said bridge, by removing therefrom timbers which by use have become or may have become de-

cayed and rotten, and thus rendering the bridge unsafe and dangerous. That the law charges the county with the knowledge of the natural tendency of timber to decay, and places upon the county the duty of exercising ordinary care to detect and guard against any decay or rottenness that might exist. That a failure to exercise such care upon the part of the county will render the county liable, although it may have no actual notice of the condition of the bridge. That it is not necessary, in order to charge the county with negligence in suffering the bridge in question to remain out of repair, for the plaintiff to prove actual notice of it, but that such notice may be inferred if the defect in the bridge was of such a character, and had continued for such a length of time, as that the officers of the county charged with the supervision and repair of the bridges of the county might and probably would have discovered if they had used ordinary care in the discharge of their duties. That the county is liable in damages if it negligently suffered rotten and decayed timbers to remain in the bridge in question, thus rendering it unsafe and dangerous." While it may be true that the first part of this charge could have been more happily expressed, we do not think it wrong when taken in connection with the latter portion, which expresses clearly the measure of the county's duty. It is a familiar rule that instructions must be read as a whole, and, if the whole charge fairly states the law of the case, it will not work a reversal, even though disconnected portions of the charge may state the law too broadly. Tested by this rule, these instructions are not erroneous.

The conclusion reached on this branch of the case renders it unnecessary to notice the assignments of error pertaining to the other branches of the case. It being true that the officials of the county, having in charge the care and maintenance of the bridge, had no notice of its defective condition, and had used due diligence in its care and maintenance, there can be no recovery against the county in any event; and it is useless to inquire whether the court committed error on a branch of the case which could only be material had it been found that the county was chargeable with notice of such defect.

The judgment is affirmed.

MOUNT, HADLEY, and ANDERS, JJ., concur.

#### JONES v. MILLER et al.

(Supreme Court of Washington. July 28, 1904.)

#### PERSONAL ACTIONS—SURVIVAL—RETENTION ON QUESTION OF COSTS.

1. Ballinger's Ann. Codes & St. § 5695, construed in connection with the other parts of the act of which it was a part, does not declare

what causes of action shall survive, but who may sue on such as do survive.

2. An action on a cause of action which does not survive the death of plaintiff will not be retained for the determination of the question of costs.

3. The remedy of a son for any cause of action individually for his own suffering caused by the mutilation of his father's body is by action in the court of original jurisdiction, and not by substitution as plaintiff, on death of his mother, in an action commenced by her for her own suffering from such mutilation, and appealed by her to the Supreme Court, where it was pending at her death.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Rebecca Jones against P. B. M. Miller and others. Judgment for defendants. Plaintiff appeals. Dismissed.

G. Ward Kemp, for appellant. Fred H. Peterson, Norwood W. Brockett, Fulton & Faben, and Miller & Ross, for respondents.

FULLERTON, C. J. Rebecca Jones, the appellant above named, brought this action to recover damages for the alleged unlawful mutilation and dishonor of the body of her deceased husband. The mutilation and dishonor complained of consisted of an incision made into the abdominal cavity, sufficient to explore the stomach and other digestive organs, by the respondents Miller and Ross, for the purpose of ascertaining the cause of death. The body was at the time in the custody and charge of the respondents Butterworth & Sons. As the grounds of her injury, the appellant alleged that upon learning the facts, and viewing the "body so cut, mutilated, and dishonored," she "was most grievously distressed, mortified, and humiliated, and received a severe nervous shock, and suffered great mental pain and distress, and has ever since grieved and suffered humiliation and mental pain and distress, and \* \* \* has been damaged in the sum of five thousand dollars." On the trial the appellant was nonsuited at the motion of the respondents on the ground that she failed to prove a sufficient cause for the jury. From the judgment following the order of nonsuit, this appeal was taken.

After the appeal had been perfected, and the cause argued and submitted in this court, Mrs. Jones died, leaving a will, in which she named her eldest son, William J. Jones, as her executor. The executor named duly qualified as such, and thereafter moved this court to be substituted as plaintiff and appellant, with leave to continue the prosecution of the action in his own name. The respondents oppose the motion, and move to dismiss the appeal on the ground that the action is not one that survives to heirs or personal representatives. These motions present the questions to be determined.

At common law an action for an injury to

¶ 2. See Costs, vol. 13, Cent. Dig. § 180.

the person, such as the one in question here, abated on the death of the person injured, and could not thereafter be revived by his heirs or personal representatives. The executor does not seriously question the correctness of this proposition, but contends that the action survives by virtue of section 5695 of the Code (Ballinger's Ann. Codes & St.), which provides: "All other causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. \* \* \*" When we read this section as if it stood alone, and apart from its context, it doubtless bears the construction put upon it; but we held in *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948, that it had no such meaning. There we said that the Legislature, when it enacted this section, was legislating with reference to causes of action which had already survived, and were not attempting to announce what causes of action should survive, and further that, if the contrary contention were correct, there was no limit whatever to causes which could survive the death of the person injured, "for causes of action for assault, slander, and for other purely personal causes would survive, and this would be so wide a departure from the established rule that the Legislature would hardly be deemed to have intended it without plainly expressing such intention." That this is the correct construction of the statute is made clear by reading it in connection with the act of which it formed a part when originally enacted, and, being so, it does not warrant the holding that causes of action such as the one at bar survive to heirs and personal representatives.

It is insisted, however, that the executor is entitled to be substituted, and to a decision on the merits of the controversy, for the purpose of determining who is entitled to costs; but such is not the rule. Where there is no longer a controversy between the parties, or the right of action has ceased to exist, the action will be dismissed by the court, even though it may leave the question of costs undetermined. *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State ex rel. Colner v. Wickersham*, 16 Wash. 161, 47 Pac. 421; *Lynde v. Dibble*, 19 Wash. 328, 53 Pac. 370; *Watson v. Merkle*, 21 Wash. 635, 59 Pac. 484; *State ex rel. Taylor v. Cummings*, 27 Wash. 316, 67 Pac. 565.

The last contention, viz., that the executor has a right to be substituted individually as the son of the person mutilated, and proceed in this action to recover damages for his own sufferings caused by the mutilation, is without merit. If he has any cause of action as an individual, his remedy is to prosecute it first in the court of original jurisdiction. He cannot commence such an action in this court

The respondents are entitled to a dismissal of the action, and the order will go to that effect.

MOUNT, HADLEY, and ANDERS, JJ., concur.

# BARTLETT et ux. v. BRITISH AMERICA ASSUR. CO.

(Supreme Court of Washington. Aug. 3, 1904.)

## FIRE INSURANCE—UNOCCUPIED BUILDING— WAIVER OF PROVISION OF POLICY.

1. The provision of a fire policy that, in the absence of an agreement to the contrary, it shall be void if the building be or become vacant, and so remain for 10 days, is not waived because of the building being vacant when insured, the insurer not knowing of it, or because of the insurer making no inquiry as to the matter.

Appeal from Superior Court, Yakima County; Frank H. Rudkin, Judge.

Action by C. H. Bartlett and wife against the British America Assurance Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Whitson & Parker, for appellants. Graves & Englehart, for respondent.

HADLEY, J. On March 28, 1902, appellants were the owners of a dwelling house in North Yakima, and on said date the respondent issued its policy of insurance upon said house in the sum of \$400, whereby it undertook to insure against loss or damage by fire for a period of three years from said date. The house was unoccupied at the time the policy was issued—a fact unknown to respondent—and it also appears that appellants had not actual knowledge that it was vacant. No representations were made by appellants upon that subject when their application was made or when the policy was issued, and no information thereon seems to have been asked by respondent. The policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." No agreement was made for an extension of time for the house to remain vacant. It remained unoccupied until the 5th day of May, 1902, when it was destroyed by fire. Demand for payment was made by appellants, and refused by respondent. This suit was brought to recover the amount mentioned in the policy. Respondent interposed the defense that the house had remained vacant for a period of more than 10 days without its permission, in violation of the terms of the above-quoted provision in the policy, and it

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1028, 1029.



brought into court for the use of appellants the amount of premium paid. The cause was tried by the court without a jury, the jury being waived. The trial resulted in a judgment dismissing the action. The plaintiffs have appealed.

The only question to be examined is whether appellants are precluded from recovery by reason of the said provision in the policy. It is the position of appellants that, inasmuch as the house was vacant when the policy was issued, respondent therefore waived that provision in the contract. It would seem that respondent should not be charged with having waived the question of occupancy, when it had not even knowledge that the building was unoccupied. But appellants urge that, since no information was asked upon that subject, and no representations were made, said requirement was therefore waived. We think, under the terms of the policy, it was wholly immaterial to respondent whether the building was vacant or occupied at the time the policy was issued. In either case it undertook to bind itself for a period of 10 days. The contract provided that the policy should become void if the building should then be or should thereafter become vacant, and should so remain for 10 days. It will be observed that the policy did not require that the property should be then occupied, but rather that if it was then unoccupied, and remained so for 10 days, without respondent's consent, it should become void. The contract, by its terms, was undoubtedly good against loss which might have occurred within 10 days, but not for loss occurring after that time, unless respondent had consented to an extension of the period of vacancy. The said provision of the contract seems to be plain and unambiguous, and the facts bring this case squarely within it, thus rendering the policy void. The following authorities are directly in point: *England v. Westchester Fire Ins. Co.* (Wis.) 51 N. W. 954, 29 Am. St. Rep. 917; *Connecticut Fire Ins. Co. v. Tilley* (Va.) 14 S. E. 851, 29 Am. St. Rep. 770; *Thomas v. Hartford Fire Ins. Co.* (Ky.) 53 S. W. 297. Appellants cite authorities to the point that an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the provisions of the policy, if, at the time it was issued, such violation was known to the company or its agent. Such authorities are not pertinent here, for the reason that the insurance company in this case does not seek to claim that its policy was for any reason void at the time it was issued. It admits that the policy was binding at the beginning, and remained so until rendered void by appellants' failure to comply with a plain and mandatory condition. Moreover, the violation of the condition was not known to respondent when it issued the policy, and could not have been known, since it could

not foresee that appellants would permit the property to remain vacant for more than 10 days. Appellants insist that, by respondents' failure to inquire as to the vacancy, it occupies the same position in law as if it had inquired and ascertained the truth. It matters not to the respondent, however, what was the fact upon that subject. It was willing to insure the property, even though vacant, for a period of 10 days, but for no longer time without its permission. It so provided in its contract. Appellants are chargeable with knowledge of the provision, and also that their property was vacant. They were therefore bound to know that the policy would become void after 10 days if the property still remained vacant.

We think that, under the contract and attending facts, the judgment was right, and it is affirmed.

MOUNT and ANDERS, JJ., concur.

#### MONROE MILL CO. v. MENZEL.

(Supreme Court of Washington. July 26, 1904.)

NAVIGABLE WATERS—FLOATING SHINGLES—DETENTION OF WATER—DAMS—BANKS OF STREAM—RIGHT TO USE—ACTIONS—PLEADING—ESTOPPEL.

1. Where, in an action to restrain obstruction of a stream, the complaint alleged that the stream was navigable for the purpose of floating shingle bolts, a subsequent allegation that plaintiff at great expense had constructed a dam across the foot of a lake which was the source of the stream for the purpose of storing water, thereby furnishing sufficient water in the stream to conveniently and rapidly float shingle bolts and other timber products down the same to plaintiff's mill, did not render the complaint insufficient, as alleging that the stream was not navigable in its natural state.

2. That a lower riparian proprietor made no objection to the owner of riparian land above him clearing the bed of the stream of obstructions, but assisted therein, and subsequently, during a period of two years, used the water which the upper riparian proprietor stored by means of a dam for the floating of shingle bolts, did not estop such lower proprietor from subsequently objecting to the upper riparian proprietor's continued interruption of the natural flow of the water by the dam.

3. Where, after the removal of artificial obstructions from a stream, it was capable of navigation by shingle bolts after heavy rains and during freshets, which occurred with periodic regularity in the spring and fall of each year, without the aid of water artificially stored in a lake, a finding that the stream was navigable was proper.

4. Since a riparian proprietor is entitled to have the stream flow through his property in its natural condition, he is entitled to restrain an upper riparian proprietor from maintaining a dam across the foot of a lake which was the source of the stream for the storage of water, and the subsequent release thereof in order to facilitate the navigability of the stream.

5. One using an unmeandered stream, the bed of which belonged to private landowners, for the purpose of floating shingle bolts, was con-

¶ 3. See *Navigable Waters*, vol. 37, Cent. Dig. § 9.

fined to the use of the bed of the stream, and had no right to trespass on the banks or abutting lands for the purpose of breaking jams, etc.

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Action by the Monroe Mill Company against George Menzel. From a judgment in favor of plaintiff, defendant appeals. Modified.

Coleman & Fogarty, for appellant. Cooley & Horan, for respondent.

**HADLEY, J.** The respondent brought this action against appellant to procure an injunction against an alleged threatened interference with the use of a stream for the floating of shingle bolts. The stream is known as the "West Fork of Wood's Creek." It commences at the foot of Lake Roesiger, in Snohomish county, and flows therefrom in a southwesterly direction, passing through the lands of both appellant and respondent. Respondent owns an extensive body of timber lands adjacent to the lake and stream, and owns the lands upon both sides of the stream at its source. Appellant's lands lie below those of respondent. The respondent has constructed, and has heretofore operated, a dam at the lower end of the lake, for the purpose of storing the waters within the lake to be used in flooding the stream in order to accelerate the movement of shingle bolts. The complaint charges that appellant threatens by obstruction to prevent respondent from driving its bolts through the stream where it crosses appellant's land. It is alleged that the stream is navigable or floatable for shingle bolts, and that respondent has now about 8,000 cords of bolts stored in the lake ready for movement, which it will be unable to move unless appellant is restrained. The answer denies that the stream is navigable, and alleges that by reason of the storing of the water in the lake the flow of the stream is at times entirely stopped, and that at other times respondent suddenly and without warning releases the stored water, and that it runs down and overflows the lands of appellant adjacent to the stream, washes away the soil, and destroys appellant's roads and landings constructed for the movement of his own shingle bolts; that appellant is engaged in removing the cedar timber from his own land, and that by reason of respondent's obstruction of the natural flow of the water it is impossible for him to run his shingle bolts down said stream. The answer prays for damages, and for an injunction perpetually restraining respondent from interfering with the natural flow of the water in the creek and from flooding appellant's lands. The cause was tried before the court without a jury. Findings of facts and conclusions of law were entered, and the decree provides that appellant shall be perpetually enjoined from in any manner obstructing or interfering with the navigation

of said stream or the driving of respondent's shingle bolts across the lands of appellant. It is further provided that appellant shall be restrained from in any manner interfering with or preventing respondent's employes from going upon the banks of said stream for the purpose only of breaking jams of bolts which may occur, so long as the going upon said banks does no injury to appellant or his land. This appeal is from that decree.

The first alleged error is that the court permitted any testimony to be introduced in support of the complaint. This contention is based upon the theory that the complaint shows that the stream in question is not navigable or floatable for shingle bolts in its natural condition. It is expressly averred that the stream is navigable for said purpose, but it is argued that other allegations have the effect to negative such fact. The following averment is pointed out as destroying the force of the positive allegation as to navigability: "That it [respondent] has at great expense constructed a dam across the foot of Lake Roesiger for the purpose of storing water, thereby furnishing a sufficient supply of water in the aforesaid stream to conveniently and rapidly float shingle bolts and other timber products down the same to the mill of this plaintiff." We think the conclusion which appellant draws does not necessarily follow when the two averments are taken together. The quoted allegation amounts to no more than the statement that respondent's own convenience in the moving of its shingle bolts is better served by the storing of the water and the operation of the dam. But it does not say that the stream is not floatable in its natural state. The court did not err in overruling the objection to the introduction of any testimony upon the above-mentioned ground.

A further point raised under the objection to the introduction of any testimony is that an attempt is made in the complaint to plead an estoppel against appellant, but that the allegations are insufficient to charge an estoppel. The complaint avers that respondent at its own expense, cleared the said stream of obstructions across appellant's land in order to facilitate the movement of shingle bolts; that appellant acquiesced therein, actually assisted in the clearing out of such obstructions, thereafter used the benefits accruing therefrom, and also the flow of water as furnished by the dam and improvements constructed by respondent at the lake. We agree with appellant's contention that the facts stated are not sufficient to estop him from claiming now that respondent is interfering with the natural flow of the water. The mere fact that he made no objection to clearing the bed of the stream from obstructions, or that he may even have assisted therein, does not necessarily establish that he consented for the floatage of the stream to be conducted in any other manner than as provided by the natural flow of the water.

The further fact that he may have used the water as it was sent down the stream by the occasional opening of the dam during a period of about two years does not establish his acquiescence in the continued interruption of the natural flow of the water, and amounts to no more than a mere license for a temporary interruption, revocable at will. Such facts do not contain the essential elements of estoppel. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Hathaway v. Yakima Water, Light, etc., Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. Rep. 874. It is true, therefore, that appellant is not estopped to assert that the complaint shows that respondent, through the operation of its dam, is interfering with the natural flow of the water. But, in view of the allegation that the stream is navigable, it is also true that appellant has no right to interfere with its navigation by respondent as it is alleged he threatens to do; and it was not error, under the averments of the complaint, to admit evidence upon that subject.

The court found that with the removal of the artificial obstructions the stream is capable of navigation by shingle bolts after heavy rains and during freshets, which occur with periodic regularity in the spring and fall of each year, and that it is so navigable without the storage of the water in the lake, and without the aid of said dam. It is assigned that the court erred in so finding. We think not, under the evidence. There was sufficient evidence to sustain the finding that the stream in its natural state can be practicably used for the floatage of shingle bolts to market at the times and seasons specified in the court's findings. Such makes it a navigable stream within the holding of this court in *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199. In that case the trial court found Elochoman creek to be an unmeandered stream, and that it can, during annually recurring freshets, be used profitably for the floating of saw logs to market. This court held it to be navigable, and a highway for that purpose. Wood's creek is much smaller than Elochoman creek, is also unmeandered, and is doubtless non-navigable for saw logs. But the evidence shows that it has sufficient capacity, in its natural state, during annually recurring periods, to float shingle bolts; and, while a single shingle bolt contains but a small amount of timber compared with a saw log, yet in the aggregate timber in that form in this locality is relatively of equal commercial value with saw logs, and its carriage to market is perhaps as important to the timber industry of this state as that of saw logs. Elochoman creek was declared to be navigable for the reason that it furnishes a natural highway for the product of the great logging industry in this state, and Wood's creek should also be held to be navigable because it furnishes a similar highway for the product

of another branch of the same industry. Elochoman creek was held to be a navigable stream because it is navigable in fact for the floatage of logs or timber to market. Its navigable character is restricted to a certain commercial and industrial purpose, and does not comprehend navigability in the broad sense as applied in America to the great rivers and water highways. The rule that navigability in fact for commercial purposes makes a water course a navigable one was also declared in *Dawson v. McMillan* (Wash.) 75 Pac. 807. The reasons leading to the holding in this state, and others where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities without great expense. Nature has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent landowner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the landowner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded. Under the former decisions of this court, and for the further reasons herein assigned, the court did not err in holding that Wood's creek is a navigable stream for the floatage of shingle bolts. The provision in the decree properly followed, whereby appellant is restrained from interfering with the running of respondent's shingle bolts along said stream where it crosses appellant's lands.

It being established that the stream is a navigable one, and that appellant shall not interfere with respondent's navigation of it, we must next inquire as to the methods and limitations of that navigation. The court refused to grant appellant an injunction preventing respondent from continuing the storage of the water in Lake Roesiger and the periodic flushing of the stream. We think this was error. Under well-established principles appellant is entitled to the natural flow of the water across his land. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.*, supra; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. It is said

that, although language used in the above cases declares the general principle, yet that there was an actual threatened diversion of a substantial portion of the water in each case, while in the case at bar there is no diversion, but simply a detention, followed by a restoration of all the water before it reaches appellant's lands. This detention, however, amounts practically to a total detention for irregular periods; and at times unknown to appellant, without warning, it is released in such quantities as to greatly increase the natural flow, and, according to testimony in the record, actually causes an overflow of his lands. The general principle governing the fundamental rights of all riparian proprietors is well stated as follows: "Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level." Gould on Waters (3d Ed.) § 204. That such a detention of water as is shown in this case is prejudicial to the appellant's rights, appears from the following authority: "It is an unreasonable detention of the water to gather it into reservoirs for future use in a dry season, or for the purpose of obtaining a greater supply than the stream affords by its natural flow in ordinary stages, or in order that, by letting it off occasionally, a flood may be obtained for the purpose of floating logs. \* \* \* Cooley on Torts (2d Ed.) p. 694. The maintenance and operation of the dam prevents appellant from navigating the stream himself at times when he may wish to do so, thereby obstructing navigation; and unless he consents to its maintenance the dam is to him a nuisance, which he is entitled to have enjoined. *Carl v. West Aberdeen, etc., Co.*, 13 Wash. 616, 43 Pac. 890; *Sultan W. & P. Co. v. Weyerhaeuser T. Co.*, 31 Wash. 558, 72 Pac. 114. We therefore think appellant was entitled to an injunction preventing respondent from maintaining and operating the dam, and requiring it to permit the water to flow across appellant's lands in its natural and regular way, and respondent must conduct its own navigation of the stream over such natural flow.

Another provision of the decree with reference to the methods attending respondent's navigation also calls for examination. It will be remembered that by its terms the decree prohibits appellant from interfering with respondent's employes in the way of

preventing them from going upon the banks of the stream upon appellant's lands for the purpose of breaking jams of shingle bolts, so long as the going upon the banks does no injury to appellant or his lands. We think this provision of the decree is also erroneous. We believe we went as far as we should go in the interest of public convenience when we held in *Watkins v. Dorris*, supra, that private landowners hold the beds of unmeandered streams subject to the easement of driving timber products over the land. But we tried to make it clear in that case that the timber driver must confine himself and his operations to the highway itself—the bed of the stream—until the landowner consents to the use of the banks, or until the right to their use has been acquired in a lawful way. If more emphatic statement of that rule is necessary, we now wish to be understood as making it with all needed emphasis. The fundamental principle of right in the landowner to control his own premises outside of the bed of the stream must not be violated. To leave parties under such terms as this decree provides would in many instances invite trouble and litigation. Each one would assume to be his own judge as to whether any injury is done to the land. What might appear to the landowner as injury might not so appear to the timber driver, and thus a controversy would at once arise, probably requiring repeated litigation to settle. The driver must know from the beginning that he must in no event go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided. Enough controversies will arise about the manner of operating in the bed of the stream to the possible damage of the adjacent land without adding thereto those arising from semilegalized trespass upon private premises, which would be the case if it were judicially held that one may operate upon private lands against the owner's consent and without compensation.

The court found that respondent's acts have produced no actual injury or damage to appellant or his lands. Appellant contends that it was error to so find. The evidence conflicts upon this subject, and we shall not disturb the finding. No judgment for damages will therefore be directed.

The decree should be modified in accordance with what has been herein said. The cause is remanded, with instructions to the trial court to enter a decree conformable to this opinion. The appellant shall recover the costs of the appeal, and neither party shall recover costs in the lower court.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

144 Cal. 140

SCOTT v. SUPERIOR SUNSET OIL CO.  
(L. A. 1,247.)

(Supreme Court of California. July 15, 1904.)

CORPORATIONS—EMPLOYMENT OF PHYSICIAN—  
PROOF—SUFFICIENCY—EVIDENCE—  
ADMISSIBILITY.

1. The separate assent of a majority of the board of directors of a corporation to the employment of a physician to attend an injured employé of the corporation is sufficient to show an employment by the corporation, where a majority of the directors, including the secretary and treasurer and vice president, actively participated in employing the plaintiff, and counseled with him concerning the care and treatment of the patient; all being avowedly done on behalf of the corporation, though the employment was not made or ratified by the action of the board at a regular meeting.

2. In an action by a physician against a corporation to recover for his services in attending an injured employé of the corporation, the admission of evidence of the knowledge of the directors of the employment of plaintiff by the defendant's secretary, acting for defendant when coupled with evidence of the express assent to the employment by a majority of the board, was proper.

Commissioners' Decision. Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. P. Scott against the Superior Sunset Oil Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

E. J. Emmons, for appellant. Anderson & Anderson, for respondent.

GRAY, C. This is an action for services rendered as a physician and surgeon. The trial was had without a jury, and plaintiff had judgment for \$1,200. The defendant appeals from the judgment and from an order denying it a new trial.

The services for which compensation is sought consisted of several surgical operations and some 61 days' attendance upon an employé of defendant named Cornell. It appears by the admissions in the pleadings and from the evidence that Cornell was employed to go upon the oil lands of defendant, and hold possession thereof, and protect the same against the claims of jumpers; and that while engaged in this hazardous employment he received the injuries which the plaintiff was called to treat. In this connection the complaint alleges: "That on the said 19th day of April, 1901, while said Cornell and said Walker were so engaged in holding possession of and protecting the said property of defendant, they were, and each of them was, shot down and painfully and dangerously wounded by unknown parties." There is no attempt to deny the above-quoted allegation. There is some attempt to deny the allegations of the complaint as to the purpose for which Cornell was employed, but, the complaint being verified, and these denials being in the conjunctive as to sev-

eral distinct facts, they must be regarded as evasive, and wholly inadequate as specific denials; and the facts thus attempted to be denied must be taken as admitted. The injuries of Cornell consisted of a gunshot through the knee and another through the lung, and were of such dangerous character that had he not received immediate medical assistance, he could not have survived the same. At the date of the injuries J. W. Crosland, a member of defendant's board of directors, was the secretary, treasurer, and acting manager of defendant, and as such he entered into a contract with plaintiff whereby plaintiff was to render the necessary medical aid to the defendant's said employé during such time as he should remain ill from his injuries; and said Crosland agreed on behalf of defendant that it would pay the plaintiff for said services and for such medicine as he should furnish. It was in pursuance of this agreement that the services were performed. The court finds "that the defendant ratified the act of its said officer in entering into said contract on its behalf with plaintiff." It is against this finding, as being without support in the evidence, that appellant's principal attack is directed.

We think the evidence amply sustains the finding complained of. The evidence shows that nurses and other physicians were employed by said secretary to assist plaintiff, and also hotel accommodations for the patient were procured by said secretary. That the plaintiff was performing the services at the request of the secretary of defendant, and looking to defendant for his pay, was known to two of the defendant's directors besides the secretary; and, though the directors had several meetings in the near vicinity during the course of the services, no action was taken to repudiate the acts of the secretary, but, on the contrary, one other director—Mr. Claffin—visited plaintiff, and told him not to economize too closely with the patient, but to keep things as cheap as he could consistent with proper treatment, because, "he said, the Superior Sunset Company was not a rich company, and they didn't want to be out any more money than they could help." A nurse struck, and was paid off by defendant, and another nurse employed. The expenses of the patient at the hotel were also met by defendant. A majority of the defendant's board of directors, including both Crosland, who was its secretary and treasurer, and the vice president, actively participated in employing plaintiff and counseling with him concerning the care and treatment of the patient. And all this was done avowedly on behalf of defendant. This was sufficient to charge the corporation. It was not necessary that the employment should be made or ratified by action of the board at a regular meeting. The separate assent of a ma-

majority of the board was all that ought to be required under the circumstances presented by the evidence. *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Streeten v. Robinson*, 102 Cal. 542, 38 Pac. 946; *Fraser v. San Francisco Bridge Company*, 103 Cal. 79, 36 Pac. 1037.

There was no error in admitting evidence of the knowledge of the directors in regard to the employment of plaintiff by its secretary acting for defendant. Such evidence was clearly proper when coupled with evidence of the express assent to the employment by a majority of the board. The question considered in *Deane v. Paving Co.*, 109 Cal. 433, 42 Pac. 443, related to an instruction given to the jury and has no application to the matter here considered.

We see no error in any action of the court. The findings are supported by the evidence; and the judgment is the legal conclusion from the findings.

We advise that the judgment and order appealed from be affirmed.

We concur: SMITH, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

143 Cal. 689

PEOPLE v. STOLL. (Cr. 1,044.)\*

(Supreme Court of California. June 25, 1904.)

CRIMINAL LAW—DIRECTING AND ADVISING ACQUITTAL—FORMER JEOPARDY.

1. It is error for the court in a criminal case to direct the jury to acquit; Pen. Code, § 1118, merely authorizing the court to advise the jury to acquit, and providing that the jury is not bound by the advice.

2. The opening statement is not evidence, within Pen. Code, § 1118, providing that, "at any time after the evidence on either side is closed," the court may advise the jury to acquit.

3. Even if a verdict rendered on the void direction of the court may be pleaded as former jeopardy, such plea is a personal privilege, which may or may not be availed of.

Angellotti and Van Dyke, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Benjamin F. Stoll was indicted for murder. From an order directing the jury to return a verdict in favor of defendant, the people appeal. Reversed.

U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People. J. A. Hosmer and Hiram Johnson, for respondent.

LORIGAN, J. The defendant was charged with murder, pleaded "Not guilty," and

thereafter, the case coming on for trial, a jury was duly impaneled and sworn to try the cause. Thereupon the district attorney made an opening statement to the jury of what the people expected to prove, at the conclusion of which the attorney for the defendant moved the court, upon such opening statement, to instruct the jury to acquit the defendant. After some discussion between counsel and the court, the court instructed the jury as follows: "Gentlemen, on the admitted facts in this case, as stated to you by the district attorney, and admitted by the counsel for the defendant, you have heard the discussion that has taken place here by counsel and the court; and I direct you to find a verdict for the defendant, for the reason, in my opinion, under the facts of the case as admitted, the homicide admitted to have taken place was justifiable." In conformity with this instruction, the jury returned a verdict of acquittal, and the people, having excepted to the order of the court directing such verdict, take this appeal.

The sole question presented is whether the court had authority to give such a direction to the jury. We are satisfied it had not, and that the order to that effect was not only erroneous, but void. It was erroneous because under no circumstances is the court authorized in a criminal case to direct a jury to return any particular verdict. It can simply advise them to do so—an advice which they are not bound to follow. It is declared by section 1118 of the Penal Code that "if, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice." The law as thus declared is explicit, and the court must follow the statute. It has no power to summarily direct the jury to acquit, and when, in the case at bar, the court assumed to depart from the statute, and directed the jury to acquit the defendant, instead of advising them of this power, it committed an error. *People v. Horn*, 70 Cal. 18, 11 Pac. 470; *People v. Daniels*, 105 Cal. 266, 38 Pac. 720; *People v. Roberts*, 114 Cal. 68, 45 Pac. 1016; *People v. Terrell*, 132 Cal. 497, 64 Pac. 894.

We are not so much concerned, however, with the matter of mere error committed by the court. If that tribunal had jurisdiction to instruct the jury upon the opening statement, its failure to do so in the proper manner would not be sufficient warrant for a reversal. That would be of no advantage to the prosecution, because, the defendant having been put on trial under a valid indictment before a competent court and jury, was once in jeopardy, and, if the case was reversed for error alone, he could, upon a retrial, effectually interpose that plea. Under such circumstances, as the interests of justice could in no manner be subserved by

\*Rehearing denied July 21, 1904.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1727.

a reversal, this court would for that reason affirm the judgment. *People v. Daniels* and *People v. Roberts*, supra. But the direction to acquit was not erroneous only. It was entirely beyond the power or authority of the court to make it, and was void. In discussing this feature of the case, we do not consider at all the merits of the opening statement—whether it justified the conclusion which the court formed from it or not. That is a matter foreign to the inquiry. The question is a broader one—not whether the court was justified, upon a particular opening statement, in instructing a jury to find for a defendant, but whether the court, upon such statement, is ever justified in so instructing them. Counsel upon both sides seem to have given the subject careful examination, and we have likewise given it our attention, and are constrained to agree with the opinion expressed by the lower court in discussing the matter preliminary to instructing the jury to acquit—that it is “rather a novel proceeding.”

While both at common law and in this country the rules of criminal procedure have gone through a varied stage of transition—the tendency of the present age being toward statutory and simpler rules—still, covering this long period, during which it might be supposed every possible action of a court in the conduct of a criminal trial, authorized or unauthorized, would pass the scrutiny of some appellate court, no case is called to our attention where the lower court has ever instructed a jury to acquit upon an opening statement, and where such action has either been sustained or disapproved by an appellate tribunal. This may be accounted for by the fact that verdicts of acquittal returned under direction of the court in criminal cases are usually conclusive, and the prosecution thereby foreclosed from any further action concerning them, unless a right of appeal is accorded, as in this state. But if for this reason the Reports are silent on the point, no such reason should apply to the numerous text-writers on criminal law, and yet none of these mention or sanction such a practice. They discuss all the varied rules of criminal procedure, but nowhere suggest or even intimate the existence of any such power in the court as was exercised here. Neither has our attention been called to the legislation of any state which has conferred it. This is all in the nature of a negative showing against the existence of such a power, and is particularly mentioned as indicating that a court has no implied power to instruct a jury to acquit on an opening statement, and that no state has considered it prudent to expressly authorize it do so. If, then, any such power exists in a superior court in this state, it must be by express statutory enactment, and must be found somewhere in the Penal Code. But the only law upon the subject is that found in section 1118 of the Penal Code, to which we have

heretofore referred—that “if at any time, after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice.” This was the section under which the court acted. Now, the only ground upon which this action could be sustained under this section would be by holding that the opening statement was “evidence,” and hence available to the court upon which to predicate its instruction. But an opening statement is never evidence of any character or of anything. It is an *ex parte* statement, the right to make which is available to both the prosecution and the defense. It serves, and always has served, but one purpose in criminal procedure, which is, when made on the part of the people, to give the jury a general outline of the case which the prosecution claims it will prove, and, when made by the defense, a general outline of the facts upon which a verdict of acquittal will be asked. This is the only purpose it serves, and it is entirely discretionary with either side whether it will make such a statement at all; and, when it is made, it is equally a matter of discretion to what extent the facts shall be stated—whether generally or in detail. And it never has been held, to our knowledge, that a district attorney must make his statement at the peril of having the court take it as the basis of an instruction to the jury advising an acquittal, if, in its judgment, the statement so warrants. If this were the rule, as it is optional with him whether he will make such a statement or not, it is hardly probable that he would be inclined to invite the danger. However, we are satisfied that in no event can the statement be considered as evidence. It cannot be so considered by the jury. As to them, its sole purpose is to present the case generally, so that they may more readily understand it. As to the prosecution or defense, the statement of either is not binding as an admission of any fact, nor available against either, nor is it a limitation upon the right of either party to introduce evidence of facts not referred to in the opening statement. While it is requisite that, when he elects to make an opening statement, the facts shall be fairly presented by counsel, and that there shall be no statement of facts which he cannot or will not be permitted to prove, still the statement binds no one by its recitals, and is conclusive on neither side in the matter of the production of evidence. No court would ever instruct the jury that the opening statement of counsel was to be considered by them as part of the evidence in the case. So it will be perceived, from the nature of the office which it is intended to perform, that such a statement cannot be deemed evidence, and no judicial designation of it as such, or attempt to make it serve that purpose, can change its nature. And it was never contemplated by section 1118 that the evi-

dence, at the close of which the court might advise the jury to acquit, would be the opening statement of the district attorney. The evidence which is meant is the evidence upon which cases are usually, and, it may be said, exclusively, tried; that evidence which the jury receive from the testimony of witnesses duly produced before them, whom they can see and hear, and on whose testimony they can rely; the best evidence which the nature of the case will permit; evidence which presents the case fully on its merits, which they can weigh, and from which they may draw, as they have a right to do, reasonable inferences and warranted deductions; evidence received from witnesses whose credibility they can consider, and from all of which they can fairly determine whether they will exercise the discretion which the section vests in them, of following the advice of the court, or not, as their best judgment shall determine, and as the law permits. It means that the jury shall have presented to them the best and most satisfactory evidence which the law can furnish, both in its nature and as to the method of its production. No *ex parte* statement of a district attorney can fill this measure. As it is always general in its statement of facts, it lacks the important element of a detailed statement of them which direct and cross-examination effectually brings out; and there is, in addition, always an absence of those most important factors in all jury trials—the presence of the witnesses, the observation the jury may make of them, the disclosure of their relation to the case, and other matters of equal moment which are valuable aids towards an intelligent verdict. An oral statement presents none of these matters. While the law permits the court to advise the jury to acquit, still it must be borne in mind that the court is in no case empowered to determine the fact of the guilt or innocence of the defendant, but that this is exclusively the province of the jury; and, as it is their judgment which must ultimately prevail, not the opinion of the court, the law contemplates that the jury shall have the best opportunity which the nature of the case can afford to determine that fact, and this is undoubtedly only attained by presenting the case of the prosecution to them on its merits. This is an important consideration, because, while the court may advise the jury, they are not bound by the advice, and, as the law gives them a discretion as to whether they shall follow the advice of the court or not, so it intends they shall be supplied with the best and most satisfactory evidence upon which that discretion can be exercised. As stated in *People v. Daniels*, 105 Cal. 266, 38 Pac. 720, in considering this section 1118 of the Penal Code: "The court was only authorized in any case to 'advise' the jury to acquit. \* \* \* The obvious effect of this provision of the Penal Code is to take from the court the power to determine, as a

matter of law, at the close of the evidence for the prosecution, that the evidence is insufficient to justify a conviction."

In this connection it may be observed, too, relative to the opening statement, that it is not at all uncommon, while a trial is in progress, either by reason of the congregation of persons interested in the case at the trial, on behalf of the prosecution, and their conferences with the district attorney, or in the examination of some witness, that the existence of important and material evidence is disclosed for the first time, and subsequently produced before the jury, so that, when the case is closed for the prosecution under all the evidence which it has produced, it will be often found that, while the court might be inclined, if it had power, to advise an acquittal in the first instance upon the opening statement, yet the actual presentation of the evidence to the jury, supplying all possible defects, would now make such an instruction unwarranted. As the actual production of evidence is thus calculated to bring out the full facts and disclose the truth, it must have been that kind of evidence upon which the law declared the court might act, rather than upon an oral statement, which, while it may not conceal or suppress the truth and justice of the case, has not the same tendency as the testimony of witnesses to disclose them.

Under the Constitution of this state, the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon the fact of guilt or innocence. The section of the Penal Code under discussion does not deprive the people of that right. It simply permits the court, after the evidence is before them, to advise an acquittal upon it. This is a grant of extreme power to the court, and we cannot believe that it was the intention of the Legislature to permit it to be called into exercise, except after the submission to the jury of all the evidence available to the prosecution, produced in the usual method characteristic of trials, and under the ordinary rules of criminal procedure, by the testimony of witnesses and the presentation of the case upon its merits, and that the action of the court in instructing the jury to acquit upon the opening statement of the prosecution was beyond the power of the court, and entirely unauthorized and void.

Counsel for respondent, treating the direction of the court to acquit as, at most, merely erroneous, devotes his brief almost exclusively to the proposition that the order should be affirmed because the defendant has been once in jeopardy, and a reversal here would effect no substantial purpose. We have discussed this matter of jeopardy to some extent earlier in this opinion. We have referred to a few of the cases on the point, and there are others in the same line. In all these cases, however, there was, in fact, a trial, and testimony presented to the



jury. Upon the submission of that testimony, and the close of the case for the people, the court erroneously instructed the jury to acquit. But this was error committed in the exercise of its jurisdiction. In the case at bar, however, the direction of the court was not only erroneous, but it was absolutely void, which, together with the fact that the void order was made at defendant's application, may put a different phase on the claim of jeopardy now insisted on. We do not think there is any pressing necessity for a disposition of that point now. The right to interpose a plea of once in jeopardy is a personal privilege, of which a defendant may or may not avail himself. Upon this case being called for trial again, the defendant may not interpose it. He may be satisfied to rely upon a trial on the merits. Be that as it may, it will be sufficient time to dispose of it when he has interposed it in the lower court, and any action which is had upon it there comes before us for review. The proposition which we now wish particularly to declare is that a court can never advise a jury upon the opening statement of the prosecution to acquit a defendant; that this can only be done at the close of the case of the prosecution, upon evidence actually submitted to the jury in the usual and recognized method.

As to the order directing the jury to acquit, it is reversed, and the cause remanded to the lower court for trial.

We concur: **McFARLAND, J.; HENSHAW, J.; SHAW, J.**

**BEATTY, C. J.** I concur in the views of Justice **LORIGAN**, except that, in my opinion, this appeal cannot be disposed of, either by affirmance or reversal of the order of the superior court, without a determination of the question, whether the verdict of acquittal rendered in obedience to that order constitutes a bar to any further prosecution of the defendant. For, if he is forever freed from further prosecution upon the charge contained in this information, I think we are scarcely justified in disregarding our own precedents in similar cases (*People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Terrill*, 132 Cal. 497, 64 Pac. 894), in each of which the order directing an acquittal, though conceded to be erroneous, was nevertheless affirmed solely because the acquittal was a bar to any further prosecution. The fact that there could be no further prosecution of the defendants in those cases would, I think, have better sustained orders dismissing the appeals upon the ground that the proceeding was vain and nugatory, than judgments of affirmance; but, since the dismissal of an appeal operates as an affirmance, this criticism applies, not to the substance, but merely to the form, of those judgments, which clearly commit this court

to the doctrine that a judgment or an order in a criminal case will not be reversed on appeal by the people when it appears from the record that the prosecution of the defendant is necessarily at an end.

The court having in its opinion expressly avoided a decision of the question whether the verdict and judgment herein are available in support of a plea of former jeopardy, I deem it improper to express an opinion upon the point thus reserved for further consideration, and content myself with the expression of my concurrence in the view that the order appealed from was unwarranted.

**ANGELLOTTI, J.** I dissent. Conceding, as I do, that the trial court erred in "directing" the jury to acquit, upon the opening statement of the district attorney, and also conceding that a trial court should never "advise" a jury to acquit until the evidence on one side is closed, I cannot reach the conclusion that the verdict rendered in favor of the defendant is an absolute nullity, and, unless this conclusion can be reached, the order should not, under the authorities, be disturbed. The California cases cited in the prevailing opinion constitute ample authority for the proposition that where a trial court, acting under the provisions of section 1118, Pen. Code, erroneously directs the jury to acquit, and the jury does acquit, the appellate court will not reverse the order upon the appeal of the people, for the reason that, under the provisions of our Constitution, the defendant cannot again be put upon trial for the offense. It was said in *People v. Horn*, 70 Cal. 17, 11 Pac. 470: "If a party is once placed upon his trial before a competent court and jury upon a valid indictment, the jeopardy attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity or by his consent, or, in case a verdict is rendered, if it be set aside at his instance." I do not understand it to be disputed that this correctly states the rule. Our Constitution provides that "No person shall be twice put in jeopardy for the same offense." Section 13, art. 1. In *People v. Horn*, supra, *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016, and *People v. Terrill*, 132 Cal. 497, 64 Pac. 894, the trial court erroneously directed the jury to acquit, and the order in each case was affirmed upon the ground that jeopardy had attached, and that the defendant was thereby forever freed from a second trial for the particular offense charged. It may be true that the order directing was ineffectual, in the sense that the jury could not have been compelled thereunder to render a verdict of acquittal, and that its only effectual office was to advise the jury to acquit. But the jury did render its verdict of acquittal, and that verdict, in favor of defendant, so long as it is not set aside at his instance, by whatsoever errors of the court it may have been induced, and regardless of

defendant's consent to or application for its rendition, constitutes an effectual bar to his further prosecution. "If, through misdirection of the judge in matter of law, \* \* \* a verdict is improperly rendered, it can never afterwards, on application of the prosecution, in any form of proceeding, be set aside." *People v. Horn*, supra. I cannot see that the fact that the order directing an acquittal was made prior to the introduction of evidence materially differentiates this case from those cited.

VAN DYKE, J. I dissent, and concur generally in the opinion of Mr. Justice ANGELL-LOTTI. It appearing from the record that all the material facts in support of the prosecution have been submitted to the court below, and the judge being of the opinion that such facts did not justify a conviction, it would have been proper to have advised the jury to acquit. Instead, however, of doing this, the jury were instructed to acquit. Conceding this to be error, as it undoubtedly was, it is useless, nevertheless, to remand the case for another trial, for, under the constitutional provision of twice in jeopardy, as construed in numerous cases in this and other courts, the verdict already rendered by the jury is a bar to another trial. See *People v. Webb*, 38 Cal. 467, 478.

144 Cal. 113

ELLIS et al. v. WORKMAN, City Treasurer,  
et al. (L. A. 1,232.)

(Supreme Court of California. July 11, 1904.)

WRIT OF MANDATE—INTEREST OF PLAINTIFF.

1. Under Code Civ. Proc. § 1086, authorizing a writ of mandate to issue only "on application of the party beneficially interested," where plaintiffs' land was sold by a city treasurer for failure to pay installments of a street improvement bond constituting a lien thereon for the amount of the bond and interest, and it is not claimed the sale was illegal, the writ will not issue to the treasurer to cancel the bond, as it does not affect plaintiffs' right to redeem, and cannot injure them unless and till they redeem.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Petition by Frank Ellis and others against W. H. Workman, treasurer of the city of Los Angeles, and another, for writ of mandate. Writ denied, and plaintiffs appeal. Affirmed.

Goodrich & McCutchen, for appellants.  
Lynn Helm, for respondents.

GRAY, C. This is an appeal from an order and judgment of the court denying plaintiffs' petition for a writ of mandate. The petition alleges, in substance, that certain real estate belonging to plaintiffs was sold by the defendant treasurer of the city of Los Angeles for failure to pay the installments

of a certain street improvement bond constituting a lien thereon to the defendant Donegan for \$4,435.34, which sum was the total amount of said bond and interest, and that said treasurer, as such, issued to Donegan a certificate of said sale. It was further alleged that, notwithstanding the full payment of said bond by said sale, the said treasurer failed and refused to cancel and mark it "Paid," and left it remaining as a lien upon said property. A demurrer to the petition was sustained, and the judgment appealed from followed.

We think the demurrer was properly sustained. There is nothing in the petition to show that the sale of the property was irregular or illegal. It will be presumed that official duty has been regularly performed. We must, therefore, presume that the property was regularly and legally sold as provided by the statute, and that all the legal steps were taken necessary to make the certificate of sale valid in the hands of the purchaser. The plaintiffs would then have no interest remaining in the property that could be affected by the improvement bond, canceled or uncanceled. Their right to redeem would still remain, though the bond were not marked "Paid," and the uncanceled bond could form no possible cloud upon that right. The real thing that affects plaintiffs' title to their property is the outstanding certificate of sale, and this would still be outstanding though the bond were canceled. And, inasmuch as the sale was to the holder of the bond for an amount covering the bond, a redemption from the sale and a proper record of such redemption will have the effect to dispose not only of the certificate of sale, but also of the bond, and thus clear the title of record. There is only one indebtedness and one creditor, and when that indebtedness is discharged it also discharges everything in the nature of an incumbrance securing that indebtedness held by the creditor. The right to redeem is optional, and may never be exercised. If it is exercised, it will cost the same to redeem whether the bond is previously canceled or not. The bond is not a lien upon the right to redeem, and can only become obnoxious to the financial interests of plaintiffs when they shall have exercised their right of redemption and shall have been thus reinvested with the unincumbered title to the property. Then, and not till then, can they claim that they are injured by the failure to cancel the bond.

The writ of mandate will not issue in a case where the plaintiff fails to show that it will subserve or protect some right or interest of his. *North v. Board of Trustees*, 137 Ill. 296, 27 N. E. 54. It will issue only "on application of the party beneficially interested." Section 1086, Code Civ. Proc. The writ will not lie "where it is apparent that the relator has no direct interest in the action sought to be coerced, and that no benefit

can accrue to him from its performance." High's Extr. Legal Rem. § 33.

The judgment should be affirmed.

We concur: HARRISON, C.; SMITH, C.

For the reasons given in the foregoing opinion the judgment is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 134

SAN FRANCISCO SAV. UNION v. R. G. R. PETROLEUM & MINING CO.  
et al. (L. A. 1,157.)

(Supreme Court of California. July 14, 1904.)

NUISANCE — WATER — LITTORAL PROPRIETOR — OBSTRUCTIONS TO USE OF OCEAN — ACTION — OWNERSHIP OF COAST LAND.

1. The fee to land between mean high-water mark and low-water mark, where the tide ebbs and flows, on an ocean coast, belongs to the state in which the abutting land is situate.

2. The erection of obstructions below ordinary high-water mark in front of the land of a littoral proprietor, whose lands abut on an ocean, which obstructions interfere with and prevent access to and use of the ocean highway by the littoral proprietor, constitutes a private nuisance, as to him, and he may maintain an action to abate it.

3. A letter from the Secretary of War, informing persons that there is no objection on the part of that department to their dredging and boring wells for the purpose of developing petroleum in the Pacific Ocean, below low-water mark, provided the operations are conducted in such manner as not to produce shoals on the water front or otherwise interfere with navigation, and that, if formal permits to erect wharves and trestles are desired, it will be necessary to furnish drawings showing plan and location of structures, constitutes no authority to the recipients to erect such obstructions in front of the land of a littoral proprietor, below ordinary high water, thereby interfering with his access to and use of the ocean highway.

Commissioners' Decision. Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by the San Francisco Savings Union against the R. G. R. Petroleum & Mining Company and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Grant Jackson, J. W. Smith, and E. A. Rizer, for appellants. Richards & Carrier, for respondent.

COOPER, C. Appeal from judgment and order denying defendants' motion for a new trial. The action was brought to obtain an injunction, and to have abated an alleged nuisance erected in front of plaintiff's land on the seashore below the land of ordinary high water. Plaintiff is, and was at the times mentioned in the complaint, the owner of the tract of land described therein, bounded on the south by the Pacific Ocean. The fee to the strip of land south of the plaintiff's southern boundary, between the mean high-water mark and the low-water mark, where

the tide ebbs and flows, belongs to the state of California. Plaintiff is the littoral proprietor of the lands described in the complaint. Prior to the commencement of the action, defendants, as naked trespassers, unlawfully entered upon said strip of land where the tide ebbs and flows, and constructed a platform 16 feet in width and 30 feet in length in front of the plaintiff's lands, and threatened to, and will unless restrained by the court, erect other platforms and obstructions on the said strip of land below mean high-water mark, and will thereby interfere with and prevent the access to and use of the ocean highway by the plaintiff. The court found that the said platform is a continuing nuisance, and specially injurious to the plaintiff. The question to be decided is as to whether or not the plaintiff, as littoral proprietor, can maintain an action to abate obstructions placed in front of his land by a stranger, below the ordinary high-water mark.

According to the common law, both the title to and dominion over the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all lands below high-water mark, within the jurisdiction of England, are in the King. Such waters, and the lands which they cover, are incapable of private occupation and ownership. Their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. The title to such lands is vested in the King, as the sovereign representative of the nation, for the public benefit. Every building or wharf erected upon such lands without license, below high-water mark, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if not a nuisance to navigation. It is the general rule in this country that absolute property in, and dominion and sovereignty over, the soils under the tide water, in the several states, belongs to the state in which such lands are situate. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and cases cited. But this absolute title in the state does not deprive the littoral proprietor of his right to access from his own land to the ocean, as against a stranger. The language of the judge of the court below on this subject is as follows: "From time immemorial the sea has been treated as a vast waste, not susceptible of occupation or private and individual ownership, except as herein indicated. Nations, governments, and peoples have all been of one accord in treating it as exempt from appropriation by individuals. The occupation by defendants is in disregard of this universally conceded condition. Upon the strength of universal custom, conduct, and tacit consent and understanding, individuals and communities have acquired properties and rights, and have located lands, built homes, and cities along the seashore, because not alone for its commer-

cial advantages, but for the permanent and indestructible beauty of the environment. Unlike the location of the interior, where the incidents of private ownership may permit encroachments by way of unsightly and disagreeable structures, the prospect of ocean view is sacred from individual obstruction and contamination. So thoroughly has this been understood and acted upon by the whole world, that no obstruction—not even wharves and docks—not built by the abutting owners have ever been attempted, except under license and control of the state, or some of its subdivisions to whom such control has been delegated. This policy and mode of dealing had inured to the property owner abutting thereon as an additional property right, which, though not involved in this case, under the pleadings, I think is explanatory, if not the foundation, of the principle enunciated by the courts—that the abutting landowner has property in the sea by way of access thereto. That no one else can acquire or own it gives the abutting owner that dominion which enables him to protect it for the benefit of his own property, which he has located, occupied, and improved under the express assurance, to some extent, and the implied assurance, to a greater extent, that individual interference shall not disturb him from the ocean side. Whatever unlawfully obstructs the free use of this property, or unlawfully obstructs the free passage or use in the customary manner of the sea by way of egress or ingress to and from it, is a nuisance. Section 3479, Civ. Code." It is said in *Gould on Waters* (8d Ed.) § 149: "But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists, in the case of tide waters, even where the shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature." And the authorities cited by the author sustain the text.

In this country the leading case is *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, in which the Supreme Court of the United States said: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among those rights are access to the navigable part of the river from the front of his lot; the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may deem

proper to impose for the protection of the rights of the public, whatever those may be.

\* \* \* This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired." Respondents say the above case has been overruled in *Scranton v. Wheeler*, 179 U. S. 156-159, 21 Sup. Ct. 48, 45 L. Ed. 126, but it was not overruled as to what is said in the quoted language. In the latter case it was held that the government of the United States did not have to make compensation for an injury to a riparian owner's right of access to navigability that might incidentally result from the erection of a pier for the purpose of improving the navigation of the river. That case involved the right of the sovereign to use and improve its navigable waters, and in the opinion it was said: "The decision in *Yates v. Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case." Instead of being overruled, the case of *Yates v. Milwaukee* is not even criticised. It has been usually followed in the several states and by the federal courts. *Case v. Toftus* (C. C.) 39 Fed. 731, 5 L. R. A. 684; *Sullivan Timber Co. v. City of Mobile* (C. C.) 110 Fed. 186; *Illinois Central R. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; note to *Miller v. Mendenhall*, 19 Am. St. Rep. 219; note to *Prior v. Swartz*, 36 Am. St. Rep. 336; *Rumsey et al. v. N. Y. & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600; note to *State ex rel. Denny v. Bridges*, 40 L. R. A. 596 et seq.; *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1.

We are not without authority in our own state upon the principle herein stated. In *Blanc v. Klumpke*, 29 Cal. 159, the court, in passing upon a demurrer to the complaint, said: "That the alleged acts of the defendant amount to an obstruction of the navigation of the bay at the point in question, and also to the use of the space as a highway by land, does not, we think, admit of debate. If so, the obstructions must be at least a public nuisance, and indictable as such. \* \* \*

Undoubtedly, if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with, and to some extent prevented, can it be said he suffers only in common with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance and the subject of an action; and it is further provided that such action may be brought by any person whose property is injuriously affected, or whose personal enjoy-

ment is lessened, by the nuisance, and by the judgment of the court the nuisance may be enjoined or abated, and damages awarded." In *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634, it is held, and has been held in other cases, that the littoral proprietor could not maintain ejectment against one who erected a wharf on tide lands, for the reason that the title is in the state, and not in the littoral proprietor; but it was said in the opinion, in speaking of the riparian proprietor's right: "On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this: That if he desires to wharf out, and is unlawfully obstructed in the exercise of the right, he may maintain an action for damages; and, if the obstruction amounts to a public nuisance, it may be abated by appropriate proceedings for that purpose. If it be only a private nuisance which obstructs him in the exercise of his right to wharf out, he may possibly cause it to be abated by the appropriate method." In *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. 82, it was held that the owner of land, the boundary of which forms a part of the water front, has a vested right of free access to the navigable water, and may enjoin the erection of a wharf materially obstructing such access, as a nuisance. The court said: "The wharf, if built by defendants as contemplated, would deprive the plaintiffs of their ingress and egress to and from their lots and the navigable waters of the state."

After many conflicting decisions in England, it has been established by recent judgment of the House of Lords that the owner of land fronting on a navigable river, in which the tide ebbs and flows, has a right of access from his land to the river, and may recover compensation for cutting off that access by the construction of public works authorized by act of Parliament. *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Lyon v. Fishmongers' Co.*, 1 App. Cases, 662; *North Shore Ry. v. Pion*, 14 App. Cases, 612, 620.

The argument is made that, even if the construction complained of is a nuisance, it is a public nuisance, and that plaintiff does not suffer special damage, different in kind from that suffered by the public. An obstruction to navigation, in so far as it would prevent the plaintiff from the right to the free use of the public waters, just as it would prevent every one else, would in one sense be an injury suffered alike by all the public. But the plaintiff has the right to free access from his land to the ocean. The obstruction of this right is a damage different in kind from that suffered by the general public, and in such case a private person may maintain his action. Civ. Code, § 8493; *Blanc v. Klumpke*, supra; *Gould on Waters*, § 123. In the section cited Mr. Gould says: "Whenever the obstruction immediately adjoins or is upon or against the front of plaintiff's premises, it is to him a private nuisance for which an

action will lie, or which may be restrained by injunction."

Our attention is called to the fact that defendants obtained permission from the Secretary of War to erect the obstructions. The letter of the Secretary of War is as follows: "I beg to inform you that there is no objection on the part of the War Department to your dredging and boring wells for the purpose of developing petroleum in the Pacific Ocean below low-water mark, provided your operations are conducted in such manner as not to produce shoals on the water front or otherwise interfere with navigation. If formal permits to erect wharves and trestles are desired, it will be necessary for you to furnish drawings showing plan and location of such structure." This, at most, was only a statement that, so far as the War Department was concerned, it would make no objection, if navigation was not interfered with. It referred to the bed of the ocean below low-water mark. The Secretary of War cannot grant rights to lands owned by the state, nor can he deprive plaintiff of his property and rights by authorizing a stranger to take them. He has no jurisdiction of such matters.

The complaint states a cause of action, and the judgment is the legal conclusion from the facts found. It is advised that the judgment and order be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 121

In re PFORR'S ESTATE. (S. F. 3,782.)\*

THORNAGEL v. PFORR et al.

(Supreme Court of California. July 13, 1904.)

WILLS — PROBATE—EXPRESS TRUST—SUSPENDING POWER OF ALIENATION—EQUITABLE CONVERSION—INTENTION—RECONVERSION.

1. A will may not be denied probate because some of its provisions are invalid or contrary to provisions of law. Its probate merely determines the validity of its execution.

2. Mere directions in a will that the executors shall take charge of the property, execute mortgages when necessary, and at the end of two years have the property sold, do not create an express trust in real estate, but create only such a trust as pertains to the office of executor; the sale requiring confirmation, and the mortgage an order by the court, under Code Civ. Proc. §§ 1517, 1561, 1577, 1578.

3. Directions in a will that the executors collect the rents and maintain the estate for two years, and, at the expiration thereof, have it sold, do not suspend the power of alienation.

4. A provision in a will that testator desires that his executors shall sell his real estate and distribute its proceeds among certain persons is a direction thereof, which, under Civ. Code, § 1338, operates as an equitable conversion.

\*Rehearing denied August 12, 1904.

† 3. See *Perpetuities*, vol. 39, Cent. Dig. §§ 50, 51.

5. The intention of testator that his estate shall be sold, and the proceeds divided among the beneficiaries, appears from the will, directing the executors to sell it, and divide the net proceeds of the sale into six equal parts, and distribute the same to his heirs and devisees "as hereinafter set forth," immediately following which are provisions, "I give, bequeath, and devise \* \* \* one-sixth part of my estate" to each of six persons named; the estate so given them being the net proceeds of the sale.

6. Where a will works an equitable conversion of real estate into personalty, a reconversion cannot be effected by one only of the six persons to whom the proceeds are directed to be paid.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John Pforr, deceased. From certain orders, Margaretha Thornagel appeals; Anna Pforr and others being the respondents. Affirmed.

J. J. Burt, for appellant. Pringle & Pringle, Henry E. Monroe, Andrew Thorne, Robinson & Getz, Christian Pforr, and John Pforr, Jr., for respondents.

HARRISON, C. The above-named decedent left a last will and testament, in which he appointed the respondents Anna Pforr and Max Waizman as his executors, and disposed of his estate as follows:

"A. First. I give and bequeath to my said niece Anna Pforr, all household furniture, books and pictures which I may possess at the time of my demise.

"A. Second. I desire and direct that my executrix and executor shall take in charge all my property, real and personal (except that which I have hereinbefore bequeathed to Anna Pforr), and to collect all the rent and other income from the same, and to defray all expenses thereon, including interest on mortgages, and to renew mortgages and to execute new mortgages thereon when necessary for the maintenance of the same for a term of two years from the date of my demise.

"A. Third. I desire that my executrix and executor, at the expiration of two years from the date of my demise, shall have the property sold at public auction or otherwise, and after paying all indebtedness standing against it, to divide the net proceeds of such sale into six equal parts or divisions, and to distribute the same, share and share alike, to my heirs and devisees as hereinafter set forth.

"B. First. I give, bequeath and devise to my niece, Anna Pforr, of this city and county of San Francisco, California, one-sixth part of my estate.

"B. Second," etc. Giving, in similar terms, an undivided sixth of his estate to each of his four surviving brothers and sisters, and an undivided sixth to the children of a deceased sister.

The appellant herein is one of the surviving sisters of the deceased, and is also one of

the beneficiaries under the above third item of his will. The above-named Anna Pforr is the daughter of Christian Pforr, one of the surviving brothers of the deceased. The deceased was unmarried, and left two brothers and two sisters, and the children of a deceased sister, as his heirs at law. When the will was presented to the superior court, its probate was contested by the appellant upon the ground that, except as to the personal property bequeathed to Anna Pforr, it is invalid, in that by its terms the power of alienation of the real estate is suspended, in contravention of the provisions of section 715 of the Civil Code. The court overruled this objection and admitted the will to probate. From this order the contestant has appealed.

After the expiration of four months from the issuance of letters testamentary, the appellant presented to the court her petition for distribution to her of the share of the estate to which she is entitled; setting forth therein the condition of the estate, and alleging that the disposition thereof made by the testator is void, and that at his death his entire estate vested in his heirs at law; that, with the exception of the personal property bequeathed to Anna Pforr, she is entitled to have distributed to her an undivided fifth of the estate; and that such distribution could be made without loss to the creditors of the estate. Upon the hearing of her petition the court held that the will was valid, and that the property of the deceased vested upon his death in the devisees under his will, in accordance with its provisions, and that the appellant is entitled to one-sixth part thereof, except his household furniture, books, and pictures, and denied her petition. From this order, also, she has appealed.

An instrument testamentary in character, and issued in the form required for a will, cannot be denied probate upon the ground that some of its provisions are invalid or contrary to the provisions of law. The probate of the instrument merely determines the validity of its execution. The sufficiency or invalidity of its provisions will be determined when effect is sought to be given to them. The statute makes no provision by which a portion of such an instrument can be admitted to probate, and probate denied to the remainder. *Estate of Cobb*, 49 Cal. 599; *Estate of Murphy*, 104 Cal. 554, 38 Pac. 543; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681.

The will in question does not create an express trust in real property. The testator has not devised the land to his executors in trust for the purposes of his will, but has merely given them certain directions to be observed in carrying out its provisions. To the extent that these directions are inconsistent with law, they are nugatory. Executors, as such, are not trustees of an express trust. Civ. Code, § 2250. And the authority which the testator herein has given to his executors creates only such a trust as pertains to the office of executor. *Bennalack v. Richards*, 116

Cal. 405, 48 Pac. 622. He has not conferred upon them the power to make any sale or disposition of his estate, other than that they "shall have the property sold" at the expiration of two years after his death, and shall distribute the proceeds among his designated beneficiaries. The sale which is thus directed is to be made by them as executors of his will, and as a part of their administration of the estate, and not as the trustees of an express trust, and will be ineffective without a confirmation by the court (Code Civ. Proc. §§ 1517, 1561), whereas, if the land had been devised to them in trust to make the sale and distribute the proceeds, it could be sold by them, as such trustees, without the necessity of reporting the sale or having it confirmed by the court. Estate of Delaney, 49 Cal. 76; Estate of Williams, 92 Cal. 183, 28 Pac. 227, 679. Neither will a mortgage by them of the property of the estate be effective, unless made by an order of the court, under sections 1577-1579 of the Code of Civil Procedure. Otherwise they would be able to transfer the estate without the approval of the court, and thus do indirectly what they are forbidden to do directly, since the right to mortgage includes a right in the mortgagee to have a sale of the land in satisfaction of the obligation for which the mortgage was given.

Neither is there any provision in the will by which the power of alienation is suspended, or which purports to prevent an absolute interest in possession from being at any time conveyed. The direction to the executors to collect the rents and maintain the estate for two years is not a restraint upon its alienation during that period; nor is the provision for its sale at the expiration of two years a prohibition against its sale prior to that time. "A power of sale, to be exercised after a definite term, is not necessarily an illegal restraint upon alienation. It does not necessarily suspend the absolute power of alienation." Garvey v. McDevitt, 72 N. Y. 563; Buchanan v. Tebbetts, 69 Hun, 81, 23 N. Y. Supp. 244. The testator has not forbidden the alienation of his estate during any fixed period of time, but, in the direction to his executors, he has fixed a limit after which the beneficiaries may enforce its sale. It was not within his power to deprive the superior court of its power to direct a sale of his estate at any time, if necessary for the purposes of administration, nor is his will susceptible of such construction. So long as the administration of the estate is pending, the executors are at all times subject to the control and direction of the superior court; and this court may at any time order a sale of the lands if necessary for the payment of creditors, or when it will be for the advantage of those interested in the estate, or when they assent to its sale. Code Civ. Proc. § 1543. There is therefore no point of time at which the beneficiaries under the will may not unite in a conveyance made at a sale under an order of the court, and thus give to

the grantee an absolute interest in possession of the estate of the testator in the property conveyed.

The suspension of the power of alienation which is prohibited by the statute is such as arises from the terms of the instrument by which the estate is created, and not such as exists outside of that instrument—as a disability of the person in whom an interest is vested, or the delay incident to procuring an order of court for the sale, or for its confirmation. Manice v. Manice, 43 N. Y. 365; Robert v. Corning, 89 N. Y. 238; Chaplin on Suspension of the Power of Alienation, § 116. "The absolute ownership and power of alienation is not suspended merely because the executor may require a period of time not measured by lives in which to execute the power of sale by a conversion of the land into money." Deegan v. Wade, 144 N. Y. 576, 39 N. E. 692. Section 715, Civ. Code, only forbids a suspension of the power of alienation, and a provision for the exercise of that power at a future time is not within its provisions unless such exercise is itself suspended beyond the period therein limited. Toland v. Toland, 123 Cal. 140, 55 Pac. 681. The will contains no directions for the accumulation of income, and it is only directions for the accumulation of income of property that the statute makes void. Civ. Code, § 723.

The provision for the sale of the property and the distribution of its proceeds among the six beneficiaries operated as an equitable conversion of the real estate into personalty. Civ. Code, § 1338. This result is not overcome by reason of the testator having used the word "desire," instead of "direct," in authorizing the sale. The words "I desire" that my real estate shall be sold are the equivalent of the words "I will" that it be sold. Appeal of City of Philadelphia, 112 Pa. 470, 4 Atl. 4. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor. Estate of Marti, 132 Cal. 668, 61 Pac. 964, 64 Pac. 1071.

Whether such conversion is effected depends upon the intention of the testator, as gathered from the entire provisions of his will. If it is apparent from its terms that it was his will that the estate be sold and the proceeds given to his beneficiaries, an equitable conversion results, even if the direction for the sale is not imperative. Dodge v. Pond, 23 N. Y. 69. "The question of conversion is a question of intention, and the real question is, did the testator intend his land should be converted into money, at all events, before distribution?" Wurts v. Page, 19 N. J. Eq. 375. Pomeroy, Eq. Jur. § 1161, says: "In fact, the whole result depends upon the intention. If, by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the prop-

erty shall be changed, then a conversion necessarily takes place."

That the testator intended that his estate should be sold, and the proceeds divided among his designated beneficiaries, clearly appears from the terms of the will. He directs his executors, in the third item thereof, to have the property sold, and to divide the proceeds of such sale into six equal portions, and to distribute the same to his heirs and devisees "as hereinafter set forth." By these connecting words the provisions in the clauses immediately following, wherein are "set forth" the persons to whom these six parts of the estate are to be distributed, become a part of his direction for the sale of the property, and the form in which he has "set forth" the beneficiaries and repeated his gift cannot be invoked to defeat his direction that the property be sold. The "estate" given to the beneficiaries by these subsequent clauses is the "net proceeds of the sale" which he had previously directed to be made, and the "one-sixth part" thereof given to each is one of the "six equal parts or divisions" into which his executors are directed to divide the said "net proceeds" and distribute to the said beneficiaries. His use in these clauses of the words, "I give, bequeath and devise" to each of the beneficiaries "one-sixth part of my estate," is subordinate to his direction in the previous part of the same item of the will that the property be sold, and must yield thereto.

The direction that the estate be sold and its proceeds given to certain designated beneficiaries was within the testamentary power of the testator, and, as the beneficiaries thereunder are the only persons interested in the estate, the heirs at law, as such, are not entitled to have the estate distributed to them. The beneficiaries among whom the proceeds of the sale are to be distributed have no interest in the land, but each of them is by the will vested with a chose in action; i. e., the right to receive from the executors his share of the proceeds of the sale. *Harcum v. Hudnall*, 14 Grat. 369. The testator had the right to determine whether they should receive lands or money from his bounty, and their rights to his estate are measured by the form in which he has given it to them. *Marsh v. Wheeler*, 2 Edw. Ch. 153; *Allen v. Watts*, 98 Ala. 334, 11 South. 646.

Under well-recognized principles of equity, the beneficiaries can, however, at any time before such sale, elect to retain the land in lieu of receiving the proceeds of the sale, and thus effect its reconversion into real estate; but as it appears from the appellant's petition for distribution to her that, with the exception of personalty appraised at less than \$200 in value, the entire estate of the deceased consists of real property, such election will be ineffective unless all of them unite therein. *Bank of Ukiah v. Rice* (Cal.) 76 Pac. 1020. "The direction to sell the land

gives to each a right to have it sold, and takes away from each one the separate right to reconvert his single share, and thus have the sale of a fraction." *High v. Worley*, 33 Ala. 196. See, also, *Harcum v. Hudnall*, 14 Grat. 376; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600. The appellant alone could not take from the other beneficiaries their right to have the proceeds of a sale of the property, and her petition for a distribution of her share of the estate was therefore ineffective to work a reconversion. Her application for such distribution was therefore properly denied by the superior court.

The orders appealed from should be affirmed.

I concur: CHIPMAN, C.

For the reasons given in the foregoing opinion, the orders appealed from are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 104

WHITE v. STEVENSON et al. (L. A. 1,245.)  
(Supreme Court of California. July 11, 1904.)

MORTGAGES — RENEWAL — SATISFACTION—EVIDENCE—MISTAKE—EQUITY.

1. The acceptance by a mortgagee of a new mortgage and note as a renewal of a former mortgage and note, or in substitution thereof, does not of itself operate as an extinguishment or discharge of the former.

2. On an issue as to whether a note and mortgage had been taken in satisfaction of a former note and mortgage, evidence held not to show that the parties had so agreed.

3. Civ. Code, § 1577, defines a mistake of fact to be an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract. By section 1589 a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it. Section 2311 provides that ratification of a part of an indivisible transaction is a ratification of the whole. Defendant gave his brother a power of attorney authorizing him to make a note and execute a mortgage in defendant's name, but the note so given under the power was not paid, and thereafter the brother gave another note and mortgage, executing it on behalf of himself and defendant, and the mortgagee surrendered the former note and discharged the former mortgage, he and the brother mistakenly believing that the power covered the latter instruments. Held, in a suit by the mortgagee for foreclosure of the first mortgage, that he was entitled to such relief, equity having power to rectify the mistake, and defendant not being permitted to claim the benefit of the discharge and at the same time repudiate the second mortgage.

4. Where a mortgage was discharged by mistake, it was not necessary that the mortgagee should obtain a decree of cancellation before suing for foreclosure.

5. Code Civ. Proc. § 462, provides that statement of new matter in an answer must be deemed controverted. Held, that in a suit to foreclose a mortgage that had been discharged of record it was not necessary for plaintiff to set out the facts showing the discharge inoperative, since, after answer relying on the discharge, under the statute there was, in effect, a replication.

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. §§ 897, 898.



Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by Silvanus White against Frank Stevenson and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

See 73 Pac. 421.

Jones & Weller, for appellant. C. E. Sumner, for respondents.

HARRISON, C. December 30, 1890, the defendants, Frank Stevenson and Charles B. Stevenson, his brother, executed to the plaintiff their promissory note, together with a mortgage to secure its payment upon certain lands in the county of Los Angeles. The note and mortgage were given for the purpose of taking up a previous note and mortgage given by them to Josefa A. De Miller, which had been assigned to the plaintiff, and were executed by Frank individually and as the attorney for Charles under a special power of attorney, by which Charles had authorized Frank to make in his name and execute to the plaintiff "a note for the amount due him on a certain note made by myself and Frank Stevenson to Josefa A. De Miller, and by her assigned to" the plaintiff; and also to execute a mortgage to secure the same upon the same property as that which was given to secure the note to Miller. No payment was made upon this note, and on December 27, 1895, Frank, acting for himself, and purporting to act as attorney in fact for his brother, Charles, executed to the plaintiff another note for the amount due upon the former one, together with a mortgage to secure its payment, upon the same property, in consideration of which the plaintiff surrendered to him the former note, and caused the mortgage to be canceled of record. No payments having been made upon the latter note, the plaintiff brought the present action for its recovery, and to foreclose the mortgage given to secure its payment. After the original complaint had been filed, he filed an amendment thereto in the nature of an additional count, in which he alleged the execution of the note and mortgage of 1890; that nothing had been paid thereon; that on December 27, 1895, the defendants executed to him the note and mortgage of that date; that said note and mortgage were intended to be, and were in fact, a renewal of those of 1890; and prayed that, in case the note set forth in the original complaint should be declared invalid, he might have judgment against the defendants upon the note and mortgage of 1890. The defendant Charles, in his answer, admitted the execution of the note and mortgage of 1890, and alleged that the same had been paid, satisfied in full, and extinguished; denied that he had executed or authorized the execution of the note and mortgage of 1895, and denied that said note and mortgage were intended to be, or were in fact, a renewal of those of

1890; and alleged that the latter note and mortgage were barred by the statute of limitations. He also set forth the power of attorney given by him to his brother, Frank, in 1890, and alleged that he had not given him any other authority to execute a note or mortgage in his name; that at the time of the execution of the note and mortgage of 1890 this power of attorney was delivered to the plaintiff, who had caused it to be recorded; that with knowledge of these facts the plaintiff had agreed with Frank that the latter should execute to him the note and mortgage of 1895 in payment and extinguishment of the note and mortgage of 1890, and that in pursuance of such agreement Frank had executed and delivered to the plaintiff the note and mortgage of 1895, and the plaintiff had accepted the same and surrendered the former note and acknowledged of record full satisfaction of the mortgage. The defendant Frank made no answer to the complaint as originally filed or as amended. Upon the trial of the cause the court found the facts substantially in accordance with the allegations in the answer of Charles, and found that the plaintiff agreed with Frank to accept the note and mortgage of 1895 in satisfaction of the note and mortgage of 1890, and that in pursuance of this agreement he surrendered the note and entered satisfaction of the mortgage. Upon these facts the court held that the plaintiff was entitled to judgment against the defendant Frank upon the note and mortgage of 1895, but was not entitled to judgment against the defendant Charles upon either of the notes or mortgages, and entered judgment in accordance therewith. From the judgment entered in favor of Charles, and from an order denying a new trial against him, the plaintiff has appealed.

For the purpose of determining the plaintiff's right of action, the complaint as amended is to receive the same consideration as if the matters alleged in the amendment had been included in the complaint when originally filed. This additional count sets forth a cause of action against the defendant Charles, and, as the court found that this cause of action is not barred by the statute of limitations, the plaintiff was entitled to judgment thereon against him, unless the other matters alleged in his answer constitute a defense thereto, and were established at the trial. The court finds that the only consideration for the note and mortgage of 1895 was that they were delivered by Frank and accepted by the plaintiff "instead of and to take the place of" the note and mortgage of 1890; that at the time of their execution the plaintiff surrendered the former note to Frank, and afterwards caused the mortgage to be satisfied of record. It also finds that the acceptance of the last note and mortgage, the surrendering of the note, and satisfying of record the mortgage of 1890 "amount to" a satisfaction thereof.

The acceptance by the plaintiff of the note and mortgage of 1895 as a renewal of the note and mortgage of 1890, or in substitution therefor, did not of itself operate as an extinguishment or discharge of the latter. One executory agreement is not extinguished by the execution of another between the same parties; nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation. It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note. *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743. The court does not find, nor was there any evidence, that there was any agreement on the part of the plaintiff that the note and mortgage of 1895 should be accepted in "payment" or "extinguishment" of those of 1890, and its finding that there was an agreement between the plaintiff and Frank Stevenson to accept them in "satisfaction" of the former, as well as its finding that the surrender of the note by the plaintiff and his discharge of the mortgage were made in pursuance of such agreement, was not justified by the evidence before it. The plaintiff testified that when the note of 1890 was about to expire, upon the representation of Frank that, if he had a little more time, he could sell the property, he said to him that, if it would be any accommodation to him, he would allow him to renew the mortgage if he wished to; that Frank was very thankful to have that opportunity, and so the new note was made out. "I went up and canceled the old one on these terms, not receiving a dollar, nor any thought of it being a settlement in any part." Frank Stevenson testified that "there was no agreement made by the plaintiff in relation to the payment and satisfaction of the note and mortgage of 1890." He also testified that during the negotiations for the note of 1895 "it was said" that the old note and mortgage were to be paid and extinguished by the new note and mortgage, but he did not state by whom this expression was used, or that the plaintiff assented thereto, nor does he qualify his previous statement that there was no such agreement on the part of the plaintiff. Moreover, irrespective of any agreement between the plaintiff and Frank, inasmuch as the court finds that at that time Frank had no authority to act in behalf of his brother, Charles could not be affected by any negotiations or agreement between Frank and the plaintiff.

As a defense to the plaintiff's right of foreclosure the respondent relies upon the satisfaction of the mortgage, which the plaintiff entered of record in December, 1895. But, while the discharge of a mortgage is presumptive evidence that it has been satisfied, it is not conclusive thereof. If it be shown that the discharge or acknowledgment of

satisfaction was obtained through fraud, or was made by reason of some mistake of fact, it will be inoperative, and the mortgage may still be foreclosed. *Jones on Mortgages*, § 966; *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39; *Pearce v. Buell*, 22 Or. 29, 29 Pac. 78. Mistake is the foundation of one of the chief branches of equity jurisprudence, and the exercise of equity jurisdiction is frequently had where a contract as written does not express the terms of the actual agreement between the parties. This jurisdiction is often invoked to set aside or cancel the release of a mortgage that has been given under a mistake of fact, or contrary to the evident intention of the parties; notably when, upon the execution of a new mortgage in renewal or as a substitute for a prior one, the former mortgage is released in ignorance of the existence of an intervening lien. Equity looks at the intention of the parties, and will control the effect of a release executed under a mistake of fact, or cause it to be canceled, when no intervening rights have accrued by reason of the mistake. *Jones on Mort.* § 971; *Story's Eq. Jur.* § 167; *Pom. Eq. Jur.* § 871; *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603; *Birrell v. Schie*, 9 Cal. 104; *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92; *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196; *Pearce v. Buell*, 22 Or. 29, 29 Pac. 78; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Bruse v. Nelson*, 35 Iowa, 157; *Young v. Shaner*, 73 Iowa, 555, 35 N. W. 629, 5 Am. St. Rep. 701; *Gelb v. Reynolds*, 35 Minn. 331, 28 N. W. 923. "The principle which runs through all cases of this description," says *Barculo, J.*, in *Barnes v. Camack*, 1 Barb. 392, "is that, when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons."

It is very evident that the surrender of the note by the plaintiff, and his discharge of the mortgage of 1890, were made by reason of a mistake as to the character of the power of attorney under which Frank purported to act in behalf of his brother in giving the note and mortgage of 1895. The instrument was not before them during this transaction, and they each testified that they supposed that it authorized Frank to execute that note and mortgage. "Mistake of fact" for which a contract may be avoided is defined in the Civil Code, § 1577, to be "an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract." The forgetfulness or ignorance on the part of both the plaintiff and Frank of the terms of the power of attorney given by Charles are as fully within the scope of this definition as is the forgetfulness or ignorance of an intervening lien on the part of a mortgagee when, upon the renewal of an existing mortgage, he

releases the old mortgage without intending to surrender his security against such intervening lien. It is not to be assumed that the plaintiff knowingly intended to accept an unauthorized note and mortgage of the respondent in satisfaction of a valid one, or to surrender and cancel an existing obligation and security without receiving any consideration therefor; or that, if he had known that the power of attorney under which Frank acted did not give him authority to bind his brother by a new note and mortgage, he would have satisfied the old mortgage of record or surrendered the old note. See *Bruse v. Nelson*, supra.

There is no substantial difference between the facts in this case and those presented in *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603, and the principle governing them is the same in both cases. In that case Revalk had mortgaged his property to Kraemer prior to his marriage, and after his marriage executed to him another mortgage, in consideration of which Kraemer on the same day canceled the prior mortgage. Revalk's wife did not join in the latter mortgage, and it was sought to hold the property free from its lien. The court held, however, that the cancellation of the old mortgage and the substitution of the new were to be regarded as contemporaneous acts, and not as creating a new incumbrance, but simply changing the form of the old, saying: "A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer's money and apply it in extinguishment of a prior incumbrance, and then claim that the property should neither be bound by the new mortgage or the old." So, in the present case, we say a court of equity will not permit Charles to set up as a defense to the mortgage of 1890 the release which was given by the plaintiff in consideration of the execution by Frank of a new mortgage, and at the same time contend that Frank had no authority to execute the new mortgage. It will not permit him to claim that his property was released from the mortgage of 1890 in consideration that it should be covered by the mortgage of 1895, and at the same time claim that the property should not be bound by either the new mortgage or the old.

The respondent has not shown any equitable consideration which requires the release to be sustained against the claim of the plaintiff. He was not a party to the agreement under which the release was given, and does not appear to have known of it until several years thereafter. No consideration was given by him for it, and no change has since taken place in his relation to the property by reason of the transaction. His

denial of any authority in Frank to execute the note and mortgage of 1895 was a repudiation of Frank's acts, and precludes him from availing himself of the agreement then made between Frank and the plaintiff. Equity will not permit him to claim the benefit of the release which was given in consideration of the execution of the mortgage of 1895, and at the same time repudiate the act of his brother in giving that mortgage. He cannot accept the benefit of the transaction without assuming the obligation for which that benefit was given (Civ. Code, § 1589); nor can he ratify a portion of his brother's unauthorized act without at the same time ratifying the whole (Id. § 2311).

Upon the facts before the court it should have rendered a decree for the foreclosure of the mortgage of 1890, as prayed by the plaintiff. It was not necessary for him to obtain a decree directing a cancellation of the discharge which he had entered of record in 1895 before commencing an action for its foreclosure (*Chester v. Hill*, 66 Cal. 480, 6 Pac. 132); nor was it necessary that a formal direction for canceling the discharge should be entered by the court before rendering the decree of foreclosure. As soon as it was shown that the mortgage was inoperative, it ceased to be a defense to the suit, and by reason of such finding passed from further consideration. Neither was it necessary for the plaintiff to set forth in his complaint the facts upon which he claimed that the discharge was inoperative, or to ask that it be canceled. He could not anticipate that the respondent would rely upon this discharge as a defense (*Moore v. Copp*, 119 Cal. 429, 51 Pac. 630), and after his answer had been filed the statute (Code Civ. Proc. § 462) operated as a replication under which evidence of any facts controverting this defense could be introduced as fully as if specially pleaded (*Moore v. Copp*, supra; *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423; *Arthur v. Home Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550).

The judgment and order denying a new trial should be reversed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons above given, the judgment and order denying a new trial are reversed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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PAYNE v. MOREY et al. (L. A. 1,287.)  
(Supreme Court of California. July 13, 1904.)

DEEDS ABSOLUTE IN FORM—UNRECORDED DEFESANCE—MORTGAGE TO ONE WITHOUT NOTICE—SUBSEQUENT PERFORMANCE OF CONSIDERATION.

1. Under Civ. Code, § 2950, providing that, when a grant of real estate purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain condi-

tions, the grant is not defeated or "affected" as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless a defeasance shall have been recorded, the recorded deed is, as to one taking a mortgage from the grantee without notice of the unrecorded defeasance, an absolute conveyance, though his mortgage is to secure a note, the consideration of which consists of his services thereafter to be rendered in an action, and he receives notice of the defeasance before he has performed services other than to make a journey in connection with the action.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Suit by George H. Payne against Charles E. Morey and others. From a portion of the judgment, plaintiff appeals. Reversed.

Puterbaugh & Puterbaugh, for appellant. James E. Wadham, for respondents.

SMITH, C. The suit was brought in the lower court to foreclose a mortgage of date September 19, 1898, given by defendant Morey to one Rawson, plaintiff's assignor, to secure the promissory note of the former to the latter for the sum of \$500, payable one year after date. The court below gave judgment for the plaintiff against Morey for the amount of the note with attorney's fee and costs. But it was adjudged that he was not entitled to foreclose, and judgment was rendered for the defendant Stewart that he was the owner of the land described in the mortgage, free of any lien on account thereof and for his costs. The plaintiff appeals from this portion of the judgment, and the case, as presented by the findings—which are not questioned—is as follows: At the date of the mortgage in suit the apparent title to the land mortgaged, as shown by the record, was in the mortgagor, Morey, who was the grantee in a deed from one Davis, then owner, of date December 27, 1897, purporting to convey to him the land. But the deed was accompanied by a separate instrument, of even date, signed by Morey, showing that it was executed as security for the payment of a note, of even date, from Davis to Morey, for the sum of \$4,000. The defeasance, it seems, was not recorded, and from the findings, taken in connection with the answer of the defendant Stewart, it may be inferred that Rawson had no notice of it, or of the nature of the transaction, when the mortgage was made to him, or afterwards until the 3d day of December following, when, it is found, he received such notice. The plaintiff became the owner of the note and mortgage in suit by assignment of Rawson, September 9, 1899, but does not claim to have acquired any additional rights as purchaser for value without notice. The consideration of the note, it is found, consisted in "services as attorney at law to be thereafter rendered by said \* \* \* Rawson in an action then expected to be soon commenced" by Davis against Morey; which suit was

in fact commenced December 15, 1898, and is still pending, and in which Rawson appeared as attorney of Morey, and is still such. But it is found that on the 3d of December, 1898, the date when Rawson received notice of the defeasance, no services had been performed by him as such attorney, other than coming from Alameda county to San Diego, at the request of Morey, November 11, 1898. The interest of the defendant Stewart in the case is as assignee of Morey of the Davis note of \$4,000, and as grantee in a deed of conveyance of the land of date March 30, 1900, from the defendant Codd, to whom, by deed of date March 18, 1899, Davis had conveyed such interest as was left in him after his deed to Morey. The date of Morey's assignment to Stewart is not found, but it appears from his answer that it was subsequent to the date of the mortgage sued on; and it is not claimed that he took the assignment, or either he or his grantor, Codd, his conveyance of the land, without notice of the mortgage.

The questions involved stand, therefore, as though the suit were between the original parties to the mortgage sued on, and the previous deed—that is to say, between Rawson, Morey and Davis—being in no way affected by the subsequent transactions; and this, indeed, seems to have been the view of the court below, and of the counsel in the case. The position of the appellant is that the obligation of Rawson, which was the consideration of Morey's note and mortgage, being in its nature indivisible, and, having been partly performed before he received notice of the defeasance, his relation to the previous transaction is that of "a subsequent \* \* \* incumbrancer for value and without notice," against whom, by the express terms of the statute, proof of the defeasance was inadmissible. Civ. Code, § 2925. On the other hand, it is claimed on behalf of the respondent that the consideration had not been wholly rendered before Rawson received notice of the nature of the transaction, and that he should then have rescinded or abandoned the contract; and this seems to have been the view of the court, as otherwise the provisions of the statute cited would seem to apply. But, under the view we take of the case, this question, we think, need not be determined. The provision cited (Civ. Code, § 2925) undoubtedly applies to all transactions of the kind described, whether concerning real or personal property. But there is another section of the Civil Code, namely, section 2950, which, with reference to real property, establishes in favor of the purchaser a somewhat more liberal rule, which is that in cases of this kind, the defeasance not being recorded, the "grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice." It cannot be claimed in this case that the mortgagee, Rawson,

came within any of the classes specified; and (as has been held with reference to another provision of the Code) "the words of the statute are not to be extended by implication to other classes of persons than those named." *Farmers' Exch. Bank v. Purdy*, 130 Cal. 455, 62 Pac. 738; *First Nat. Bank v. Menke*, 128 Cal. 103, 60 Pac. 675; *Talcott v. Hurlbert* (Cal.) 76 Pac. 647. As to Rawson, therefore, and his assignee, the plaintiff, the recorded deed from Davis to Morey must be regarded as being what in its terms it purports to be, namely, a conveyance of the land. As to Davis and Morey, the transaction was, indeed, a mortgage only; and hence, by the subsequent deeds of Davis to Codd, and of the latter to Stewart, Stewart acquired the title, but his title is subject to the prior mortgage of the plaintiff.

There are other considerations that might lead to the same conclusion—as, for example, that it would be grossly inequitable to permit Morey to take advantage of his own fraud by averring the transaction to be different from what he represented it to be; and that the defendant Stewart stands in no better case than his assignor. But in view of the explicit terms of the statute it will be unnecessary to enter upon these considerations.

We advise that the judgment be reversed, and the cause remanded, with directions to enter judgment for the plaintiff on the findings for the foreclosure of his mortgage for the sums adjudged him.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiff on the findings for the foreclosure of his mortgage for the sums adjudged him: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

#### KRAUSE v. OREGON IRON & STEEL CO.\* (Supreme Court of Oregon. Aug. 8, 1904.)

WATER COURSES — OBSTRUCTION — IMPEDING DRAINAGE — IRREPARABLE INJURY — INJUNCTION — QUANTUM OF PROOF — LACHES.

1. Obstruction of a river, materially impeding the flow of its waters, and consequently the drainage from lowlands along and near its course, retarding the planting of crops thereon from one to four weeks, is an irreparable injury, authorizing equitable relief.

2. Plaintiffs in a suit to enjoin defendant from obstructing the river with a dam, impeding the drainage of their lands along the river, a prior acquired right, have the burden only of making out the better case by the preponderance of evidence.

3. Defendant in a suit to enjoin obstructions of a river with a dam impeding the drainage of lands, may not urge the objection of laches, because the suit was not brought at an earlier

date, it being in no worse position for maintaining its defense, and having been involved in no expense or inconvenience on account of the delay, and the injurious effects of the dam having been complained of from the time of its obstruction, and a concession of a partial abatement thereof having been obtained through the insistence, and the suit being brought three years later.

Appeal from Circuit Court, Clackamas County; Thomas A. McBride, Judge.

Suit by August Krause against the Oregon Iron & Steel Company. Decree for plaintiff. Defendant appeals. Affirmed.

S. B. Linthicum and J. Couch Flanders, for appellant. C. M. Idleman, for respondent.

WOLVERTON, J. The defendant constructed a dam in the Tualitin river, in Clackamas county, in 1888, which it maintained in its original condition until 1894, when, on account of the complaints of landowners, farmers, and gardeners upon the lowlands along the river above, it was lowered and otherwise materially abated, and has been since preserved in that state to the time of the institution of this suit, November 6, 1897. This general statement is subject to the qualification that certain flashboards were employed temporarily from time to time as convenience suggested for the purpose of raising it in either condition to a still greater height. The plaintiff is the owner of a tract of 25 acres of land near the river, which he alleges is drained by it and Rock creek, a small tributary thereto; and that by reason of the obstruction caused by the dam the water is cast upon his land, and the drainage so impeded and retarded as to hinder and delay him in planting his crops until too late in the season for them to mature properly, to his irreparable damage. The Tualitin river, in its general character, is a tortuous and sluggish stream, extending many miles inland from its confluence with the Willamette. Much of the land along its course is of a swampy and marshy character, soft and spongy, and has been redeemed by drainage. Being so redeemed, it is very valuable for gardening and farming purposes. The land owned by plaintiff is of this character, it being formerly submerged by a swamp. Rock creek is situated 12 or 15 miles above the dam by the way the water runs, and plaintiff's land lies nearly a mile above its mouth, but near its course, and is drained by means of ditches and drains emptying into it. It has been quite definitely established, and in fact is scarcely controverted, that prior to the erection of the dam in 1888 plaintiff was not hindered in the planting of his crops in the spring by reason of the water remaining on his land, but that the drainage was ample to carry it away in regular course after the spring rains had subsided. The dam was originally built to enable the defendant to float cord wood through a canal constructed from the

\* 2. See *Waters and Water Courses*, vol. 48, Cent. Dig. § 261.

river some 3 or  $3\frac{1}{2}$  miles above to Sucker Lake, thence to defendant's plant, which had the effect of backing the water up in the main stream a long distance above. The exact extent to which it retarded the flow therein and cast the water back upon the lands along its course is difficult to determine, but that it was seriously impeded in the usual and natural discharge there can be no possible doubt. It is in evidence that when the dam was completed in 1888, which was in the latter part of the summer, the water at Scholl's Ferry, 25 miles above, was raised 25 inches, and at the mouth of Rock creek from 3 to  $3\frac{1}{2}$  feet. This we accept as reliable, for there is nothing of moment to contradict it, and the river was rendered navigable for small steamboats and other light craft. From the best proofs we have in the record, it appears that the dam was first constructed at a height of 5 feet above the bed of the stream, for a distance of 100 feet, and upon either end of this space it was raised by steps to a height still above that, approximating 6 feet at the margin of the stream; the entire length being about 250 feet. The main span was built of sawed timbers, 12 by 12 inches, five of these being placed one above the other, with perhaps a decking over all. Above this the company also used a couple of flashboards, which together were 20 inches in width, with which to raise the dam when it was desired, and when both were in use they increased its height to 6 feet 8 inches, or more. It is a conceded fact that the use of the dam in this mode and condition was very detrimental to the farmers and gardeners on the stream above, because in 1894, after a conference was had with a number of them so affected, the defendant agreed to and did lower it for a space of 200 feet, so that it stood 2 feet lower than the 100-foot space as originally constructed; but it was still stepped up at the margins of the stream at either end of the 200-foot space. This was done by taking two tiers of timbers off of the 100-foot space and lowering the additional 100 feet to its level. How the wings were reconstructed does not appear. This left the dam still consisting of three tiers of these timbers, placed one above the other, and upon this was a 4-inch decking, so that it was approximately 3 feet 4 inches in height at its lowest space. The defendant, however, continued the use of the flashboards of the same width as before, when convenient, and permitted others to use them. These statements we make in the nature of conclusions of fact, deeming them so clearly established that it would be a work of supererogation to attempt to summarize and comment upon the testimony adduced tending for or against their support. We may simply allude to the following named witnesses testifying with relation thereto: Charles Porter, E. A. Eddy, John L. Smith, E. Savage, August Krause, F. Grouer,

Fred Fredericks, A. J. Hess, and William Jergens.

From a survey made of Rock creek for drainage purposes prior to the building of the dam, it was ascertained to have a fall of from 3 to  $3\frac{1}{2}$  feet from a certain road mentioned in the evidence down to the mouth of the stream, where it empties into the Tualitin river. Plaintiff's place is 70 or 80 rods above the road. At the crossing of the creek there is a bridge, nearly a mile from the river. From this data we are enabled to get some idea of the influence of the dam upon the drainage of plaintiff's premises. We have seen from the evidence that the dam as originally constructed raised the Tualitin at the mouth of Rock creek from 3 to  $3\frac{1}{2}$  feet, which was sufficient to set the water back up the creek a considerable distance, if not to the road; several witnesses indicating that it was cast back a mile, or nearly to the bridge, and that a foot more would have carried it upon plaintiff's premises; one affirming that it checked the fall entirely; and it needs no demonstration to prove that it would materially stifle and prevent the requisite drainage so necessary to the successful cultivation of his land. The dam was subsequently lowered two feet, however. This would leave some rise in Rock creek—from a foot to a foot and a half above the normal condition. There appear to have been a series of riffles, five in number, originally in the main stream, the lowest being some four miles above the dam and the highest above the town of Tualitin. The condition was such that John L. Smith, a witness for defendant, could not run his scow, drawing 14 inches, over one of them, but, in order to accomplish his purpose, he obtained permission of defendant to put the flashboards upon the dam, and on doing so he secured the required depth. This was in the summer of 1897. Measurements were taken at the time 20 or 30 rods below the mouth of Rock creek to ascertain what effect the flashboards had on the stream at that point, and it was found that when the water stood 19 inches on the flashboards it was raised 9 inches at the point designated, thus showing the direct effect of raising the dam on the stream above at Rock creek. One of the witnesses, in answer to a question whether they put in those flashboards whenever they chose, pointedly states his objection as follows: "Yes, sir; whenever they feel like it. That is the reason I want that dam out. I don't want any flashboards on that dam." Witnesses for the plaintiff, however, generally concur in their testimony that the dam in its present condition and as maintained and controlled impedes very materially the flow of the water in the Tualitin, and consequently the drainage from the low and previously overflowed lands along and near its course, and retards the planting of crops thereon from one to three and four weeks in the spring, to the manifest injury of the owners

year by year; some years greater, and at others less. Such an injury is irreparable, because insusceptible of definite ascertainment and exact redress, and affords proper cause for equitable interference through the injunctive process. There is testimony contradictory of this, but we are unable to accord to it equal weight, so that the preponderance of the evidence is clearly in favor of the conditions thus indicated. It stands to reason that a sluggish stream affords a tardy drainage at best, and that the difficulty is heightened in direct proportion as the stream is obstructed and the current clogged and checked, and we have no doubt that the dam as at present constructed and maintained, considering as well the use of the flashboards, interferes appreciably with the plaintiff in planting and producing his crops. At what particular height it can be maintained without injuring him is not so clear. Relatively speaking, a two-foot dam would affect Rock creek but slightly, and we entirely agree with the judgment of the learned trial court that it ought to be abated to that height from the lowermost portion of the bed of the stream, and be so maintained continuously. The decree should therefore be affirmed.

It should be stated that many individuals are affected similarly to the plaintiff, and that, although not parties to this suit, they have contributed to its prosecution for the purpose of obtaining an abatement of any obstruction of Tualitin river by the defendant resulting to their detriment.

Defendant's counsel contend that, to be successful, plaintiff should make out his case by clear and convincing proof, and that otherwise the court ought not to interfere with defendant's maintenance of its dam. The rule sought to be invoked, however, is not applicable here. The defendant owes to the plaintiff and other landowners whose crops are dependent upon the proper drainage of the soil in which they are produced a duty to see that it does not trespass upon their prior acquired rights and privileges, and it can proceed with its obstruction of the stream just so far only as not to impinge upon these rights and privileges. The case sought to be maintained is a continuing trespass, and there exists no reason here whatever why a stronger rule should be applied against plaintiff than the usual one—that the party making the better case by the preponderance of the testimony is entitled to prevail.

It is urged also that the plaintiff has been gully of laches in not instituting his suit sooner, and ought not to succeed on that account. It appears, however, that the dam has been a disturbing factor with these people along the Tualitin river ever since it was first constructed, and they have not since ceased to complain of its injurious effects. Such was their insistence in 1894 that they obtained a concession of a partial abatement of the obstruction. But this proved to be

inadequate, and within a little over three years later this suit was begun. The defendant has been involved in no expense or inconvenience on account of the delay in instituting the suit, and is clearly in no worse position for maintaining its defense now than if the suit had been brought at an earlier date. The position is therefore untenable.

The form of the decree is unobjectionable. The words "beginning from the lowermost portion thereof" should be construed as meaning from the lowermost portion of the bed of stream; not from the lowest depths of some hole or sudden depression therein, but from the lowermost part of the general contour of the channel. The 12-inch timbers presumably rest on the bed, and they should not be constructed to a height greater than two feet from the lowest part of the general contour.

Affirmed.

#### BARSTOW v. THE AURELIA.

(Supreme Court of Oregon. Aug. 8, 1904.)

##### BOAT LIEN LAW—LIMITATIONS.

1. Under B. & C. Comp. § 5706, providing that a boat constructed in the state shall be subject to a lien for debts due by virtue of a contract with its owners or their contractors on account of material furnished in its construction, and sections 5707-5721, providing the method of procedure to enforce such lien, and section 5722, declaring that all actions against a boat under the provisions of this chapter shall be commenced within one year after "the cause of action shall have accrued," limitations begin to run not from the furnishing of the material, but from the expiration of the credit allowed by the contract under which the material is furnished.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by Carl H. Barstow against the steamboat or vessel Aurelia, her tackle, apparel, and furniture. Judgment for defendant. Plaintiff appeals. Reversed.

R. Citron, for appellant. E. E. Coovert, for respondent.

BEAN, J. This is an action to enforce a lien under the boat lien law of this state on the steamboat Aurelia for materials used in her construction. The boat was built by one Ross, as contractor, and was completed on March 1, 1903. From time to time between September 11 and October 17, 1902, during the building of the boat, Ross purchased of the plaintiff's assignor sundry materials to be used, and which were used, in the construction of the boat, under an agreement that the value thereof should not become due and payable until the boat had been completed. Section 5706, B. & C. Comp., provides: "Every boat or vessel used in navigating the waters of this state or constructed in this state shall be liable and

¶ 1. See Maritime Liens, vol. 24, Cent. Dig. § 122.

subject to a lien, \* \* \* (2) for all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel on account of labor done or materials furnished by mechanics, tradesmen, or others in the building, repairing, fitting, and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launch ways constructed for the launching of such boat or vessel." Sections 5707 to 5721, inclusive, provide the method of procedure for enforcing such lien, and section 5722 declares: "All actions against a boat or vessel under the provisions of this chapter shall be commenced within one year after the cause of action shall have accrued." This action was commenced November 23, 1903, within one year after the credit allowed the contractor had expired and the debt had become due and payable, but not within a year after the materials were furnished. The single question for decision is whether it was brought within the time required by law. The language of the statute seems to be so plain upon this point as to leave but little room for argument. It limits the time for the commencement of an action to enforce a lien to one year after "the cause of action shall have accrued." Now, it is common learning that a cause of action does not accrue until the party owning it has a legal right to sue on it. In short, it accrues at the moment he may bring and prosecute an action thereon, and not earlier. 19 Am. & Eng. Enc. Law (2d Ed.) 193. In interpreting the boat lien law, there is no reason apparent why the language of the statute should be given any other than its ordinary and generally understood meaning. If the Legislature had intended that the time in which to commence an action to enforce a lien should begin to run from the date of furnishing the material, regardless of the credit extended, it would have so provided. It did not do so, but, on the contrary, declared that the claimant should have one year from the time the cause of action accrued in which to commence his action, and this plainly means one year from the time he is entitled to sue on his claim. The reasoning of Mr. Justice Sawyer in *Edgerly v. Schooner San Lorenzo*, 29 Cal. 419, construing a similar statute, is clear and convincing, and gives effect to the plain import of the language used by the Legislature. It can make no difference whether the materials were purchased by the owner or contractor, because the statute makes no distinction on that account. The earlier cases in Wisconsin and Missouri (*Emerson v. Steamboat Shawano City*, 10 Wis. 433; *Darby v. Steamboat Inda*, 9 Mo.

653), holding that under statutes of similar import the time in which to commence the action dates from the time the materials were actually furnished, and not from the expiration of the credit given therefor, are seemingly based upon the idea that possible hardship and injustice might be inflicted if the language of the statute were given its ordinary meaning. That is a matter, however, with which the courts have nothing to do. If a statute is plain and unambiguous, it is the province of a court to enforce it as it comes from the Legislature, and, if the language used does not express the idea intended to be conveyed, or if the law produces inconvenience or hardship, the remedy is with the Legislature, and not with the court.

The judgment of the court below will be reversed, and it is so ordered.

#### LEMMONS v. HUBER.

(Supreme Court of Oregon. Aug. 8, 1904.)

APPEAL FROM JUSTICE—RETRIAL ON MERITS—TIME OF APPEAL—FINAL JUDGMENT.

1. Plaintiff, on appeal to the circuit court from the judgment of a justice, rendered on the hearing merely of the question of retaxation of costs, is not entitled to a retrial of the issues as made by the pleadings, the appeal not being within the 30 days provided by B. & C. Comp. § 2230, after a final judgment, so far as the merits of the case are concerned, was made and entered; it then deciding that plaintiff had failed to sustain the issues of his complaint, dismissing the action, and entering judgment against plaintiff for costs and disbursements; and it is immaterial that the justice then prematurely entered in the judgment the amount of the costs, which was reduced on the retaxation.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by Joseph Lemmons, by B. F. Bonham, his guardian ad litem, against Stephen Huber. From a judgment of a justice, he appeals. Affirmed.

The plaintiff, by his guardian ad litem, brought an action in a justice's court to recover the value of 3½ tons of hay alleged to belong to him, which it was averred the defendant wrongfully and unlawfully converted to his own use. The cause came on for trial before a jury March 16, 1903. After plaintiff had introduced his testimony, defendant moved for a nonsuit on the ground that plaintiff had failed to prove title to the hay in controversy. This motion was sustained by the justice, and judgment rendered against the plaintiff for defendant's costs and disbursements, stated in the judgment entry to be \$28.80. On March 18th the defendant filed a cost bill, claiming the amount stated as his disbursements. The next day objections were filed thereto, and a day or so later an amended verified statement was filed by defendant, in which the amount of his disbursements was stated to be \$27.30.



On April 17th the matter came on for hearing on the objections to the cost bill, and the justice's court found the amended verified statement to be correct, and ordered and adjudged "that the amount of disbursements set forth in defendant's amended verified statement of his disbursements, to wit, the sum of \$27.30, be, and the said sum of \$27.30 is hereby, allowed as defendant's disbursements herein." On May 8th a notice was served on the defendant, notifying him that the plaintiff appealed to the circuit court from the "final judgment made and entered in the above-named justice's court on the 17th day of April, 1903, wherein it was ordered and adjudged by the court that the amount of disbursements set forth in defendant's amended verified statement of his disbursements, to wit, the sum of \$27.30, be, and the same is hereby, allowed as defendant's disbursements herein." At the hearing in the circuit court the plaintiff demanded a retrial on the issues of fact and law as made by the pleadings in the justice's court. The circuit court ruled that the appeal was from the taxation of costs merely, and refused a retrial. The plaintiff declined further to insist upon or prosecute his objections to the cost bill, and it was thereupon ordered and adjudged "by the court that the judgment of the justice's court as hereinbefore described [the one rendered on April 17th] be, and the same is hereby, affirmed; that the defendant have and recover of and from the plaintiff and J. A. Baker, his surety on appeal, the sum of \$27.30 taxed and allowed by said justice's court as defendant's costs and disbursements, and the further sum of \$7.50 as the costs and disbursements of this action in this court." From this judgment the plaintiff appeals.

B. F. Bonham and Carey F. Martin, for appellant. Samuel T. Richardson and W. Ellis Richardson, for respondent.

BEAN, J. (after stating the facts). Plaintiff's motion for a retrial of the issues as made by the pleadings in the justice's court was properly denied. A final judgment, so far as the merits of the case were concerned, was made and entered March 16th. The appeal was not taken until the 8th of the following May—more than 30 days thereafter, and not within the time provided by statute. B. & C. Comp. § 2239. A judgment is final for the purpose of an appeal when it determines the rights of the parties. *State v. Security Sav. Co.*, 28 Or. 410, 43 Pac. 162. The justice's court by the judgment of March 16th finally determined the rights of the parties before it, so far as the merits of the case were concerned. It then decided that the plaintiff had failed to sustain the issues of his complaint by his testimony, dismissed the action, and entered judgment against the plaintiff for costs and disburse-

ments; and this was a final judgment. The controversy over the disbursements did not delay the entry of the judgment, nor did the final decision of that question amount to a modification of the judgment, or extend the time in which to appeal. *Wilson v. Palmer*, 75 N. Y. 250; *Hewitt v. City Mills*, 136 N. Y. 211, 32 N. E. 768. The costs were but a mere incident to the judgment. The proceedings subsequent to its rendition were merely for the purpose of ascertaining the amount of the disbursements to which the defendant was entitled, and they did not alter, modify, or affect the judgment in any way. The fact that the justice seems prematurely to have entered in the judgment the amount of the disbursements, as shown by the cost bill first filed before the objections thereto had been disposed of, cannot in any way affect the question. The appeal, although not probably so intended, merely operated to bring up for review the judgment of the justice's court taxing costs, and on such an appeal the original judgment cannot be attacked or reviewed. *Purvis v. Kroner*, 18 Or. 414, 23 Pac. 260. It is true there is in the record no formal motion to retax costs in the justice's court, but the docket entry shows that the question was disposed of by that court sitting in a judicial capacity, both parties to the litigation appearing, and it is from the judgment rendered on such hearing that the appeal was taken.

It has been suggested that an appeal would not lie from the taxation of disbursements in a justice's court, and therefore the circuit court was in error in affirming the judgment of that court in relation to the taxation of costs. The Justice's Code contains no special provisions for the taxation of disbursements, but sections 2200, 2237, B. & C. Comp., would seem to make the general statute in relation to the taxation of disbursements in courts of record applicable to justice's courts. This question was not discussed in the briefs, and was not particularly urged at the argument, nor is it very material in this case, as the plaintiff was not seeking by the appeal to review the judgment of the justice's court in the matter of the taxation of costs, and makes no question about its correctness.

Judgment affirmed.

#### McFARLANE v. McFARLANE.

(Supreme Court of Oregon. Aug. 8, 1904.)

JUDGMENTS—DEFAULT—APPLICATIONS TO OPEN  
—DISCRETION OF TRIAL COURT—ERRONEOUS EXERCISE.

1. The discretion accorded the trial court by B. & C. Comp. § 103, in allowing answers or replies to be made after the time limited by the Code, is legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve, and not to defeat, the ends of substantial justice.

2. After the entry of a decree for divorce, procured upon service by publication, plaintiff

petitioned the court for a modification of the original decree and for alimony, attorneys' fees, allowances for support of children, and costs, in pursuance of which a citation to show cause was issued to defendant. Defendant appeared specially, and challenged the jurisdiction of the court, both as to person and subject-matter, and, on his contentions being overruled, refused to plead further, suffered default, and appealed. On appeal he secured a reversal in part and a remand to the trial court, where he promptly made application, under B. & C. Comp. § 103, providing that the court, in its discretion, may allow an answer to be made after the time limited by the Code, to be permitted to answer and tender an answer, setting up a good defense. *Held* that the proceedings on defendant's part having been taken in good faith, and in order to present his opposition to the proceedings in the most advantageous manner, the court should have permitted him to answer to the merits, although he was in part mistaken in his view of the law, when he suffered default and took an appeal.

Appeal from Circuit Court, Marion County; R. P. Boise, Judge.

Suit by Elizabeth McFarlane against A. McFarlane. From the decree rendered, defendant appeals. Reversed.

The plaintiff, Elizabeth McFarlane, on February 24, 1899, commenced a suit against defendant for divorce, and, having procured service of summons by publication, took a decree for divorce, a third of his real property, the care and custody of the minor children, and for costs and disbursements. Subsequently, on February 5, 1903, it being ascertained that personal service could be had on the defendant, plaintiff petitioned the court for a modification of the original decree, and for alimony, attorney's fees, an allowance for the support of the minor children, and costs in the original suit, in pursuance of which a citation was issued to the defendant, requiring him to appear and show cause why the prayer of the petition should not be granted. The defendant appeared specially, and challenged the jurisdiction of the court, both as to the person and the subject-matter. The trial court, however, maintained jurisdiction, and, the defendant refusing to plead further, a default was entered against him, and a decree rendered in accordance with the prayer of the petition. The defendant appealed from such decree to this court, where he was in part successful, it being held that the plaintiff was entitled in such supplementary proceeding to a modification of the original decree in so far only as it pertained to an allowance for the support of the minor children, but that the court was without jurisdiction therein to grant alimony, attorney's fees, or costs in the original suit. *McFarlane v. McFarlane*, 43 Or. 477, 73 Pac. 203, 75 Pac. 139. Without entering a final decree, however, the case was remanded to the trial court for such other proceedings as might be found necessary, not inconsistent with the opinion rendered. When the mandate went down, the defendant very promptly appeared, and moved the court to set

aside the default, with leave to answer, basing the motion upon certain affidavits, with which an answer to the merits on the supplementary petition was tendered. This motion having been denied, and a decree rendered granting an allowance for the support of the minor children, defendant again appeals.

P. H. D'Arcy and Geo. G. Bingham, for appellant. Carey F. Martin and W. M. Kaiser, for respondent.

WOLVERTON, J. (after stating the facts). The sole question presented for our consideration is whether the circuit court erred in denying defendant's motion to open up the default, and for leave to file an answer to the merits. The application comes within the first, rather than the last, clause of section 103, B. & C. Comp., the purpose of the defendant being to be relieved of a default in failing to answer, and to be allowed to answer after the time limited by the Code, and not to be relieved of a decree entered against him through his mistake, inadvertence, surprise, or excusable neglect. The decree formerly rendered had been vacated on the appeal, and nothing remained in the record but an entry of default against the defendant, and the purpose of the motion was to get rid of this, and to be allowed to answer to the merits, after the time for answering had expired. The case is not widely different from that where simple default, not a judgment or decree, has been entered against a party who has failed to appear when served with a summons, and he applies to be let in to answer to the merits, the defendant here occupying the more pardonable position. Ordinarily, if he presents reasonable grounds excusing his default, the courts are liberal in granting relief, for the policy of the law is to afford a trial upon the merits when it can be done without doing violence to the statute and established rules of practice that have grown up promotive of the regular disposition of litigation. It was the purpose of counsel, by adopting the course pursued, to present two questions: (1) That the court had no jurisdiction of the person because of the supposed defect in the service of summons in the original cause, consequently that it could have no jurisdiction in the supplementary proceeding, such proceeding being based largely upon the hypothesis that a valid decree of divorce had been previously rendered; and (2) that the court did not have jurisdiction to grant the particular relief demanded. In doing this it is further manifest that they desired to avoid any adverse effect that a general appearance might have had, either in the original or supplementary cause, in conferring jurisdiction of the person or of the subject-matter. There was at the time of entering the special appearance a judgment of department No. 1 of the circuit court of Marion county in their favor upon the

first question, although subsequently reversed (*McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 325, 74 Pac. 468), and as to the second they were successful in part upon the appeal. It is apparent, therefore, that counsel were acting in good faith, according to their best judgment, and they were not without plausible reason for resisting a general appearance. It was not an insuperable barrier to excusing their default that they were unsuccessful in maintaining their position to the fullest extent, while, upon the other hand, the fact that they were successful in part affords persuasive and fair argument why they should be relieved. Counsel have a legal right to present their causes upon grounds of their own choosing, and to employ all fair and honorable tactics and strategy to bring them to a successful issue. By tactics and strategy we do not mean trickery or deception, or the adoption of any measures calculated to defraud or overreach the adversary, and thereby to thwart or pervert justice; but rather their privilege to call to their aid all recognized rules of law and practice most advantageous to the maintenance of their course. That they may at times mistake the law, the rules of practice, or the application of either, is not to the purpose, for, if counsel were always right, and always agreed upon such matters, there would be but little use for courts of justice, except as triers of fact. When, however, they have acted conscientiously, and in perfect good faith, in the course pursued toward the court and the opposing parties litigant, and have reasonable grounds upon which to base their judgment, it does not stand to reason that they or their clients should be punished or suffer because it subsequently develops by judgment of the court that they were mistaken in their views of the law and the proper procedure to be adopted.

Now, without pursuing the matter further, it is insisted that, because counsel were mistaken as a matter of law, the court ought not to relieve defendant of his default. Every time, however, a demurrer is filed and overruled, there is an apparent mistake on the part of counsel as a matter of law; yet, if interposed in good faith, courts do not hesitate to grant leave to answer. Indeed, such is the law's behest (*B. & C. Comp. § 101*), and the statute under which the present relief is sought is strongly akin to that. The delay here was necessarily larger than in such a case, but that circumstance does not detract from the force of the argument, as the course pursued was apparently the only safe method at the command of counsel by which to save all the questions desired to be presented for adjudication. The defendant has a meritorious defense, and we are called upon to determine whether there was an abuse of discretion in the trial court in denying his motion. The discretion accorded is one governed and controlled by legal

principles—"a legal discretion," as was said in *Thompson v. Connell*, 31 Or. 231, 235, 48 Pac. 467, 65 Am. St. Rep. 818, "to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice." Taking into account the viewpoint of counsel, acting honestly and from conscientious motives, as it is very apparent they did, that the course pursued was the only way by which questions deemed vital to their defense could be most effectively presented, and their right to have the law finally determined upon the theory adopted, it not being trivial or frivolous, and there being plausible reason and authority for its support, we are of the opinion that the motion ought to have been granted, and that there was error in the exercise of the legal discretion accorded to the court in such matters in denying it. In support of these views and the conclusions here reached, see *Baxter v. Chute* (Minn.) 52 N. W. 379, 38 Am. St. Rep. 633; *Whereatt v. Ellis* (Wis.) 35 N. W. 314, 5 Am. St. Rep. 164.

The decree of the trial court will therefore be reversed, and the cause remanded, with directions to allow the motion to set aside the default of defendant in the supplementary proceeding, with leave to file his answer tendered to the merits, and for such other proceedings as may seem proper.

Reversed.

# RICE FISHERIES CO. et al. v. PACIFIC REALTY CO. et al.

(Supreme Court of Washington. Aug. 3, 1904.)

LANDLORD—WRONGFUL REMOVAL OF PERSONAL PROPERTY—ACTION FOR DAMAGES—INSTRUCTION—POLL OF JURY—QUESTION BY JUROR—RIGHT TO CHANGE VOTE—APPEAL—STATUTES.

1. Under Sess. Laws 1903, p. 285, c. 148, § 1, providing that judgment in conformity with the verdict shall be entered immediately, and that, if motion for a new trial be seasonably filed, execution shall not issue until the motion is determined, when a motion for a new trial has been filed in time a judgment is not of final effect until the motion is determined.

2. The time for taking an appeal begins to run from the date of the order denying a motion for a new trial, and hence, when taken within 90 days after the determination by the court of a motion for a new trial, seasonably filed, is in time.

3. Affidavits in support of a motion for a new trial, which are not embodied in a bill of exceptions or statement of facts, cannot be considered on appeal.

4. In an action to recover damages for injury to personal property, the complaint alleged that the plaintiffs were on a certain date the owners and in possession of certain buildings, and owners of certain personal property in the buildings and on the adjoining grounds; and that on the day mentioned defendants unlawfully took possession of all the property, and converted it to their own use. *Held*, that a charge that, if the relation of landlord and tenant

¶ 1. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 431, 1895.

existed, then plaintiffs would be entitled to 10 days' notice, in order to determine their rights to the property, and, unless the notice was given, plaintiffs would have the right, under certain conditions, to recover, was not erroneous; the presumption under the allegations of the complaint being that plaintiffs' occupancy of the buildings was rightful, and consequently the occupancy of the grounds on which the buildings stood was also rightful.

5. Where a tenant is in rightful occupancy of buildings and other personal property, and the owner of the land on which they are situated wrongfully removes the buildings and other chattels, he is liable to the tenant for the resulting damage, notwithstanding the removal was not done maliciously or wantonly.

6. A verdict on conflicting evidence will not be disturbed on appeal.

7. Ballinger's Ann. Codes & St. § 5012, providing that when the jury is polled, in case 10 of the jurors do not answer in the affirmative that the verdict returned is the verdict of each, the jury shall be returned to the jury room for further deliberation, does not require the jury to be immediately sent back when 10 of the jurors do not answer in the affirmative.

8. Where the jury is polled, and less than the requisite number answer in the affirmative that the verdict returned is the verdict of each, more than one poll may be taken when the court believes a mistake has been made, or is informed by a juror that he desires to change his vote.

9. Where, on the return of a verdict, the jurors were polled, and less than the requisite number answered in the affirmative as to the verdict returned being the verdict of each, the fact that a whispered conversation occurred between the jurors, after which one of the jurors changed his vote from negative to affirmative, is not of itself sufficient to show that improper influences were brought to bear on the juror, there being nothing in the record to show what was said.

10. Where both parties agreed that when the jury agreed on a verdict the court should receive it in the absence of respective counsel, and in receiving the verdict it appeared from the poll of the jury that less than the requisite number answered in the affirmative that the verdict returned was the verdict of each, whereupon one of the jurors asked the court if he might change his vote, and the court answered that he could if he had made a mistake, the answer was correct, and the incident was not prejudicial to the rights of the parties.

Appeal from Superior Court, Whatcom County; Jere Neterer, Judge.

Action by the Rice Fisheries Company and others against the Pacific Realty Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Kerr, McCord & Craven, for appellants. Crites & Romaine, for respondents.

HADLEY, J. Respondents brought this suit against appellants to recover alleged damages for injury to personal property and also to their business of salting and smoking fish. The complaint alleges that respondents were, on the 12th day of December, 1902, the joint owners, and that the respondent Rice Fisheries Company was in the possession, of certain frame buildings known as "Sutherland Fish Company's Smokehouses," in the city of Fairhaven; that they were also the joint owners of a large amount of other personal property located in said smokehouses and on adjoining grounds, con-

sisting of barrels, tierces, vats, tanks, box shooks, half barrels, saltpeter, kits, pails, and other personal property; that all of said property, including the buildings, was of the value of \$1,500; that on said date the appellants, acting together, maliciously, wrongfully, unlawfully, and by force took possession of all of said property, and broke, damaged, destroyed, and converted it to their own use; that by reason of the destruction of said property respondents were also damaged in their business. Damages are demanded in the sum of \$2,000. The answer is a general denial. A trial was had before the court and a jury, resulting in a verdict for respondents in the sum of \$500. The court withdrew from the consideration of the jury the issue as to damage to respondents' business for the stated reason that there was no evidence upon that subject. Appellants' motion for new trial was denied, judgment was entered upon the verdict, and this appeal is from the judgment.

Respondents moved to dismiss the appeal for the alleged reason that the notice of appeal was neither served nor filed within the time limited by law. The judgment was entered on the 24th day of June, 1903, and the notice of appeal was served and filed on the 3d day of October, 1903. It is true the appeal was taken more than 90 days after the date of the judgment, but the motion for new trial, which was seasonably served and filed, was not acted upon by the court until September 26, 1903. By the terms of section 1, c. 148, p. 285, Sess. Laws 1903, judgment in conformity with the verdict shall be entered immediately as was done in this case. It is, however, provided in the same section that, if a motion for new trial shall be seasonably filed, execution shall not issue upon the judgment until the motion shall be determined. Construing said section in connection with other statutory provisions, this court held in *State ex rel. Payson v. Chapman*, 70 Pac. 525, that, when a motion for new trial has been filed within time, a judgment is not of final effect until the motion is determined, and that the time for taking an appeal begins to run from the date of the order denying the motion for new trial. This appeal was therefore taken within the time limited by law. The motion to dismiss the appeal is denied.

Respondents also move to strike from the transcript certain affidavits purporting to be in support of the motion for new trial, for the reason that the same are not embodied in a bill of exceptions or statement of facts. It has been frequently held by this court that such affidavits are in the nature of evidentiary matter, and must be certified by the trial court as a part of the record, and as containing facts which were considered by the court below, in order to entitle them to consideration here. *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Griggs v. MacLean* (Wash.) 74 Pac. 360; *Shuey v.*

Holmes, 27 Wash. 489, 67 Pac. 1096. The motion to strike the affidavits is granted.

It is assigned by appellants that the court erred in instructing the jury that, if they found that the relation of landlord and tenant existed between the Rice Fisheries Company and Pacific Realty Company, then the former company would be entitled to 10 days' notice, in order to determine its right of occupancy, and, unless such notice was given, it would have the right, under certain conditions, to recover. The theory upon which this instruction is assailed is that the question of the right of respondents to possession of the realty upon which the buildings in controversy were located is not an issue under the pleadings. We think it must be presumed from the allegations of the complaint that the respondents' occupancy of the buildings where they stood was at the time a rightful occupancy. No other theory would sustain the allegation that appellants wrongfully took possession of the buildings. If the occupancy of the buildings as they then stood was rightful, then it must follow that the occupancy of the ground upon which they stood was also rightful. Appellants' general denial put that fact in issue. Evidence upon the matter of notice or lack of notice to quit was therefore competent as bearing upon the question of rightful or wrongful possession, and correspondingly upon the right or wrong of appellants in taking possession and removing the property from the lands. The criticized instruction submitted the issue raised by that evidence, and, for the reasons stated, was not erroneous.

Errors are urged upon the court's refusal to give several requested instructions to the effect that the only theory upon which respondents could recover was that appellants maliciously and wantonly injured and destroyed the property, and that the burden was upon respondents to show that it was so done. It is true the complaint charges that appellants acted maliciously, but it also charges them with acting wrongfully and unlawfully. Proof of a mere wrongful or unlawful injury to the property was, therefore, in support of the complaint, even though the element of maliciousness were wanting. If respondents' occupancy of the buildings was at the time a rightful one by reason of tenancy, then it was wrongful and unlawful for appellants to forcibly remove the buildings and other property, even though it was not done maliciously or wantonly, and for resulting damage in such case appellants must be liable. We think the court did not err in refusing the requested instructions, and we believe the jury were fully and fairly instructed as to the law of the case.

It is next assigned that error was committed in overruling the motion for new trial. So far as evidence in support of the verdict is concerned, there was, we think, testimony to sustain it, and, the conflicting features having been settled by the jury, we shall not

disturb the verdict on that ground. It is, however, claimed that a new trial should have been granted for alleged irregularities occurring at the time the jury returned to the court to announce their verdict. The affidavits having been stricken from the record, our examination of this matter is confined to what appears in the statement of facts in a statement prepared by the court himself, and designated "Supplemental Statement," but attached to the original statement of facts, and certified with it. That statement shows that it was agreed by counsel for both parties that when the jury should agree upon a verdict the court should receive it in the absence of respective counsel. After a time the jury reported an agreement upon a verdict, and, as they were about to return to the courtroom, one of respondents' attorneys entered the room, appellants' attorneys being absent. After the jurors had taken their places in the jury box, the court inquired if they had agreed upon a verdict. The foreman replied in the affirmative, and passed the verdict to the court. The clerk, by direction of the court, read the verdict, and immediately afterwards the court asked if it was the verdict of each one, to which the response came, "It is," and possibly some juror said, "It is not." Thereupon the court ordered the jury polled, as is customary in said court when a verdict is received in the absence of attorneys in the case. On being polled, nine jurors replied in the affirmative and two in the negative (the cause by consent having been tried by eleven jurors). The court then ordered the jury polled again, thinking a mistake might have been made by some juror. The result was the same as before. The court then stated, in substance, that the jury had no business to announce that it had agreed upon a verdict when it had not so agreed, adding, "This is no verdict," and further stating that they had been plainly instructed that it was necessary for ten to agree before they could return a verdict. The court then turned to examine the statutes, and about this time, or possibly just as the second poll was being taken or commenced (as to that the court is not positive), one juror who had voted in the negative stated that he would like to say a word, if it was proper to do so, or words to that effect; whereupon the court promptly informed him that no statement was proper. About this time the same juror asked if he could change his vote, to which the court replied, "If you have made a mistake," or words to that effect. The court thereupon directed the jury to be polled again, and upon doing so ten jurors responded in favor of the verdict, the aforesaid juror voting "Yes," instead of "No," as theretofore, and one other juror at all times voting "No." Thereupon the verdict was ordered filed in the presence of the jury, and the jury were discharged. The court further stated that the time consumed in the foregoing proceedings was only

sufficient for the doing of the things above enumerated in their consecutive order without any appreciable intermission. The court believes that after the first poll of the jury some of the jurors sitting next to the said juror who changed his vote said something to him by way of whispering, prior to his asking permission to change his vote. This fact was not observed by the court, but from sworn statements of other persons he is convinced that such is the fact.

Appellants contend that the law provides that if, upon a poll, a sufficient number of jurors do not assent to a verdict, they shall be immediately sent back to the jury room. The statute (section 5012, Ballinger's Ann. Codes & St.) says: "In case ten of the jurors do not answer in the affirmative, the jury shall be returned to the jury room for further deliberation." The statute does not say they shall be immediately sent back to the jury room, and there is nothing in the statute to prohibit more than one poll if the court believes a mistake has been made, or is informed by a juror that he desires to change his vote. Each juror's vote must be directed by his own conscience, and is not under the control or direction of the other jurors. There seems to be no good reason, therefore, why he may not change his vote in the presence of the court and jury, under the circumstances shown in this case, without having to go through the mere form of going back to the jury room. There is not sufficient showing that any improper influences were brought to bear upon the juror. The mere whispering of one juror to another does not of itself show that he was even speaking about the verdict. Whether a whispered conversation about the verdict under the circumstances shown here would constitute prejudicial error would depend upon what was said, and, since there is nothing in the record to show what was said, no prejudice appears. It is contended that the communication of the judge to the jury in the manner aforesaid was in the nature of instructions, and should have been made in the presence of appellants or their attorneys. What was said by the court was but a reiteration of what he had said as to the law in his instructions given before the retirement of the jury. No new feature as to the law of the case was introduced. He simply stated what he said in his instructions—that ten jurors must agree before they could return a verdict, and informed a juror, who asked for his own information, that he could change his vote if he had made a mistake. That a mistake had been made seems evident, as it will be presumed, under the instructions given, and without other showing, that the foreman understood there were ten votes in the jury room for the verdict, or he would not have reported that a verdict had been reached. Counsel must know the possibility of such circumstances arising, and, if they voluntarily consent for the court to

receive a verdict in their absence, that consent must carry with it the understanding that the court is at liberty to act as a reasonable and sensible man in dealing with such simple emergencies when they arise. He should not be left as though he were dumb, without privilege to open his mouth, merely because counsel have not happened to be in court. The orderly dispatch of business will not permit that he shall be thus narrowly restricted. The juror asked a plain question, which it would have been his right to ask if counsel had been present. The answer of the court was concise and correct. No prejudice to appellants' rights could have resulted therefrom. The case of *State v. Austin*, 6 Wis. 203, cited by appellants, was a criminal case. On the first poll of the jury one juror answered, "I subscribed the verdict." The court directed that the question be put to the juror again, and told him he must answer "Yes" or "No." The juror replied, "Then I will never say 'Yes,' because I subscribed it." He being further instructed by the court as to his duties as a juror, the question was put to him a third time, and he answered, "Yes." The Supreme Court held that it was evident that such a doubt existed in the juror's mind, which fact was made known to the court, as made the reception of the verdict erroneous. The holding was clearly right, particularly in a criminal case, where the element of reasonable doubt is always material. In *Farrell v. Hennessy*, 21 Wis. 639, also cited by appellants, a juror stated that he consented to the verdict as a matter of accommodation, but that it was against his conscience. It was held that the court should have directed the jury to retire and reconsider their verdict. No such conditions as appeared in the Wisconsin cases are shown in the case at bar. As far as the record discloses, the juror acted voluntarily as his conscience and judgment directed, and with no attending coercive or unduly persuasive circumstances. It was not error to receive the verdict.

The judgment is affirmed.

MOUNT and ANDERS, JJ., concur.

#### KANE v. KANE et al.

(Supreme Court of Washington. Aug. 3. 1904.)

DIVORCE—JURISDICTION—CHANGE OF VENUE—STIPULATION—STATEMENT OF FACTS—EVIDENCE—SUFFICIENCY—CHALLENGE—WAIVER—REOPENING CASE—APPEAL—RECORD—JUDGE'S CERTIFICATE—STATUTE—COST BILL.

1. Where the parties to a suit for divorce, involving also the adjustment of property interests, by stipulation agreed to try the case in another county in the same judicial circuit, having the same judge as the county where the suit was brought, the stipulation was, in effect, a change of venue, and hence a legislative change, putting the counties concerned in separate districts, before the trial of the case, did

not affect the jurisdiction of the court to which the change was made.

2. In a suit for divorce a cross-complaint was filed by the wife to set aside an alleged fraudulent conveyance of property to his son, who was subsequently made a cross-defendant. A decree was rendered on it for the wife, from which the son and husband separately appealed. The statement of facts proposed by appellants recited that the cause came on for trial, "it having been stipulated by the attorneys representing plaintiff and defendant, as well as defendants to the cross-complaint, that the same might be tried" in the county to which it had been changed by stipulation prior to the time the son was made a party. *Held* to sufficiently show the consent of the son to try the case in the county to which the change was made.

3. A wife sued for divorce before she had been a resident of the state a year, and, before the case was tried, the husband, who had been a resident a sufficient length of time to maintain an action, filed suit against the wife for divorce, and it was stipulated that the two actions should be tried as one. After the wife had been a resident of the state more than a year, she filed a cross-complaint in the husband's suit, praying for divorce, among other things, therein. *Held*, that the court had jurisdiction notwithstanding that when the wife filed her action she had not been a resident of the state a year, the pleadings showing that the action brought by the wife was abandoned.

4. Where the sufficiency of the evidence in a divorce case is challenged, and, on the challenge being overruled, the party making it proceeds to introduce evidence in his own behalf, any error in the ruling is thereby cured.

5. Permitting a party in a divorce proceeding, after challenge to the sufficiency of the evidence is made, to reopen the case and introduce other evidence, is not an abuse of discretion, it appearing that the additional evidence consisted merely in the formal introduction of answers, which were already in the case in the form of pleadings.

6. An action for divorce is triable de novo on appeal.

7. Where an action is triable de novo on appeal, the Supreme Court must have all the evidence before it which was before the court below in order to so try it.

8. Under Ballinger's Ann. Codes & St. § 5060, providing that a judge's certificate to the record on appeal must recite that the record contains all the facts which the parties have agreed to be all that are material, a certificate reciting that the record contains all the evidence, and further reciting that it contains all the material evidence, is insufficient, it appearing therefrom that certain depositions were read, but the deposition evidence not appearing in the record.

9. A cost bill need not be filed before it is served, nor served before the judgment is filed.

Appeal from Superior Court, Douglas County; C. H. Neal, Judge.

Action by Patrick Kane against Elizabeth Kane for divorce, James L. Kane and another, cross-defendants. From a judgment for defendant, plaintiff and James L. Kane separately appeal. Affirmed.

H. N. Martin, for appellants. Alfred E. Barnes, Geo. A. Latimer, and Alfred M. Craven, for respondents.

HADLEY, J. This is an action for divorce, involving also the adjustment of property interests. On or about the 1st day of

October, 1901, Patrick Kane and Elizabeth Kane became husband and wife. Thereafter, on March 31, 1902, the wife filed a complaint in the superior court of Douglas county, asking for a divorce from the husband. That action not having been brought on for trial, the husband thereafter, on the 15th day of November, 1902, filed a complaint in the same court, asking for divorce from the wife. The wife then filed an answer and cross-complaint to the husband's complaint, demanding a divorce, together with alimony, attorney's fees, and a division of the property; also that certain alleged fraudulent conveyances of the husband and his grantee should be declared void. By leave of court the wife made Patrick J. Kane, Jr., and James L. Kane parties defendant to the cross-complaint. Said defendants are sons of the husband, and the cross-complaint alleges that they are fraudulent grantees for the purpose of defeating the rights of the wife in the property conveyed. In the action brought by the husband, issues as tendered by the complaint and cross-complaint were joined by the several parties aforesaid. It was stipulated between the husband and wife that the separate actions for divorce should be consolidated and tried as one action, but the issues were really made up under the title of and within the case brought by the husband. The husband charged the wife with cruel treatment and with other unbecoming conduct. The wife made like charges against the husband, and also charged that he broke into her trunk, and took from her, without her consent, and appropriated to his own use, the sum of \$1,800 in money; the same being her sole and separate property. By stipulation, and for the convenience of the parties, the cause was transferred to Lincoln county for trial, where it was afterwards tried. The trial was by the court without a jury. Findings of facts and conclusions of law were made, and a decree was entered thereon, by the terms of which the wife was granted a divorce upon her cross-complaint, and was awarded \$1,200 as permanent alimony, together with \$250 as counsel fees. It is also provided that she shall recover from her husband the further sum of \$1,800, which the court fixes as her just and equitable portion of the property involved. The court found that the husband had taken and appropriated the \$1,800, which was the wife's separate property when the two were married, and the item of \$1,800 mentioned in the decree was evidently based upon the theory that the money had become commingled with the husband's property, and that a just division of the property interests required that special account should be taken of that money. This doubtless accounts for the statement of said sum as a separate item in the decree. The decree also provides that the wife shall have a specific lien for the total of said several amounts, and for costs upon the un-

¶ 6. See Divorce, vol. 17, Cent. Dig. § 570.

divided half of certain described real estate. It is also declared that certain specified deeds and conveyances of said real estate are null and void as against the wife, and the same are canceled and set aside. The conveyances referred to are three deeds executed by said husband, Patrick Kane, to his son Patrick J. Kane, Jr., and also three deeds made by the latter, and executed two days later than the others, purporting to convey the same real estate to his brother, James L. Kane. At the trial the cross-complaint was dismissed as to Patrick J. Kane, Jr., evidently on the theory that he has no present real, or even apparent, interest in the property, since he has conveyed it to said James L. Kane. From the decree the said husband, Patrick Kane, and said James L. Kane have separately appealed.

It is assigned that the court erred in overruling the motion for new trial and in entering judgment for the reason that it had jurisdiction neither of the subject-matter nor of the persons of the litigants. In support of the contention on the question of jurisdiction it is argued that, at the time the stipulation was made to try the cause in Lincoln county, said county was in the same judicial district with Douglas county, and that Judge Neal, who was the judge in Lincoln county, was also judge in Douglas county, but that by an act of the Legislature, which took effect thereafter and before the trial of the cause, a new judicial district was created, whereby said counties were placed in separate districts. A new presiding judge was appointed for the district, which includes Douglas county, and at the time of the trial Judge Neal was not the presiding judge of the superior court of that county. It is therefore urged that, since this action was brought in Douglas county, the judge of the superior court of Lincoln county, not being also the judge in Douglas county, had not jurisdiction to try it. We believe the change of districts did not affect the matter of jurisdiction. If no change had been made, Judge Neal, when trying the cause in Lincoln county, would have tried it as the superior court of that county, and not of Douglas county. The stipulation between the parties to all intents and purposes effected a change of venue to Lincoln county. It is, however, contended in behalf of appellant James L. Kane that he never consented for the cause to be tried in Lincoln county, the above-mentioned stipulation for the transfer having been made before he was even made a party to the cross-complaint. The statement of facts proposed by appellants and certified by the court contains the following recital: "This cause came on for trial on the 13th day of July, 1903, at 10 o'clock a. m., before C. H. Neal, Judge, it having been stipulated by the attorneys representing the plaintiff and defendant, as well as defendants to cross-complaint, that the same might be tried at

Davenport, Lincoln county, Washington, before the above-named judge." The above statement certified in the record sufficiently shows the consent of appellant James L. Kane to try the case in Lincoln county.

It is further contended that the court had not jurisdiction, for the reason that when the action brought by the wife, Elizabeth Kane, was commenced, she had been a resident of this state but about five or six months. It is true, jurisdiction could not have been conferred by that complaint, since she had not resided in this state one year. But it is not disputed that the husband, Patrick Kane, had been a continuous resident of this state for many years prior to the time he filed his complaint, and was then a resident of Douglas county. He was, therefore, competent under the law to institute an action for divorce. The wife, as the defendant to the husband's complaint, had the right to defend against it, even by way of cross-complaint, and the cross-complaint shown in the record was also filed after she had been a resident of this state for more than one year. While there was a stipulation in terms declaring that the two actions should be tried as one, yet the pleadings show that the action brought by the wife was to all intents and purposes abandoned. Jurisdiction was full and complete in the action that was tried.

It is urged that the court erred in refusing to sustain the challenge interposed by appellants to the evidence when respondent Elizabeth Kane rested her case in chief and in refusing to dismiss the case. It is not necessary that we should discuss the evidence or pass upon its sufficiency as it stood when the challenge and motion to dismiss were made, for the reason that appellants proceeded at once to the introduction of evidence on their own behalf, and did not stand upon their challenge and motion to dismiss. This court held, in *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930, that in an action for divorce although the court may have erred in denying a motion to dismiss at the close of the plaintiff's testimony, yet the error was cured by the defendants thereafter proceeding with the case. It was held that in equity one must stand upon his motion to dismiss if he would reap advantage from it. It had been previously so held in *Cattell v. Fergusson*, 3 Wash. St. 541, 23 Pac. 750, which case was followed in the one first above cited. Under that rule appellants must be held to have waived the motion by proceeding to introduce their own evidence.

It is further insisted that error was committed in permitting respondent to reopen her case after the challenge to the sufficiency of her evidence was made. We think the court did not abuse its discretion in reopening the case. Appellants were not prejudiced thereby. The additional evidence consisted of a formal introduction as evi-



dence of the answers of Patrick J. Kane, Jr., and James L. Kane, to the cross-complaint, which were already in the case in the form of pleadings.

It is contended by appellants that certain of the material findings of facts as made by the court are not supported by the evidence. But it is urged by respondent that under the record this court would not, in any event, be justified in disturbing these findings, for the reason that it is apparent from the record that all the evidence is not here. The certificate of the court first recites that it contains all the evidence, whereas it is apparent that said recital is erroneous, as the depositions of four persons are shown to have been read in evidence, and much time was consumed by objections to questions therein. The record discloses only the names of the several persons whose depositions were read, the numbers of the several interrogatories challenged by objections, the objections thereto, and the rulings thereon. The deposition evidence itself does not, however, appear in the record. The action is triable de novo here, and this court must have all the evidence before it which was before the court below, in order to so try it. *Enos v. Wilcox*, 3 Wash. St. 44, 28 Pac. 364; *Cadwell v. First National Bank*, 3 Wash. St. 188, 28 Pac. 365; *Kirby v. Collins*, 6 Wash. 297, 32 Pac. 1060; *State ex rel. Van Name v. Directors*, 14 Wash. 222, 44 Pac. 270. It is true the judge's certificate makes the further recital that the statement contains all the material evidence; but, it being manifest that it does not contain all the evidence, it becomes necessary, under section 5060, Ballinger's Ann. Codes & Statutes, that it shall recite that it contains all the facts which the parties have agreed to be all that are material. *Nickeus v. Lewis County*, 23 Wash. 125, 62 Pac. 763. The certificate is lacking in said particular. It being manifest, therefore, that all the evidence which was before the trial court is not before us, we cannot, in the absence of agreement between the parties, try the case de novo with a view to making new findings. We have, however, read the evidence that is in the record, and we may say that, standing alone, we think it justifies the findings made by the court, both upon the divorce issue and upon the money and property features of the case. There is much evidence in the record that is here, but an analytical discussion of it would require much space, and we believe it would not serve any useful purpose, in view of its conflicting nature. If we were required to make findings in the case, we should be disposed, from the evidence before us, to adopt the findings of the trial court who heard and saw all the witnesses testify. The findings will therefore not be disturbed.

The conclusions of law are not inconsistent with the findings. The provisions of the decree as to alimony, attorney's fees, and

division of the property, are not unreasonable under the record showing. The cancellation of the conveyances as having been intended by the parties thereto to be in fraud of respondent's rights is sustained by the findings, and the lien declared thereon properly and logically follows.

Appellant Patrick Kane complains that the court denied his motion to strike the respondent's cross bill. The point urged seems to be that the cost bill was served the day before it was filed, and before the judgment was filed, it being claimed that for said reasons it was not a cost bill. Said appellant directs attention to no statute or ruling of court which requires that a cost bill shall necessarily be filed before it is served, or that it cannot be served before the judgment is filed. It is admitted that the court considered the cost bill, allowing some items and disallowing others. No specific items are pointed out, and no prejudice to said appellant's rights appears.

The judgment is affirmed.

MOUNT and ANDERS, JJ., concur.

SEATTLE & L. W. WATERWAY CO. et al.  
v. SEATTLE DOCK CO.

(Supreme Court of Washington. July 26, 1904.)

STATE TIDE LANDS—IMPROVEMENTS—TITLE OF ACT—CONSTITUTIONAL LAW.

1. Laws 1893, p. 241, c. 99, entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens on tide and shore lands belonging to the state, granting rights of way across lands belonging to the state," does not violate the constitutional provision against embracing more than one subject, though the title is broad enough to include three, the real subject or purpose of the act being the excavation of public waterways by private contract, and the liens and rights of way provided for being merely incidental thereto.

2. The title of Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens for the compensation, is sufficient though not indicating the power of the land commissioner to give the liens.

3. Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on tide lands for the compensation, is not unconstitutional as depriving any one of property without due process, no private owner of lands being affected, the state being the owner of all the tide lands affected at the time the act was passed and the contract for excavating the waterway and filling tide lands was made, and owners of uplands bordering on the tide lands, though having a preference right to purchase, not having on that account any interest entitling them to notice, but they, when purchasing the land, taking it with notice of the contract and all its terms and conditions.

4. Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on state tide lands for the compensation, does not contravene Const. art. 12, § 9, and Id. art. 8, § 5, providing that the credit of the state shall not be given to any individual, the state not being liable to discharge the lien, but it being provided that the lands shall be appraised, and not sold for less than the ap-

praised value, and that the purchasers shall take subject to the liens, and that, if the preference right purchasers do not purchase, the remedy of the contractor shall be to purchase at the appraised value.

5. Laws 1893, p. 241, c. 99, relative to excavations of public waterways by private contract, with liens on state tide lands for the compensation, does not provide for the contracting of a debt by or on behalf of the state in contravention of Const. art. 8, § 3, there being merely a provision for the lands becoming liable for the improvements after the state has parted with its interest therein.

6. Even if Laws 1893, p. 241, c. 99, relative to excavations of public waterways by private contract, with liens on state tide lands for the compensation, grants a special privilege and a monopoly, in contravention of Const. art. 1, § 12, and Id. art. 12, § 22, in that it allows the contractor to erect locks in the waterway, and to exercise exclusive control thereof, and collect toll for his private gain, this is a separable part of the act, and leaves unaffected thereby the part relative to compensation for the improvements.

7. Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on state tide lands for the compensation, does not contravene Const. art. 11, § 15, inhibiting the taking of private property for the debt of a public or municipal corporation, there being no debt till the purchase of the tide lands from the state, when the purchasers agree to pay for the improvements the state has permitted to be placed thereon.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Seattle & Lake Washington Waterway Company and another against the Seattle Dock Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Ballinger, Ronald & Battle, for appellant. Sachs & Hale, for respondents.

MOUNT, J. This action was brought by respondents to foreclose certain liens on tide lands in the city of Seattle. The liens arose under the provisions of chapter 99 of the Laws of 1893, page 241 (Ballinger's Ann. Codes & St. §§ 4080, 4089), entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state." The complaint contains five causes of action, each cause being based upon a lien upon a separate tract of land. The complaint alleges, in substance, that on October 27, 1894, the state of Washington, by its duly authorized commissioner of public lands, entered into a written contract with Eugene Semple for the excavation of a waterway and filling in certain tide lands described (a copy of the contract is attached to the complaint); that after the execution of the contract Semple, for a valuable consideration, assigned and transferred the said contract and all his rights therein to respondent Seattle & Lake Washington Waterway Company, so that said company became substituted for the said Semple in the contract for all purposes; that the contract was entered into after due proceedings by adver-

tisement and otherwise, in full compliance with the provisions of the laws of the state, which proceedings are fully set out; that the respondent the waterway company began the work of excavating the waterway and filling in the tide lands according to the contract prior to the dates of the certificates sued upon, and had filled in and raised above high tide, in full compliance with the contract, the tide lands upon which it is sought to foreclose the liens herein; that on the dates of the certificates the Commissioner of Public Lands issued to the waterway company the certificates described, and which are attached to and made a part of the complaint, and which contain a description of the lands improved and the cost of the improvements; that these certificates were filed in the office of the auditor of King county immediately after their execution, and were duly recorded under the provisions of section 4 of the act above referred to; that by the filing of said certificates the waterway company acquired a lien upon the said lands for the amount due and to become due upon the said certificates under the provisions of said act; that afterwards the waterway company, for value, sold, assigned, and transferred and delivered to respondents Morris & Whitehead, Bankers, a corporation, the said certificates and all right, title, and interest therein; that subsequent to the making of the contract above mentioned between the state of Washington and Eugene Semple, and subsequent to the assignment thereof by Semple to the Seattle & Lake Washington Waterway Company, the appellant acquired from the state of Washington the tide lands upon which liens are sought to be enforced; that the deed from the state for the lands described in the complaint contained the following provision: "Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of the act of the Legislature of the state of Washington entitled 'An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide or shore lands belonging to the state, granting rights-of-way across lands belonging to the state,' approved March 9, 1893;" that certain installments on the certificates are long past due and unpaid. The prayer is for a foreclosure of the liens. Defendant Hofus appeared, and disclaimed any interest in the lands. Appellant, Seattle Dock Company, appeared, and filed a general demurrer to the complaint, which demurrer was overruled. It then filed an answer denying certain allegations, and pleaded six affirmative defenses, substantially as follows: (1) That under the act of the Legislature of the state approved March 26, 1890, the owners of uplands in front of which these tide lands are situated, or the improvers thereof, duly applied for the purchase of the same, which applications were allowed, and the contracts of purchase

from the state issued and executed, to all of which the appellant, by mesne conveyances, has become the owner; that the said act of 1893 referred to in the complaint is unreasonable, and contrary to the federal and state Constitutions in certain respects set forth in said defense, and that its passage was an exercise of power prohibited by the fourteenth amendment to the federal Constitution. (2) The contract set forth was not in conformity with the act, but was contrary thereto in respects set forth in said defense; and that said contract was the taking or attempting to take defendant's property without just compensation, and is the depriving of defendant of its property without due process of law, contrary to the federal and state Constitutions; and that, prior to the filling in of said lands, the defendant forbade the Seattle & Lake Washington Waterway Company from filling in the same. (3) That the certificates issued and attempted to be foreclosed are null and void, in that the land commissioner had no jurisdiction to issue the same. (4) That the lots included within the description set forth in the contract of tide lands which the contractor was to fill were owned by many and divers persons; that the contractor has entered into contracts with certain of these owners, whereby said owners' lots and tracts should not be filled under the contract, but should be exempt therefrom. (5) That the contractor has contracted with other owners of lots included within said description of tide lands by which said contractor agreed to fill and is now filling said owners' lands in manner and upon terms as agreed upon with said owners, and different from the manner and terms mentioned in the contract with the state. (6) That the contractor did not comply with the terms and conditions of the contract with reference to bulkheads, but violated the same, and constructed bulkheads in a manner different from, and of a different material from, that provided in the contract, which manner of construction and materials used were inferior in every respect to the manner of construction and materials prescribed. The plaintiff demurred to these affirmative separate defenses on the ground that none of them stated facts sufficient to constitute a defense. These demurrers were sustained, and defendant refused to plead further. Upon a trial of the issues made by the denials of defendant the facts were stipulated, and the court entered a decree foreclosing the liens for the amount prayed in the complaint.

The appellant assigns error upon the orders of the trial court denying the demurrer to the complaint and in sustaining the demurrers of the plaintiff to the affirmative defenses of the defendant. It is first urged that the act creating the liens is void because it embraces more than one subject, as shown both by the title and by the act itself. The title of the act is as follows: "An act prescribing the ways in which waterways for the uses

of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights-of-way across lands belonging to the state." This title is no doubt broad enough to include three separate, independent subjects of legislation, but when we come to examine the act itself we find that the real subject or purpose of the act is the excavation of public waterways by private contract. The liens and rights of way provided for are merely incidental to the main subject, and are special only to this class of contracts. They are ends or means to the accomplishment of the main purpose of the act, and are not independent subjects. The act is therefore not void upon the ground urged.

It is next argued that there is nothing in the title of the act indicating the powers conferred upon the land commissioner; that power is conferred upon the land commissioner to incumber private property with liens for the filling in of such property against the owner's will. In the first place, we do not think the act is capable of the construction which appellant seeks to place upon it. The act intends, no doubt, to give a lien for filling in lands owned by the state on March 9, 1893, where a contract has been entered into while the state was owner of the land; but the act does not give a lien upon lands where the contract is entered into after the state has parted with its title thereto. But, if the act is susceptible of the construction placed upon it by appellant, it is not necessary to the validity of it that the powers and duties of the land commissioner shall be stated in the title. The office of the title is to call attention to the subject-matter of the act, which must be looked to for a full description of the powers and duties conferred. *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. It is not required that the title of the act shall be a complete index to the act.

Appellant next insists that the act is in conflict with section 3, art. 1, of the state Constitution, and the fourteenth amendment to the Constitution of the United States, which declare that no person shall be deprived of property without due process of law. It is argued that this act deprives appellant of its property without due process of law in four particulars, viz.: (1) It does not afford the owner any notice or opportunity to be heard touching the improvements; (2) the method provided by the act for determining the amount which appellant's lands are to pay is arbitrary, and contrary to the constitutional provision above named; (3) the act is a delegation of legislative and judicial power to a branch of the executive department; (4) the act is an excess of legislative power, and is for a private purpose, or, if for a public purpose, then it imposes burdens upon a small locality for the benefit of the whole public. One hundred and sixty pages of appellant's brief are taken up in discussing these four

propositions. The general principles laid down and discussed and the authorities cited in the brief are no doubt correct when applied to a state of facts where the state itself is not the owner of the land, but in this case it is conceded that the state was the owner of all the tide lands in controversy at the time the act was passed and at the time the contract to fill the same was entered into. This being true, the state could enter into any kind of a contract for filling the lands, at any price, and upon any terms. It could also designate some officer to accept the work when such officer should deem it completed according to the contract. It could afterwards sell the land, and the purchaser would take subject to all the terms and conditions of the contract; and this is what the state did. At the time the act was passed, and the waterway contract entered into, the state was the sole and exclusive owner of the lands. Appellant had no interest in any of them. Appellant's grantors had only a preference right to purchase. They had no vested or other interest. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Mississippi Valley Trust Co. v. Hofus*, 20 Wash. 272, 55 Pac. 54. They were, therefore, entitled to no notice except such as is provided by the act or the contract. When they purchased the land from the state, they took with notice of the contract, and all the terms and conditions thereof. The Commissioner of Public Lands is made the judge of when the contractor is entitled to a certificate, and, in the absence of fraud, his decision is conclusive upon the appellant, as it would be upon the state if the state were still the owner. *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133; *Miss. Valley Trust Co. v. Hofus*, supra. For these reasons there is no question of due process of law or want of notice in the case.

It is next argued that the act is in violation of section 9 of article 12, and section 5 of article 8, of the state Constitution, which declare that "the credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, company, or corporation." We are unable to see that this act in any manner gives the credit of the state to the enterprise. It is true that certain tide lands are authorized to be filled in, and at a stated price, but the state is not bound to pay even this price. The lands were to be appraised, and not sold for less than the appraised price; but purchasers of these lands were required to take notice of the lien created by the cost of filling the same, and were bound to pay for the improvements. So that no aid or credit was given by the state directly or indirectly to the waterway company. The state was not even liable to discharge the lien. It fixed the price of the land without the improvements, and any person qualified to purchase was at liberty to do so. It is argued that the certificates of liens have the state's land back

of them, but this is only true after the state has sold the lands, and then the purchaser takes with notice of the lien and the improvements, which he impliedly, at least, agrees to discharge. If preference right purchasers did not see fit to pay the state the appraised value of the land, and, in addition thereto, pay the waterway company for the improvements, they were under no obligation to purchase. In the event that the state did not sell the land, the only remedy of the waterway company was to purchase the land from the state at the appraised price before the expiration of the lien. While it may have been an advantage to the waterway company to be able to purchase at the appraised price in case preference right purchasers did not do so, we fail to see that the credit of the state was thereby loaned or in any manner given to the waterway company.

It is next argued that the act is in violation of section 3 of article 8 of the state Constitution, which provides that: "No debts shall hereafter be contracted by or on behalf of the state, unless such debts shall be authorized by law for some single work or object to be distinctly specified therein. \* \* \* No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election," etc. It is clear from what we have said above that this is not a debt created or contracted by or on behalf of the state. By the terms of the act and the contract the state is not liable for any improvements upon the lands. Nor are the state's lands liable therefor while they remain the property of the state. The lands become liable only after the state has parted with all its interest. The purchaser from the state takes the title with notice, and agrees to pay the claim of the waterway company for improvements. If this claim may be said to be a debt, it is not such a debt as is meant by the provision named.

It is next argued that the act is contrary to section 12 of article 1, which declares that "no law shall be passed granting to any citizen, class of citizens or corporation other than municipal privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations"; and section 22 of article 12, which declares that monopolies shall not be allowed in this state. It is said that, because the act allows the respondent waterway company to erect locks in the waterway, and to exercise exclusive control thereof, and collect toll for its own private gain, this is a special privilege, and a monopoly. Even if this contention is correct, it does not affect this case, because this is a separable part of the act, and, if this part fails, the portion relating to the certificates would not necessarily fail. Hence it is unnecessary in this case to decide this question.

Appellant further claims that the act is contrary to section 15 of article 11, which

provides that private property shall not be taken or sold for the payment of corporate debts of any public or municipal corporation, except in the mode provided by law for the levy and collection of taxes. As we have seen above, this is not a debt of any public or municipal corporation. It is no debt at all until some one purchases the land, and thereby assumes it, and agrees to pay for the improvements which the state, as owner, has permitted the waterway company to place upon the lands. It then, and for that reason, becomes a debt of the purchaser. Hence this provision of the Constitution is not violated.

The remaining questions presented by appellant are that the contract is not in conformity with the act in a number of respects, and that the Commissioner of Public Lands had no jurisdiction to issue the certificates sued on, because the certificates are not in conformity with the act. All these questions were settled by this court in *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133, and *Miss. Valley Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54. We shall therefore not notice them further.

There is no error in the record, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY and ANDERS, JJ., concur.

# STOCKDALE et al. v. RIO GRANDE WESTERN RY. CO. et al.

(Supreme Court of Utah. Aug. 11, 1904.)

EMINENT DOMAIN—DAMAGING PROPERTY—NUISANCES—OPERATION OF RAILROAD—MUNICIPAL CORPORATIONS—STREETS—USE BY RAILROADS.

1. A city council may grant franchises to railroad companies, authorizing them to make a reasonable use of the public streets of the municipality for the purpose of constructing and operating thereon railroads designed for the use of the public for the transportation of passengers and freight.

2. A switch track, which is part of a general railway system, and which may be used by any or all who have occasion to ship freight over it, and which is not designed for the exclusive use or convenience of any particular person or corporation, is—although, from its location and surroundings, only a limited number of persons will have occasion to use it—a public utility, and does not constitute, when laid in the public street, a public nuisance.

3. Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a taking, within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without just compensation, to the extent of the damage suffered, even though the title and possession of the owner remain undisturbed.

4. A franchise giving a railroad company the right to occupy a street and sidewalk with its spur track does not give it power by which it

can rightfully extend its track over the property of a shipper, and there maintain and operate it, to the irreparable damage of the property of an adjoining owner.

5. The operation of a railroad switch track over property in a city, which results in the shaking of ground by the passage of engines and cars, and causes smoke and noise in close proximity to the premises of a property owner, is a nuisance, within Rev. St. 1898, § 3506, providing that anything obstructing the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, entitling any person whose property is injuriously affected thereby to an injunction, as well as to damages.

6. Under Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without just compensation, a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property was actually taken and appropriated for public use.

7. Losses and inconveniences suffered in common with the general public by reason of the operation of a public utility, such as a railroad, in the vicinity of one's premises, do not entitle the property owner to damages or injunctive relief.

8. A railroad cannot subject private property in a city to the burdens to which it will be subjected by the running of cars and engines over a switch laid over adjoining property, without proceeding under the law of eminent domain, as contemplated by Const. art. 1, § 22, prohibiting the taking or damaging of private property for public use without just compensation, and the statutes of the state.

Bartch, J., dissenting in part.

Appeal from District Court, Salt Lake County; T. Marioneaux, Judge.

Action by Amella Stockdale and others against the Rio Grande Western Railway Company and another. From a judgment for plaintiffs, defendants appeal. Modified.

This action was brought to restrain defendants from operating and running cars over a certain steam railway track, known and designated as a spur or switch track, which track is situated to the south of, and in close proximity to, plaintiffs' premises, upon which there are two dwelling houses (cottages) owned and occupied by the plaintiffs, and by other parties who are tenants of plaintiffs. These premises are 20 rods in length by 5 rods in width; that is, they have a frontage of 5 rods, which faces west on what is known as Fourth West street, in Salt Lake City, Utah. One of the cottages is of brick, and the other is a frame structure. The brick cottage is near the southwest corner of the premises mentioned, and faces west. It has a door and window at the rear or east end, and two windows in the south side, which face the switch track in question, which track passes on a curve within 25 feet of the house, and continues east nearly the entire length of plaintiffs' premises, and within 5 feet thereof.

The third, fourth, and a part of the fifth findings of fact by the trial court, and over which there is no controversy, are as follows:

"(3) That since the 12th day of September,

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1464.

1874, the plaintiffs have been the owners and in the actual possession of the north half of lot 4 [then follows a full description of the property], situated on Fourth West street between Fifth and Sixth South streets; that on said premises, for several years prior to the commencement of this action, there have been, and now are, erected two dwelling houses occupied by the plaintiffs and other tenants, said houses fronting on Fourth West street, and facing west; that situated in the same way, and in the same block, south of plaintiffs' premises, are other houses belonging to and occupied by other people; that the value of plaintiffs' said land and houses is several thousand dollars.

"(4) That for a long time prior to the commencement of this action the said defendant Anheuser-Busch Brewing Association was, and now is, the owner of the south half of lot 4, block 29, \* \* \* adjoining the plaintiffs' premises on the south, and that thereon it has partially erected a large warehouse for the purpose of receiving and shipping beer, and the bottling of the same, in connection with its main private business, and for the purpose of conducting therein a private beer-handling business; that about 65 feet in front of said lots of plaintiffs and the defendant Anheuser-Busch Brewing Association, and about 5 feet from the middle of said Fourth West street, the defendant the Rio Grande Western Railway Company maintains its Park City branch line of railway, and that from said line of railway said defendant Anheuser-Busch Brewing Association on the 25th of July, 1903, by petition in writing, applied to the city council of Salt Lake City, Utah, to permit said Rio Grande Western Railway Company to construct a switch track or spur from said line on Fourth West street over and across the east side of said street and its sidewalk, in, to, and over the land of said defendant Anheuser-Busch Brewing Association, to its warehouse on said lot 4; \* \* \* that on the 5th day of October, 1903, \* \* \* said city council of Salt Lake City duly passed, and on the 9th day of October, 1903, the mayor of said city duly approved, an ordinance granting to said defendant the Rio Grande Western Railway Company the franchise and right of way to construct and operate a spur or switch track on and across Fourth West street, between Fifth and Sixth South streets, in Salt Lake City, Utah, on and into said defendant Anheuser-Busch Brewing Association's premises.

"(5) That from the main line of the Park City branch of said defendant railway company on the same street, about 14 feet south of the starting point of the \* \* \* contemplated spur, a spur or switch is already constructed and in operation, crossing and cutting said street, so that, when said spur crosses the sidewalk of said street, it is within 50 feet of the switch track constructed by defendant."

The court further found, and the evidence supports the finding, "that the operation of said switch track by running cars thereon will impose great burdens upon plaintiffs' premises, because of the shaking of the ground by the passage of engines and cars over the track, and by reason of the smoke and noises incident to the operation of said steam railroad, all in such close proximity to plaintiffs' houses and premises that its operation would be a private nuisance to these plaintiffs, and would thereby greatly diminish the value of plaintiffs' premises." The court also found that the operation of the spur track under consideration, in connection with the switch track immediately south thereof, would be an unreasonable obstruction of the ordinary use of said street and sidewalk for public travel, and the plaintiffs' right of access to their premises would be greatly impaired thereby.

The record shows that the railway company does not own the ground on which the spur track is built which leads into a coal yard immediately south of the premises of the Anheuser-Busch Brewing Association, and that the coal company, on whose land the last-mentioned switch track is constructed, will not permit the railway company to remodel the track so that freight can be shipped over it to the warehouse of defendant Anheuser-Busch Brewing Association.

The court found, as a conclusion of law:

"(1) That the said franchise granted by said city council \* \* \* to said defendant railway company to construct a switch track or spur across the said street in and to and over said defendant Anheuser-Busch Brewing Association's premises was wholly without and beyond the power of said city council, and that no such power is delegated by law to said city council; \* \* \* that said grant did unreasonably obstruct said street and sidewalk on said Fourth West street."

"(4) That the plaintiffs are entitled to a decree as prayed for in their complaint, to enjoin permanently said defendants from the operation of said spur track."

A decree was entered perpetually enjoining defendants from maintaining and operating the switch track under consideration, and ordering defendant railway company to remove the same from the street and sidewalk. From the judgment and decree, this appeal is taken.

Sutherland, Van Cott & Allison and David B. Hempstead, for appellants. Arthur F. Thomas, for respondents.

McCARTY, J., after making the foregoing statement, delivered the opinion of the court.

The first question presented by this appeal is, did the city council exceed its power by granting to defendant railway company a franchise to construct and operate the switch or spur track in question? The power of a city council to grant franchises to

railroad companies to make a reasonable use of the public streets of the municipality, for the purpose of constructing and operating thereon railroads designed for the use of the public for the transportation of passengers and freight, is so well settled that a discussion of this doctrine, which is fundamental, seems unnecessary. Plaintiffs, however, contend that the switch track under consideration is designed wholly for the exclusive use and benefit of a strictly private enterprise, and that its maintenance and operation would in no way subserve the public interest, and would have no relation whatever to the public convenience or welfare, and that therefore it does not come within the foregoing rule. We do not think the record supports this contention. True, the franchise was granted the railway company to build the switch track in question on the petition of the Anheuser-Busch Brewing Association, but the petition does not even suggest that the switch is designed for the exclusive use of the petitioner. That it is not so intended is apparent from the city ordinance granting the franchise, which provides, in part, as follows: "A franchise and right of way is hereby given and granted to the Rio Grande Western Railway Company, its successors and assigns, to lay, construct, and operate a switch or spur standard gauge railroad track leading from a convenient point on \* \* \* its railroad line on Fourth West street to and onto lot 4, block 29, in Plat 'A,' Salt Lake City Survey." The ordinance provides that the track shall be laid, maintained, and operated under certain restrictions as to grade crossings, culverts, etc., but no mention is made of the defendant Anheuser-Busch Brewing Association; nor is it even suggested anywhere in the ordinance that the use of the switch track is to be limited or in any wise restricted from that made by the balance of the railway system of which it forms a part. In fact, the record affirmatively shows that its maintenance and operation will be subject to and controlled by the same rules and regulations as the balance of the system. Joseph H. Young, the general superintendent of the defendant railway company, testified—and his testimony on this point is not disputed—that the property in the vicinity of the switch tracks is largely devoted to warehouse purposes, and that this spur is not only intended for the purpose of freight to and from the warehouse of the brewing association mentioned, but to and from any and all other warehouses that may hereafter be built in the vicinity of the spur. Neither do we think the maintenance of the spur track under the circumstances and conditions as shown by the record is an unreasonable use of the street for trackage purposes.

Plaintiffs cite and rely upon the case of *Cereghino v. Oregon S. L. Ry. Co.* (Utah) 73 Pac. 634, recently decided by this court,

which they insist is decisive of the case under consideration. In that case the city council of Salt Lake City, on petition of the Consolidated Wagon & Machine Company, a private corporation, granted by resolution to the railway company a franchise to construct on one of the public streets of the city a switch track to be used for the exclusive benefit and convenience of said wagon and machine company. The record in that case also showed that there were three other switch tracks on the street in the vicinity of the plaintiff's property, and that the construction of an additional switch track immediately in front of, and in close proximity to, her property, would have shut it off from the street by a network of railroad tracks, the operation of which would have greatly depreciated the value of, if not entirely ruined, such property, for the purposes to which it was devoted. In deciding the case this court held that the city council had not properly exercised its power in granting the franchise, and that it could not lawfully permit the use of the public streets for exclusively private purposes, to the detriment of the public, and damage to private property abutting on such street. In the case at bar, as hereinbefore observed, the switch track complained of is a part of a general railway system, and may be used by any and all who may have occasion to ship freight over it, and is not designed for the exclusive use, benefit, and convenience of any particular person, company, or corporation. True, it is evident from its location and surroundings that only a limited number of persons and business institutions will have occasion to use it, but that does not make of it a private undertaking. The test is, will any and all persons and business institutions who may have occasion to do so be permitted to use it? That is, will the track be open to public use generally? If so, then it is a public utility. *Clarke v. Blackmar et al.*, 47 N. Y. 150; *Lewis, Eminent Domain*, 171; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111. In the case of *Chicago, B. & M. Ry. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75, it was held that "the character of the use in the case of a railroad or railroad track does not depend upon the amount of business or number of persons who have occasion to use it, but on the right of the public to the benefit of it." In *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659, this same general question was involved, and the court said: "The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which the right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small." And likewise in the case of *People v. Blocki*, 203 Ill. 363, 67 N. E. 809, it was held that "all termini of tracks and switches are more or less beneficial to

private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under public control to the extent that railroad tracks generally are, they are tracks for public use." Tested by this rule, which is supported by the weight of authority, the findings of the trial court that the city council exceeded its authority in granting the franchise, and that the spur track is a public nuisance, are erroneous.

Appellants' next contention is that the court erred in finding that the operation of the switch track will be a taking of plaintiffs' property, and a continuous trespass thereon, and that plaintiffs are entitled to injunctive relief. It is not shown, nor do we understand respondents to claim, that the operation of that part of the switch track extending from the main line of railway to the point where it enters the premises of defendant Anheuser-Busch Brewing Association, which point of entrance is about the same distance from plaintiffs' premises as the main line, would materially damage their property, or subject them to any inconvenience, other than that suffered by others who may have occasion to use the street and sidewalk. But it is insisted—and there is evidence in the record that supports the contention—that the operation of that part of the spur track which is entirely within the premises of the defendant Anheuser-Busch Brewing Association, and passes within 25 feet of the brick house mentioned in the statement of facts, and then extends nearly the entire length of plaintiffs' premises, and within 5 feet thereof, would not only materially depreciate the value of said premises, but the shaking of the house by the passing engine and freight cars, and the smoke and cinders from the engine, would be a continuous source of discomfort and annoyance to the plaintiffs and their tenants. Therefore the important question is, are the plaintiffs, under these circumstances and conditions, entitled to injunctive relief? Appellants insist, on the one hand, that as the spur track was constructed in pursuance of a franchise regularly granted by the city of Salt Lake, and is, in contemplation of law, a public highway, respondents' only remedy, if they have one, is by an action at law for damages; while, on the other hand, respondents, with equal vigor, contend that the maintenance and operation of the track will amount to a continuous trespass upon their property, to their discomfort and irreparable damage, and that by the terms of section 22, art. 1, of the Constitution of this state, which provides that "private property shall not be taken or damaged for public use without just compensation," they are entitled to equitable relief to restrain the threatened trespass. The authorities do not all agree as to just what will amount to a taking of private property, within the meaning of the provision of the Constitution

of the United States, which provision, with an occasional change in the phraseology, has been incorporated into the Constitutions of the several states, namely, "Private property shall not be taken for public use without just compensation." Many of the earlier cases adopted the more restricted construction, and held that, to bring a case within the foregoing provision of the Constitution, there must be an actual physical appropriation of the private property sought to be converted to a public use; but, as stated in 1 Lewis on Eminent Domain (2d Ed.) § 57, "the law, as to what constitutes a taking, has been undergoing radical changes in the last few years." And the great weight of the more recent judicial authority, which we believe to be supported by the better reason, and which is more in accord with our ideas of equity and natural justice, holds that any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed. *Rigney v. City of Chicago*, 102 Ill. 64; *Vanderlip v. City of Grand Rapids et al.* (Mich.) 41 N. W. 677, 3 L. R. A. 247, 16 Am. St. Rep. 597; *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; *Pearsall v. Supervisors*, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; *Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504. Some of the earlier decisions of the Supreme Court of the United States and some of the state courts, as well as the opinions of most of the text-writers who have discussed this question in their treatises on constitutional law and the law of eminent domain, have declared in favor of the more liberal and broader construction of the foregoing constitutional provision. *Eaton v. B., C. & M. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Grand Rapids B. Co. v. Jarvis*, 30 Mich. 308; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Lewis, Eminent Domain* (2d Ed.) § 91e, and cases cited in note. Mr. Sedgwick, in his work on Constitutional Law (2d Ed.) pp. 462, 463, says: "The tendency under our system is too often to sacrifice the individual to the community, and it seems very difficult, in reason, to show why the state should not pay for property of which it destroys or impairs the value, as well as for what it physically takes. If, by reason of a consequential damage, the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken." *Elliott on Roads & Streets* (2d Ed.) § 202; *Mills on Eminent Do-*



main (2d Ed.) §§ 30-32. Several of the states, in order to set at rest this much-vexed question, and at the same time give additional security to private property within their respective commonwealths, have had incorporated into their several Constitutions the word "damaged," or its equivalent, and associated it with the word "taking"; thereby providing that private property can be neither taken nor damaged for public use without just compensation.

Appellants insist that, the city council having lawfully granted the defendant railway company a franchise to maintain and operate the spur track in question, plaintiffs' only remedy is by an action at law to recover such damages as they may sustain by its operation, and cite the case of *Cereghino v. Oregon S. L. Ry. Co.*, supra, in support of their contention. The *Cereghino* Case is not in point, and has no application to the issues in this case, only so far as the right of defendant railway company to occupy the street and sidewalk with the switch track is involved.

While the franchise granted in this case gives the defendant railway company the right to occupy the street and sidewalk with its spur track, it does not clothe it with power by which it can rightfully extend the track on and over the premises of its codefendant, and to maintain and operate it to the irreparable damage of plaintiffs' property. And the evidence shows that the operation of that portion of the spur track which is constructed on the private property of the Anheuser-Busch Brewing Association would be a source of great annoyance and discomfort to plaintiffs and their tenants, and would, in effect, as found by the court, amount to a private nuisance. Section 2503, Rev. St. 1898; *Wood on Nuisances* (2d Ed.) p. 127; *Lewis on Eminent Domain*, § 152.

Under the provisions of the Constitution of this state hereinbefore referred to, a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property was actually taken and appropriated for such use. That such is the spirit and intent of the foregoing provision of the Constitution is evident from the tone and character of the extended discussions on this question in the constitutional convention at the time the provision was adopted and became a part of the organic law of the state. Pages 326-344, 623-654, *Proceedings Const. Conv. 1895*.

We do not wish to be understood as holding that every inconvenience that an individual may be subjected to in the possession and enjoyment of his property because of the construction and operation of a railroad or other public utility in the vicinity of his premises entitles him to damages or injunctive relief. The rule is well settled that no

recovery can be had for losses and inconveniences which are suffered in common with the general public. *Elliott on Roads & Streets* (2d Ed.) § 262; *Lewis on Eminent Domain* (2d Ed.) § 236a.

Before the appellant railway company can subject the property in question, or any part thereof, to the burdens to which it would be subjected by the running of cars and engines over the switch referred to, it must proceed under the law of eminent domain, as contemplated by the foregoing provision of the Constitution, and as required by the statutes of this state.

The judgment of the district court, so far as it affects that portion of the switch track located on the public street and requires the removal of the entire spur, is vacated, and said court is directed to so modify its findings and decree; but the judgment, in so far as it restrains the defendant railway company from operating cars and engines on the portion of the switch track located on the premises of the Anheuser-Busch Brewing Association, is affirmed. The costs of this appeal are taxed against the appellants.

BASKIN, C. J., concurs.

BARTCH, J. (concurring in part and dissenting in part). I concur in that portion of the opinion which holds that the findings of the trial court that the city council exceeded its authority in granting the franchise to construct a spur track upon the street, and that the spur track is a public nuisance, are erroneous, and in that portion of the judgment of this court which vacates the judgment of the lower court in so far as it affects "that portion of the switch track located on the public street, and requires the removal of the entire spur"; but I dissent from the remaining portion of the opinion and judgment herein, because I do not think the facts in this case warrant interference by injunction, nor a proceeding under the law of eminent domain. If the operation of the spur should, through carelessness or otherwise, cause injury to the plaintiffs, they have a remedy in damages.

#### In re MAGNES' ESTATE.

BROWN v. ELDER, Treasurer.

(Supreme Court of Colorado. June 20, 1904.)

INHERITANCE TAX—REVENUE LAW—UNIFORM TAXATION—LIMITATION ON RATE—TITLE OF ACT—CHANGING LAW OF DESCENT—CONSTITUTIONAL LAW.

1. The inheritance tax provisions of *Sess Laws 1902, c. 3, §§ 21, 22*, part of an act entitled "An act in relation to public revenue," do not contravene Const. art. 10, § 3, requiring uniform taxation; this relating only to taxes on property, while the inheritance tax is on the privilege of receiving property by will or inheritance.

¶ 1. See *Taxation*, vol. 45, Cent. Dig. § 1674.

2. Because the inheritance tax is on a privilege only, such tax provisions do not contravene Const. art. 10, § 11, limiting the rate of taxation on property for state purposes.

3. Sess. Laws 1902, c. 3, entitled "An act in relation to public revenue," the direct and avowed object of which is to provide for securing public revenue for governmental purposes, does not contain more than one subject, in contravention of Const. art. 5, § 21, though it provides for public revenue from a tax on inheritances and succession, as well as from a tax on property, while prior revenue laws embraced only taxes on property, privileges not being taxed.

4. The title of Sess. Laws 1902, c. 3, "An Act in relation to public revenue," is not too general, so as not to clearly express the subject of the act (the providing for public revenue by taxes on property and privileges), as required by Const. art. 5, § 21.

5. The inheritance tax provisions of Sess. Laws 1902, c. 3, entitled "An act in relation to public revenue" (sections 21, 22), imposing a tax on the privilege of receiving property by will or inheritance, do not change the law of descent, which Const. art. 5, § 25, provides shall not be done by special law.

Error to County Court, City and County of Denver; Ben B. Lindsey, Judge.

In the matter of the estate of Peter Magnea, deceased. There was a judgment relative to the inheritance tax, and Samuel R. Brown, administrator of deceased, brings error; Charles S. Elder, treasurer of the city and county of Denver, being defendant in error. Affirmed.

H. W. Spangler, for plaintiff in error. N. C. Miller, Atty. Gen., for defendant in error.

CAMPBELL, J. The sole question for determination is whether the so-called inheritance tax law of this state is valid. It is said to contravene several provisions of our state and federal Constitutions. As throwing light upon the object of this legislation, and as pertinent to some of the objections made to it, a brief reference to the history of the state's financial condition and standing will be helpful:

By section 11 of article 10 of our Constitution, as originally adopted, the minimum rate of taxation on property for state purposes was two, and the maximum rate six, mills on each dollar of valuation, depending upon the amount of taxable property within the state. As amended in 1891 (Sess. Laws 1891, p. 89), which amendment is still in force, such rate can never exceed four mills on each dollar of valuation. From the beginning of our state history, down to the year 1901, the public revenue received into the state treasury for state purposes was not sufficient to meet the expenses of the three great departments of government, and to provide an adequate support for the different state institutions. Whether the shortage was due to excessive appropriations, or to failure of the executive assessing officers to fix the valuations as the laws require, it is neither profitable to inquire, nor necessary to determine. It is enough for our present purpose to say that different Governors of

the state and its various executive officers and the courts have repeatedly called to the attention of the General Assembly the annual deficits in the state revenues, and suggested methods for liquidating and preventing a recurrence of the same. At one session of the General Assembly a plan was adopted for lowering the rate which counties might levy for county purposes; the thought being that such limitation would result in increased valuations of property, which would inure to the benefit of the state. If such plan had been adhered to, and the rate kept sufficiently low, the financial situation might have been relieved, but at the close of the fiscal year of 1900 the state's financial statement was unsatisfactory. There were then outstanding obligations of the state, evidenced by defaulted warrants and certificates of indebtedness, in large amount, bearing interest at more than the then legal rate, which could not be paid; and it seemed practically impossible to get sufficient revenue from a direct tax on property even to pay current expenses of the government—much less, to take up these matured obligations. Such was the condition that confronted the Thirteenth General Assembly when it convened in January, 1901. To meet and remedy it, that body passed a comprehensive revenue measure, the chief object of which was to provide adequate funds for state purposes. Because of imperfections in the act pointed out by the courts, apparently by general consent of the different departments the act was deemed invalid; and so, the emergency being great, the Governor convened the General Assembly in special session in 1902; and, as appears from his proclamation and message thereafter submitted, the primary object of the call was to enable the General Assembly to provide ways and means for securing more revenue for the general purposes of the state. At such special session there was introduced and passed by the General Assembly a comprehensive revenue measure, entitled "An act in relation to public revenue." Acts Sp. Sess. 1902, c. 3. Included therein from sections 21 to 41, both inclusive, are what constitute our present so-called inheritance tax provisions, which are the subject of attack in this case. These particular sections, though once declared by this court objectionable legislation (In re Inheritance Tax, 23 Colo. 492, 48 Pac. 535), were taken bodily from the statute of Illinois, and after the same had been construed by the Supreme Court of that state and held constitutional under provisions substantially the same as our own. By section 21 of this act, "All property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, \* \* \* is subject to a tax at the rate hereinafter specified," and all persons so receiving such property, in whatever capacity, are made liable for the tax

until the same is paid. The section provides that when the beneficial interests shall pass to or for the use of "any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter," or to an adopted child, or to one to whom the deceased stood in the acknowledged relation of a parent, or to any lineal descendant, the rate of tax shall be \$2 on every \$100 of the clear market value of such property so received, provided that the sum of \$10,000 of any such estate shall not be subject to any such duty or taxes, and only the amount in excess of \$10,000 shall be subject thereto. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew, or any lineal descendant of the same, the tax is \$3 on every \$100; and in all other cases on every \$100 of the clear market value of what passes, and at the same rate for any less amount, on all estates of \$10,000 and less, \$3; on all estates of over \$10,000, and not exceeding \$20,000, \$4; on all estates over \$20,000, and not exceeding \$50,000, \$5; and, on all estates over \$50,000, \$6; and there is a proviso that, where the estate is of a less value than \$500, it shall not be subject to any duty or tax at all. Section 22 provides that "when any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother, sister, the widow of the son, husband of the daughter, or a lineal descendant during the life or for a term of years and remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent, \* \* \* and after deducting therefrom the value of said life estate, or term of years, the tax prescribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county." There is a proviso that persons beneficially interested, if they elect not to pay the same until they shall come into the actual possession and enjoyment, shall give bond for securing the payment of the amount due when they do come into possession. The other sections are purely administrative in character, and are not material to this review.

1. The tax herein imposed is attacked upon the ground that it lacks the elements of uniformity and equality which section 3 of article 10 was intended to secure, and is in excess of the limited rate of four mills on each dollar of valuation, which, as it is said, the general assembly may not, under section 11 of the same article of our Constitution, exceed in securing revenue for general state purposes. In the late case of *Parsons v. Peo-*

*ple*, 32 Colo. —, 76 Pac. 666, it was held that section 3 applies only to taxes upon property, and not to a privilege or occupation tax, and that in raising revenue for state purposes the General Assembly is not restricted to a tax on property at the limited rate of four mills prescribed by section 11, but may select other subjects of taxation, such as occupations and privileges. A careful investigation will disclose that, with few exceptions, where similar questions have been raised in other states and in the Supreme Court of the United States, an inheritance or succession tax has been held not to come within the purview of the uniformity and equality clause of State Constitutions, and that the power to impose the same is to be found in the sovereign power of taxation which the state possesses to the fullest degree, except as limited in its organic act. In these decisions substantially every objection as to the lack of uniformity and equality, and the alleged arbitrary and unjust discriminations which these provisions are said to exhibit, and that they contravene various sections of our Bill of Rights affecting the property rights of citizens, have been considered and decided adversely to the contention of counsel for plaintiff in error. It is not necessary for us to make an argument in support of their validity, and, if we should do so, the result would be largely a repetition of the reasoning of the Supreme Court of the United States and of many state tribunals. We shall content ourselves merely with the general statement taken from the opinion of the Supreme Court of the United States in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, in which the decree of the Circuit Court of the United States for the District of Illinois upholding the validity of the act of which ours is a substantial copy was affirmed—that the constitutionality of such taxes is based upon two principles: First, an inheritance tax is not one on property, but one on the succession; second, the right to take property by devise or descent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the state may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of the respective state Constitutions requiring uniformity of taxation. See, also, *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *Billings v. People*, 189 Ill. 472, 59 N. E. 798, affirmed in 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; *Dos Passos on Inheritance Tax Law* (2d Ed.) § 8 et seq. In *Cooley on Taxation* (5th Ed.) at pages 8, 30, 584, that learned author says that succession to an inheritance may be taxed as a privilege, though the property of the estate itself be already taxed as property, and taxes are required to be uniform. It is

an impost or duty upon the devolution of an estate. Other cases upholding, and some overthrowing, acts of this character, will be found in the authorities already cited. To enumerate them here would unnecessarily burden the opinion. In *Black v. State*, 89 N. W. 522, the Supreme Court of Wisconsin held invalid the inheritance tax law of that state upon the ground that it made unlawful discriminations between beneficiaries in the same class. We do not understand that such discriminations exist in our statute. Indeed, the Wisconsin court, in referring to *Magoun v. Bank*, supra, in which the Illinois law of which ours is a copy was held valid, observed that the provisions of the Wisconsin law there held invalid were different from those in the Illinois law, which in the *Magoun* Case were upheld. The exemption which the Wisconsin act contained was based upon the size of the whole property devised or granted, and not upon the amount received by each legatee or grantee; and the necessary result, as the opinion in that case states, was that people in the same class were subject to different rules; some being exempt, while others are taxed. Were the foregoing the only objections made, we would proceed no further, believing that they have been disposed of by the rulings of the Supreme Courts of Illinois and other states and by the Supreme Court of the United States under a statute the same as ours. But other objections, apparently not made in the cases arising under the Illinois law, are here presented, and to them we now address ourselves.

2. It is contended that these provisions are violative of section 21 of article 5 of our Constitution, which provides that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title," in that they embrace a subject distinct from, and not germane to, the subject mentioned in the title, and that their subject-matter is not clearly expressed therein. It is said that the legislation embraced in these sections changes and radically modifies two separate and distinct pre-existing laws of the state, one relating to the law of descent, and the other to the transmission of property by testamentary conveyance, while all the other provisions of the act concern the taxation of property for the purpose of public revenue. It is further said that the power to make such changes in the substantive law of the state relating to the subject of descents and inheritances is referable to the police, and not to the taxing, power of the state. The argument is that hitherto in this state, under the general title of revenue only, such legislation has been enacted in order to produce public funds as provides for the laying of direct taxes upon property, and that the word "revenue," in the title of this act, is used in that sense. And the conclusion is that all such provisions in this act as are not related to the subject of direct taxation of property

do not come within the title. It is conceded that the lexicographers give to "revenue" a broader meaning than that here contended for, but, by reason of the long-continued custom in this state, it is insisted that the restricted meaning must be here adopted. Among other cases, we are cited to *Geer v. Board of Com'rs*, 97 Fed. 435, 38 C. C. A. 250, wherein it is said that a bill for raising revenue, within the meaning of section 31 of article 5 of the Colorado Constitution, which reads, "All bills for raising revenue shall originate in the House of Representatives," is one which provides for the levy and collection of taxes for the purpose of paying the officers and of defraying the expenses of the government, and that the bill then before the court was not of that character, for its main purpose was to authorize certain quasi municipal corporations to refund their debts. That case is not in point here. The direct and avowed object of this act is to provide for securing public revenue for governmental purposes, and the word "revenue" in the title is sufficiently broad to include all provisions having that general object in view—not only provisions for securing revenue as the result of a direct tax upon property, but revenue derived from the imposition of licenses, duties, excises, and a tax on occupations or on successions. In *United States v. Norton*, 91 U. S. 566, 23 L. Ed. 454, it was said that federal "revenue laws" meant such laws as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government. To the same effect is *United States v. Mayo*, 1 Gall. 396, Fed. Cas. No. 15,755. In *State v. Ewing*, 22 Kan. 708-712, Mr. Justice Brewer, in response to the contention that only such funds as are raised by taxation of property can be included within an act whose title relates to revenue, said: "The word is broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner. The general funds of this state are collected from taxes, but the Legislature might, in an act with such a title—at least, so far as any question of the form of the legislation is concerned—enact that they be collected from licenses or from the sale of lottery tickets, or it might unite and enact that part might be collected from one source and in one manner, and the rest from another source and in a different manner." If it be a fact that heretofore our General Assembly has included in the general revenue laws only provisions for a direct tax on property, that is not conclusive that "revenue" was used in the restricted sense here. Until this act was passed, it is well known that our legislative department had not selected as subjects of taxation privileges and occupations. And when it here created these new subjects, it is clear that "revenue" was intended to include funds derived from a tax thereupon, and the term was so used by the

General Assembly. We are clear that the title of this act, being one relating to revenue, clearly embraces provisions in the body of the act providing for public revenue from a tax on inheritances or successions. In *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, it seems that certain provisions relating to an inheritance tax were included in the general revenue law of that state.

The further objection here urged that the title of the act is too general is not usually a tenable one. Indeed, this court, in passing upon the titles of acts, has advised the General Assembly against the attempt to make them too specific. It is true that, if the title is so general as to be misleading, it may be obnoxious to the constitutional provision under consideration; and courts in some cases have declared titles so general as to be misleading—such, for example, as *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693, and *Stegmaier v. Jones* (Pa.) 52 Atl. 56. But there is no such objection to the present title, in view of the financial history of the state, of which the courts, as well as the people, are advised. One would naturally expect to find in an act entitled "Revenue" provisions imposing a duty upon privileges or successions.

3. The third general ground of objection is that this act, in so far as the sections under consideration are concerned, is repugnant to section 25 of article 5, which reads: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, \* \* \* changing the law of descent." To this point is cited *In re Cope's Estate*, 191 Pa. 1, 43 Atl. 79, 45 L. R. A. 316, 71 Am. St. Rep. 749. The direct inheritance tax law of Pennsylvania was there considered, and it was held to be a tax law, pure and simple; imposing a state tax upon specified personal property, and exempting all others of the same class. Being a direct tax upon property, and not laid upon the same with uniformity and equality, the court said that it was contrary to the constitutional provision of that state, declaring that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. The court, moreover, went further, and said that this provision of the Constitution applied not only to all taxes upon every kind of property, but included inheritance or succession taxes as well. The act was also held invalid because it infringed another clause of the Pennsylvania Constitution, which declared that all laws exempting from taxation property other than the particular property therein described were void, and the property exempted by the act under review did not come within such description. The court then, after having held the act unconstitutional because it was in violation of the exemption, uniformity, and equality clauses of the state

Constitution, addressed itself to a further contention of the commonwealth—that the thing imposed was not a tax at all, but rather an exercise by the state Legislature of its general police powers, whereby it might appropriate to itself such portion of a decedent's estate as that body, in its wisdom, might consider necessary or proper, and, to that end, might change the pre-existing law of descent. To this the court replied that, if the assumption be conceded, nevertheless the act was void, for on this assumption it was nothing more than a special act purporting to amend the law of descent, which the Constitution of Pennsylvania, like ours, prohibits. This was the reasoning of the court: "The pre-existing law of succession is changed by that act, in that it imposes a burden on so much of said property as is in excess of \$5,000, and leaves it unchanged as to the residue. It is therefore a special, and not a general, act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property, not exceeding \$5,000 in value, shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, \* \* \* while others in precisely the same class are exempted therefrom." The laying of a direct tax upon property just as much changes the law of the land under which the owner is entitled to its exclusive use and enjoyment as does the imposition of a succession tax upon the privilege of receiving property under the intestate laws change the law of descent. And yet we apprehend that a law of the former kind would not be called a local or special law, nor is it correct to say that it changes the law which protects the owner in the enjoyment of his property. It is difficult to see wherein the imposition of a succession tax on property passing under the intestate laws changes the pre-existing law of descent. That law remains just as it was before. Property passes thereunder after just as it did before the tax was laid, and to precisely the same persons; and the laying of the tax merely casts upon its devolution to those persons a burden that was not borne before, but which at any time the state could impose in the form of a tax. But whether the reasoning of the court in *Cope's Case* justifies the conclusion that the act is special, and that it changes the law of descent, is not important for us to determine, for it will be observed that the court expressly said that the act would be invalid, as contravening that provision of the Constitution which forbids such legislation, provided it was not a tax law on property. If, on the other hand, the act merely imposed such a tax, as the court said it did, clearly it was not subject to the constitutional objection that it was a special law which changed the law of descent. We have already held that our law imposes a tax upon the privilege of taking, receiving, and enjoy-

ing property that passes by will or under our intestate laws, and that authority for its imposition is found in the sovereign power of the state to lay a tax upon privileges and successions. Cooley on Constitutional Limitations (5th Ed.) 616. Therefore, both upon the authority of the Pennsylvania case and upon principle, our act does not infringe the section of our Constitution prohibiting the changing of the law of descent by special act, and such is not its purpose. In legal contemplation, it does not change the law of descent in the sense of the inhibition of our Constitution; and, as already said, it no more modifies or abrogates the law of descent, or the right to hold and enjoy property which passes by will, than does any kind of a tax on property change the general law under which the owner enjoys it.

It may be, as counsel for plaintiff in error argues, and as this court, in Re House Bill No. 122, 23 Colo. 492, 48 Pac. 535, remarked, that the provisions we have been considering are most objectionable. Such observation of this court, however, had no reference to the question of their validity, but referred to their drastic nature and inequality or apparent lack of fairness in classification. So, also, it was made at a time when the bill containing them was under consideration by the General Assembly, and therefore pertinent to the answer which the court was required to make to the question propounded by that body. But with the wisdom or policy of a completed work of the Legislature merged into a statute a court has nothing to do. However unwise the act may seem to the judiciary, if it is not inhibited by the fundamental state or federal law, it cannot be annulled. Our investigation leads us to the conclusion that none of the constitutional objections urged are tenable. The judgment below, which was in harmony with this view, is affirmed. Affirmed.

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CITY COUNCIL OF CITY AND COUNTY  
OF DENVER v. BOARD OF COM'RS  
OF ADAMS COUNTY.

(Supreme Court of Colorado. June 20, 1904.)

COUNTIES—SUBDIVISION BY LEGISLATURE—APPORTIONMENT OF DEBTS AND PROPERTY—POWERS OF LEGISLATURE—CONSTITUTIONAL PROVISIONS—DATE OF OPERATION—TAXATION—LIMIT—MANDAMUS—ATTEMPTED DEFEAT OF PROCEEDING.

1. Sess. Laws 1899, p. 330, c. 133, providing that there shall be levied and assessed on all taxable property within counties of the first class taxes at a rate not to exceed three mills on the dollar, does not preclude the city and county of Denver from levying taxes in excess of that rate, where such levy is necessary to meet the charge imposed by Sess. Laws 1903, p. 159, c. 79, providing for the adjustment of equities between the city and county of Denver and the other counties created out of old Arapahoe county on its dismemberment in pursuance of the constitutional amendment designated as article 20.

2. A city council cannot, after the service of an alternative writ of mandamus ordering it to levy a tax for a certain purpose, by making the annual levy and omitting therefrom the levy which it was ordered to make, defeat the mandamus proceeding; and, where it attempts to do so, it is competent for the court to compel it to reconvene and correct the levy, or to add an additional levy sufficient to pay the claim.

3. The boards of county commissioners, acting in pursuance of Sess. Laws 1903, p. 159, c. 79, providing for the adjustment of equities arising out of the dismemberment of old Arapahoe county and the creation of the new counties from its territory, acted as mere instrumentalities of the state government for the accomplishment of the purpose of the act, and it was not competent for them to raise the question of the constitutionality of the statute under which they acted.

4. In the absence of a constitutional limitation, it is competent for the Legislature, at the time it carves out a new county from the territory of an old one, or by subsequent legislation, to adjust the property rights and equities existing between the two.

5. While not conclusive with the courts, a contemporaneous legislative construction of a statute or constitutional provision is persuasive.

6. The date of the taking effect of a constitutional amendment cannot be established by admission or agreement of counsel.

7. The constitutional amendment designated as article 20, creating the city and county of Denver, section 1 of which provided that such city and county should own all the property possessed by the included municipalities and by the county of Arapahoe, and succeed to all the rights, liabilities, and benefits, and assume all indebtedness, of the constituent bodies, and section 3 of which provided that, immediately on the canvass of the vote showing the adoption of the amendment, it should be the duty of the Governor to issue his proclamation accordingly, whereupon the former city of Denver and the pre-existing municipal corporations and designated part of Arapahoe county should merge into the city and county of Denver, became effective when ratified by the people on November 4, 1902; but the city and county of Denver, therein provided for, did not come into being until the day of the issuing of the Governor's proclamation, on December 1, 1902, and consequently there were included in the obligations which it assumed such as existed on that day.

8. The city and county of Denver, created by the constitutional amendment designated as article 20, is still a county, as well as a city; and the General Assembly, except as otherwise provided in that article, has the same control over its county funds that it has over the funds of the other counties, and may, unless limited by the Constitution, make such provisions for raising and disbursing its county revenue as seem to it wise and proper.

9. The amendment to the Constitution designated as article 20, creating the city and county of Denver, provided that such city and county should own all the property previously owned or possessed by the included municipalities and by the county of Arapahoe, and should succeed to all the rights, liabilities, and benefits, and assume all the bonds and indebtedness, of the constituent bodies. Sess. Laws 1901, p. 133, c. 57, provided that the portion of old Arapahoe county not included in the city and county of Denver should be divided into two counties. *Held*, that it was competent for the Legislature to pass Sess. Laws 1903, p. 159, c. 79, making specific provision for the payment by the city and county of Denver to the other counties of their proportionate interest in the property of the old county, which the constitutional amendment vested in the city and county of Denver, and for payment for which it made no provision.

Error to District Court, City and County of Denver; Frank T. Johnson, Judge.

Mandamus proceedings by the board of county commissioners of the county of Adams against the city council of the city and county of Denver, sitting as a board of county commissioners. The writ was granted, and defendants bring error. Affirmed.

Henry A. Lindsley and Charles R. Brock, for plaintiff in error. O. H. Pierce and C. M. Kendall, for defendants in error.

CAMPBELL, J. This proceeding in mandamus, instituted by the board of county commissioners of Adams county against the city council of the city and county of Denver, sitting as a board of county commissioners, was to compel the latter to levy a tax to pay a certain claim in favor of the county of Adams and against the city and county of Denver, which was imposed by the General Assembly in connection with the dismemberment of Arapahoe county and the formation of three new counties out of its territory.

Prior to the year 1901, what may be properly designated as old Arapahoe county was geographically the same as when our state Constitution was adopted. At the regular session of the Thirteenth General Assembly, held in that year, there was before that body a general scheme to grant to its county seat, the former city of Denver, so-called home rule, which involved the subdivision of Arapahoe county into two new counties proper, and the erection of a new body politic, partaking of the nature and characteristics both of a city and county. To bring about this result, the General Assembly passed, in the form of an act, a proposed amendment to the Constitution, which has been submitted to and ratified by the people, and is now known as article 20 of that instrument. By this amendment all the territory theretofore included within the outer boundaries of the former city of Denver, which inclosed several distinct municipalities and some unorganized territory, was merged into one body corporate, to be known thereafter as the city and county of Denver. At the same session the General Assembly passed two acts by which all of the remaining portion of the territory of old Arapahoe county was divided into two parts, one of which was made into the new county of Adams, and the other into the county of South Arapahoe, which were to take effect on November 15, 1902, only in the event that the constitutional amendment was adopted. When these three measures went into effect, that which was formerly the county of Arapahoe therefore became three separate political subdivisions of the state, bearing the names just mentioned; and it is apparent that the entire scheme was dependent upon the adoption of the constitutional amendment. This amendment was voted upon at the general election held on the 4th day of November, 1902, and received a ma-

jority of the legal votes cast. Section 1 thereof provides that the new city and county of Denver shall own all of the property theretofore owned or possessed by the included municipalities and by the county of Arapahoe, and shall succeed to all the rights, liabilities, and benefits, and shall assume and pay all bonds, obligations, and indebtedness, of these constituent bodies. Section 3 provides that, immediately upon the canvass of the vote showing the adoption of the amendment, it shall be the duty of the Governor to issue his proclamation accordingly, and thereupon the former city of Denver and the pre-existing municipal corporations and the designated part of the county of Arapahoe shall merge into the city and county of Denver.

In the acts of the General Assembly creating the two new counties proper, and carving the same out of Arapahoe county, provision was made for a division of property between them; and at the next succeeding regular session of the General Assembly, in 1903, the appropriate sections of these acts of 1901 were amended so as to make more definite the method of appraising the property of the respective counties, and for adjusting the equities between them arising out of the dismemberment of old Arapahoe county and the creation of the new ones. Sess. Laws 1901, p. 183, c. 57; Sess. Laws 1903, p. 159, c. 79. Acting under the amendment of 1903, and in accordance with its directions, it was ascertained that the new city and county of Denver should pay to the county of Adams about \$60,000. The city and county of Denver refused to pay the same, or to levy a tax for that purpose, whereupon this proceeding was instituted to compel the levy of the necessary tax. In the court below, as shown by the original return to the alternative writ, the only defense interposed was that the act of 1903 under which the alleged indebtedness had been ascertained was unconstitutional. By an amendment to the return an additional defense was that no power was given to, and no duty imposed upon, the council to levy the tax demanded.

1. The law of this state requires the levy of the annual county tax to be made not later than November 30th, but, if laid at a later time, it is not for that reason invalid. On this day the county of Adams caused a demand to be made upon the city council of Denver to pay, or levy a tax to pay, the claim in question, which the latter refused to do. These proceedings were thereupon instituted, and the alternative writ issued, to which the city council made return on the 21st of December, 1903—in form, an answer; in legal effect, a demurrer. The only defense set up was that the act of 1903 by which this demand was imposed is unconstitutional, in that it places upon the city and county of Denver burdens, and provides a basis and method for adjusting the equities between these respective counties, other than and different from those which Const. Amend.

art. 20, prescribes. The court indicating that it entertained a contrary view, the respondent was permitted to file an amended return, which, in substance, states that after the issuance and service of the alternative writ, and the filing of the original return, the respondent, on January 2, 1904, sitting as a board of county commissioners, enacted an ordinance by which it reached the limit of its power to levy a tax to raise a fund for ordinary county purposes, and caused such levy to be certified to the county assessor, and that, by reason of the premises, it is without authority to make any further or additional levy for the year 1903, since its power in that respect was exhausted by the enactment of the ordinance referred to.

It was improper for the city council, after the service of the alternative writ, and while the proceeding was pending, to enact any ordinance which provided for a levy inconsistent with or contrary to its command. Neither the original nor the amended return constitutes a defense to the writ, if the statute of 1903 is valid. The amended return certainly shows no cause why the writ should be discharged. In Sess. Laws 1899, p. 330, c. 133, it is enacted that there shall be levied and assessed upon all taxable property within counties of the first class, for ordinary county revenues, including the support of the poor, and for the purpose of raising a fund to meet any unforeseen contingency, taxes at such rate as may be necessary, but not to exceed three mills on each dollar of valuation. If this act is now applicable to the city and county of Denver, as to which we express no opinion, it certainly has no bearing upon this case. The demand which the General Assembly has imposed upon the city and county of Denver is not one whose payment must be made only out of its ordinary county revenues, and it is not a claim upon either of the other two funds. It is not an expense or claim or demand against the county of an ordinary, but of an extraordinary, kind; and the power to impose it, if it exist at all, carries with it, as a necessary implication, the power, residing in the city and county of Denver, to pay the same, and to levy a tax for that purpose other than, and in addition to, that which it may levy to secure its ordinary county revenue. This, we think, clearly appears from the authorities. *Ralls County Court v. U. S.*, 105 U. S. 733, 26 L. Ed. 1220; *U. S. v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Scotland County Court v. U. S.*, 140 U. S. 41, 11 Sup. Ct. 697, 35 L. Ed. 351.

The fact that the city council assumed to make the annual levy after service of the alternative writ did not exhaust its power in the premises or defeat the proceeding. If by such action a municipality can escape the performance of its duty, it might by the merest subterfuge easily repudiate all its just obligations. It was entirely competent for the district court, in the circumstances

of this case, as was done, before the books passed into the hands of the treasurer, to compel the council to reconvene and to correct the levy theretofore made, by amending the same, or by adding an additional levy sufficient to pay this claim, which, in fact, counsel say, has been done. *People v. Salomon*, 54 Ill. 39; *Wartman v. Wartman*, Fed. Cas. No. 17,210; *State v. Headlee*, 22 Wash. 126, 60 Pac. 126; *Sharpe v. Engle*, 2 Okl. 624, 39 Pac. 384; *County Com'rs v. Melvin*, 89 Md. 37, 42 Atl. 910.

2. The other defense to the writ, upon which plaintiff in error mainly relies, is that the act of 1903, p. 159, c. 79, is unconstitutional. We observe, in the first place, that the General Assembly in this act selected as its representatives for carrying out its commands those who were acting as boards of commissioners of the respective counties. They were mere instrumentalities of the state government for the accomplishment of its purpose, and the general rule in such cases is that it is not competent for them to raise the question of the constitutionality of the statute under which they are to act, but this question should be left to those who are directly interested in, and affected by, its provisions. *People v. Ames*, 24 Colo. 422, 51 Pac. 426; *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *People v. Salomon*, supra. That, in the absence of a constitutional limitation, it is competent for the Legislature, at the time it carves out a new county from the territory of an old one, or by subsequent legislation, to adjust the property rights and equities existing between the two, is well settled. *Frost v. Pfeiffer*, 26 Colo. 338, 58 Pac. 147; *County Com'rs v. County Com'rs*, 17 Colo. 41, 28 Pac. 476; *People v. Alameda County*, 26 Cal. 641; *Perry County v. Conway County*, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665; *Board of Education v. State*, 64 Kan. 6, 67 Pac. 559; *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Sangamon County v. City of Springfield*, 63 Ill. 66. This power has often been exercised with us, as an examination of our statutes discloses.

But it is said that when Const. Amend. art. 20, gave to the new city and county of Denver all the property theretofore owned by the old county of Arapahoe, and required the new municipality to pay all the latter's bonds, obligations, and indebtedness, this was a complete adjustment of the rights and equities of the two by a constitutional amendment which was intended to be, and was, exclusive of any other legislative arrangement, and that only such burdens as existed when the new county sprang into existence were contemplated. The General Assembly, during the same session at which it prepared, in the form of an act, the submission of this constitutional amendment, passed an act for the creation of the county of Adams, and another for the county of South Arapahoe, and therein made provision for an ascer-



tainment and settlement of the claims and demands which the two new counties might have against Arapahoe county, out of whose territory they, as well as the city and county of Denver, had been formed. Possibly because of indefiniteness or lack of time for its execution, the act of 1901 seemed not susceptible of practical enforcement. However that may be, the General Assembly in 1903, as it might do, amended the earlier act, whereby its uncertainties were removed. Under this last act the respective officers of the city and county of Denver and the county of Adams, who were therein designated, without objection on the part of any of them to such procedure, made the appraisal of property and ascertained the amount due to Adams county.

While it is not conclusive with the courts, nevertheless a contemporaneous legislative construction of a statute or constitutional provision is persuasive. Here we are bound to conclude that the same General Assembly which submitted the constitutional amendment when it passed the Adams county act did not suppose that the amendment was intended to settle or that it did adjust definitely the respective property rights and liabilities growing out of the subdivision of old Arapahoe county into three new political subdivisions, or that the act of 1901 or 1903 contained hostile provisions; and we must construe these various acts so as to bring harmony out of them, if sound canons of construction permit. There is nothing in the language of section 1 of article 20 which is inconsistent with the legislative interpretation. Indeed, we think it clear that the intention was to leave to the General Assembly the power which it assumed to exercise in the act of 1901, p. 133, c. 57, and later in the act of 1903, p. 159, c. 79.

In the court below and upon the application for a supersedeas the attorneys for the city and county of Denver expressly stated that the constitutional amendment went into effect on the 1st day of December, 1902, when the Governor issued his proclamation declaring the result of the official canvass of the vote. Upon final hearing, however, this position was abandoned, and learned counsel now say that this amendment took effect eo instanti upon the day of the general election, when a majority of the people ratified it. Of course, such a fact, if it be a question of fact, is not established by admission or agreement of counsel; and, if it be a question of law, it is for the courts, and not for counsel, to settle. And owing to the doubts and uncertainties arising out of the adoption of Const. Amend. art. 20, which are not altogether dispelled by the most attentive study, we are not inclined to hold counsel to the strict rule which forbids the taking of inconsistent positions.

The reason for the insistence by counsel upon their latest contention becomes appar-

ent when it is observed that in the act creating Adams county was the declaration that it should take effect on the 15th day of November, 1902, and only if the constitutional amendment was adopted. If, say counsel, the constitutional amendment was not in force until the 1st day of December, 1902, the day of the proclamation, the Adams county act was a valid law 16 days before; but, if the amendment became effective at once upon its ratification, then the city and county of Denver became an organized body 11 days before Adams county was created. Therefore they draw the conclusion that the Arapahoe county from which Adams county was taken was not the original Arapahoe county out of which the city and county of Denver was carved, but it comprised only so much thereof as was left after the city and county of Denver was segregated. The argument proceeds further, and it is that Adams county therefore could not equitably claim to be the beneficiary—nor could the Legislature make it such—of any indebtedness which original Arapahoe county owed, which, and which only, the city and county of Denver was to pay, because, as already said, the territory now composing Adams county was no part of the original Arapahoe county, from which the city and county of Denver was taken, but was created out of that part left after the latter was formed. We do not concede that this argument is valid, even if the city and county of Denver became a county before Adams county was created. For the purpose of the present case, we may safely assume that the constitutional amendment, as a law, or as a part of the organic act, went into effect on the day the majority of the electors voted for it—November 4, 1902. From this, however, it does not follow that the new city and county of Denver, for whose organization it provided, became a body politic on the day that the amendment itself became a part of the Constitution. This question was recently before our Court of Appeals in the case of *Boston & Colo. S. Co. v. Elder* (Colo. App.) 77 Pac. 258. That tribunal, speaking by President Judge Thomson, in effect held that the city and county of Denver was not brought into being until the day that the Governor issued his proclamation stating the result of the official canvass. The learned judge well says that a law is none the less effective as such because it provides for something to be done in the future. While the amendment may have become effective when adopted by a majority vote, it fixed a time in the future at which the consolidation it provided for should take place. So we may safely say here that the amendment itself became effective November 4, 1902, when it was ratified by the people, but the city and county of Denver for which it provided did not come into being until the day of the issuing of the Governor's proclamation, on December 1, 1902, for the amend-

ment itself expressly so provides. This being so, we think it necessarily follows, even from article 20 itself, that included in the obligations that the new city and county of Denver assumed were such as existed when it became an organized body, and those certainly include this equitable claim of pre-existing Adams county, which the General Assembly made a legal one in the creating act.

But aside from these considerations, it is clear that the intention of the lawmakers and the people, to be gathered from the amendment and the acts creating Adams and South Arapahoe counties, was that the adjustment of the property rights and respective claims and liabilities of these three new political subdivisions of the state with reference to each other was intended to be left to the General Assembly for determination. The city and county of Denver is still a county, as well as a city. *People v. Sours*, 31 Colo. 369, 74 Pac. 167; *Id.* (Colo. Sup.) 74 Pac. 172. The General Assembly, except as otherwise provided in article 20, has the same control over its county funds that it has over the funds of other counties, and, unless limited by the Constitution, may, in general, make such provisions for raising and disbursing county revenue as seem to it wise and proper.

Recurring again to the situation that confronted the legislative department, let us see what measures it adopted to perfect the plan in the legislative mind. Old Arapahoe county was subdivided into three new bodies politic. All of the property owned or possessed by original Arapahoe county was given to the new city and county of Denver. This property was acquired from taxes levied upon all the property of the old county. To the revenue thus derived and so used, the territory which was set off to the county of Adams contributed its portion, as did the territory which was constituted into the county of South Arapahoe. The constitutional amendment made no specific provision for the payment by the new city and county of Denver to the county of Adams or to the county of South Arapahoe for their proportionate interest in this county property, but provision was made for payment by the new city and county of Denver of all the obligations and liabilities of the county of Arapahoe, and to its rights these newly created counties succeeded. When, therefore, that portion of old Arapahoe county exclusive of the city and county of Denver was subdivided into the two counties, it was entirely competent for the General Assembly to provide that the successor of all the property of Arapahoe county, viz., the new city and county of Denver, should pay to each of the new counties, the other constituent elements of the original county, a just proportion of the value of that property which their citizens and taxpayers helped to buy. That is all that has been done in this case. There is nothing in the constitutional amendment opposed to this view, and the separate acts of

the General Assembly expressly authorize it.

The judgment of the district court ordering this tax to be levied was right, and its judgment is therefore affirmed. Affirmed.

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RACHOFISKY et al. v. BENSON.

(Court of Appeals of Colorado. Jan., 1902.)

APPEALS—SEPARATE DOCKETING—CLERK'S FEES.

1. Under Ct. App. Rule 30 (64 Pac. xv), requiring payment by appellant to the clerk, on filing of each suit, of \$25, to be in full of clerical costs, plaintiffs, on adverse judgment being rendered against them in each of three suits, cannot have the transcripts in the three appeals bound together and lodged as one transcript, and the three appeals docketed as one appeal, paying only the clerk's fees for a single cause.

Appeal from District Court, La Plata County.

Three actions by Rachofsky and others against M. C. Benson. From adverse judgments, plaintiffs appeal, lodging one transcript only. Cases ordered to be separately docketed, or appeals in two cases dismissed.

N. C. Miller, for appellants. F. C. Perkins, B. W. Ritter, and Orland S. Isbell, for appellee.

PER CURIAM. The appellants brought three actions in replevin against M. C. Benson; alleging in each case the ownership and possession in themselves of the property described in the complaint in that case, its wrongful seizure and wrongful detention by the defendant, and a refusal by defendant to deliver it to them upon demand made by them. In each case judgment was rendered against the plaintiffs. In each case the plaintiffs prayed an appeal to this court. In each case the prayer was allowed, and the penalty of the appeal bond, and the time within which it should be filed, fixed. A separate appeal bond was filed in each case, and a separate transcript, separately certified, of the record in each case, was brought to this court. Before any of the cases were tried, the defendant died, and his widow, who was administratrix of his estate, was substituted as defendant.

The appellants have bound the three transcripts together, and lodged them in this court as one transcript, and have caused the three appeals to be docketed here as one appeal. There is no warrant for such a proceeding. The law contemplates a review on appeal or writ of error of the final judgment in a single suit, and not a complication of judgments rendered in a number of cases. Rule 30 of this court (64 Pac. xv) requires the payment to the clerk, upon filing of each suit or proceeding, of \$25 by the party bringing the proceeding, which shall be in full payment of all clerical costs of such party in the cause, except for copies of papers. Here were three proceedings brought as one, for

each of which \$25 should have been paid, but for two of which nothing was paid.

The appellants will, within 30 days, cause each of the three cases to be docketed separately in this court, paying to the clerk, in two of them, the fees prescribed by the rule, or the appeals in the two cases not docketed will be dismissed.

### STATE v. UNDERWOOD.

(Supreme Court of Washington. Aug. 10, 1904.)

**MURDER—CONTINUANCE—EVIDENCE TO SUPPORT CONVICTION IN SECOND DEGREE—SUBMISSION TO JURY—HYPOTHETICAL QUESTION—GOOD CHARACTER—INSTRUCTIONS—HARMLESS ERROR—NEW TRIAL—MISCONDUCT OF JURORS—AFFIDAVITS—NEWLY DISCOVERED EVIDENCE.**

1. There is no abuse of discretion in refusing a continuance in a murder case, though without fault of defendant his principal attorney withdraws five days before the trial, and the three attorneys then appearing have but three or four days to prepare, there being no absent witnesses, and the only question being whether death was caused by drowning or chloroform.

2. There being evidence to support a conviction of murder in the first degree, defendant may not complain that there was not evidence to support the conviction of murder in the second degree.

3. Where there is evidence warranting a conviction of murder in the first degree, it is not error to submit to the jury the questions of murder in a less degree; Const. art. 4, § 16, providing that the court shall not charge with respect to matters of fact, or comment thereon, but shall declare the law, and Ballinger's Ann. Codes & St. § 6907, providing that, if defendant plead guilty to a charge of murder, a jury shall be impaneled to hear the testimony and determine the degree of murder.

4. Where the facts are in dispute, it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case; it then being for the jury to determine whether the facts stated in the question are proven, and, if they are not, to disregard the opinion based thereon.

5. Though witnesses state that they had known defendant for a long time, and knew his associates, and that his reputation was good because his character had never been questioned, yet, this evidence having been submitted to the jury, and the prosecution not having questioned that it was the best evidence of good character, and the court having charged that evidence of previous good character is competent as tending to show that a defendant would not be likely to commit the crime charged, if the jury found that defendant had borne a good character among his neighbors and acquaintances, after they had considered all the evidence, including that bearing on his previous good character, or if they entertained a reasonable doubt, they should acquit him, this was sufficient; so that it was not error to refuse to charge that, where a character witness testifies that he knows defendant and his associates in the community in which he lives, and that he has never heard defendant's character called in question, such character is good.

6. Defendant, having been convicted of murder in the second degree, is not prejudiced by any error in instructions that, if the jury find certain enumerated facts to be true, their verdict should be "Guilty of murder in the first degree."

7. A new trial for misconduct of a juror is properly refused where the affidavits charging the misconduct are overcome by counter affidavits.

8. Denial of a new trial for newly discovered evidence as to the cause of the death is justified, it being merely cumulative evidence.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Paul Underwood was convicted of murder, and appeals. Affirmed.

Silas M. Shipley, E. E. Shields, and T. D. Page, for appellant. W. T. Scott and Elmer E. Todd, for the State.

MOUNT, J. Appellant was convicted of murder in the second degree, and appeals from a judgment entered thereon. The undisputed facts are substantially as follows: During the month of May, 1902, appellant and his wife were living at Ballard, in King county. On the 15th day of May, 1902, a female child was born to them. On the last day of May, 1902, appellant disposed of all his household goods, and Mrs. Underwood and the baby spent the evening with Mrs. Hetzler, a neighbor. At about 9 o'clock appellant came to the house of Mrs. Hetzler, and, in company with his wife and baby, started for Seattle. The baby at that time was asleep, and apparently well. The next morning, June 1, 1902, at about 6:30 o'clock, the baby was found dead on the tide flats near the street car line leading to Seattle. The baby was tied inside of a sack in the bottom of which was a stone weighing about 10 pounds. The weight of the baby was about 8 pounds. The body was carried to an undertaking establishment, where a post-mortem examination was held on the next day, viz., June 2, 1902, when the doctors present concluded that death resulted from drowning. On June 1st defendant and wife left Seattle for Aberdeen, where their parents resided. On Tuesday, June 3, 1902, defendant heard that there was a warrant out for his arrest, and fled, but was afterwards arrested in the woods near Tokeland. Defendant confessed that he had killed the child, but stated that the killing was done accidentally, without criminal intent, and substantially as follows: That soon after leaving the house of Mrs. Hetzler, and while he and his wife were waiting for a street car on which to ride to Seattle, the child became sick, and appeared in much distress; that, in order to relieve the suffering of the child, he administered chloroform which he happened to have in his pocket; that, through inadvertence, an overdose was given, from which the child died; that, being without friends and money, and not knowing what to do, defendant and his wife decided to dispose of the body by dropping it into the bay; that thereupon defendant went back to the house where they had lived, which was but a short distance away, and procured a sack and a rock, and placed the baby in the

¶ 6. See Homicide, vol. 26, Cent. Dig. § 720.

sack with the rock, and dropped sack and all into the bay, where it was found. On a trial before a jury the defendant was found guilty of murder in the second degree. Other facts necessary to an understanding of the questions discussed will be stated hereafter. Appellant assigns errors as follows: (1) In overruling appellant's motion for a continuance; (2) that the evidence is insufficient to support the verdict of murder in the second degree; (3) in submitting to the jury the question of appellant's guilt of any crime other than murder in the first degree; (4) in ruling on the admissibility of evidence; (5) in refusing to grant a new trial because of misconduct of a juror and of newly discovered evidence. We shall consider these assignments in the order stated.

1. Soon after appellant's arrest, his father employed M. K. Snell, an attorney of Tacoma, to defend the accused. Snell accepted the employment, and was relied upon by appellant to defend the case and procure witnesses. Defendant's father and mother, being poor people, sold and mortgaged all the property they had to raise money to pay Mr. Snell his fee. \$365 was paid thereon. Soon after the arrest of the defendant, he was arraigned in open court, entered a plea of not guilty, and the case was set down to be tried on September 22, 1902. On September 14th appellant's father employed E. E. Shields, an attorney of Aberdeen, to assist Mr. Snell in the trial of the case. On September 16th Mr. Snell notified appellant's father that he would withdraw from the case, and turned over to Mr. Shields all the papers and memoranda he had in the case, and thereafter also returned \$250 of the money paid thereon. On the 18th Snell filed his withdrawal with the clerk, and on the same day the present attorneys appeared, and filed a motion for a continuance of the trial for one month, upon the grounds that Mr. Snell had withdrawn from the case, and that 30 days would be necessary for counsel to prepare for the trial. This motion was supported by several affidavits, stating at length the employment and withdrawal of Mr. Snell, and that he had done nothing, and was of no assistance in finding witnesses for the defense, and that counsel then employed could not prepare either upon the facts or law in the short time remaining before the day set for the trial. The court, after hearing these affidavits and arguments by counsel, denied the motion on the same day it was filed. This ruling is the first error assigned. This motion for a continuance was not based upon any statutory ground, but depended upon the discretionary power of the trial judge. This power will be reviewed and revised only for its abuse. It is true, so far as the affidavits show, that no fault attached to the appellant for the withdrawal of his principal attorney five days before the day set for the trial of the cause. It also appears from the statements in the affidavit

of the three attorneys representing appellant at the motion for a continuance that it would be impossible for them to properly prepare for a trial of so much importance in so short a time as was remaining from the 18th to the 22d of September. This latter statement appears to be the principal one relied upon. The argument is made that appellant was entitled to a fair trial, and to be represented by counsel, who were required to give their best ability to the interests of their client; that, in order to do this, they must have time to prepare themselves for the trial. But whether attorneys could possibly or properly prepare for the trial of the case in the three or four days left is a relative question, depending upon the circumstances of the particular case. It is claimed that many technical medical questions would arise, and that it was, therefore, necessary for defendant's counsel to prepare themselves upon that branch of the case, and particularly in reference to the symptoms and conditions manifested upon a body which had met death by drowning. The facts in the case were few and very simple. It was not claimed that there were any absent witnesses. All who knew about the death of the child were at hand. The place where the child came to its death was within six miles of Seattle, where two of appellant's attorneys then resided, and on the line of a street car. Where the facts were so readily accessible, it seems that two or three days ought to be enough time to obtain them. It may be true, as counsel states, that it was necessary for counsel to inquire as to the symptoms of death by drowning and those caused by chloroform, in order to intelligently examine and cross-examine the expert witnesses thereon; but it seems to us that the time at the disposal of three competent attorneys was amply sufficient therefore. After reading all the evidence and the whole record, we are convinced that the trial court did not abuse its discretion in refusing a continuance of the case upon the grounds stated.

2. Appellant next insists that the evidence is not sufficient to support the verdict of murder in the second degree, because, under the evidence in the case, the defendant is guilty of murder in the first degree or is not guilty at all. This contention is based upon the fact that there is no direct evidence of deliberate or premeditated malice, but that these elements of the crime depend upon circumstances. The main issue of fact was whether the child was drowned or was killed by chloroform. The court instructed the jury that, if they entertained a reasonable doubt that the child was drowned, or if they believed that the child came to its death by chloroform, then they must find the defendant not guilty. It is argued that the same evidence which proved the death of the child by drowning also proved deliberation and premeditation, and, since the

jury found that there was no deliberate and premeditated malice, they must have found the defendant not guilty. There was evidence to support a verdict of murder in the first degree, and appellant cannot complain because he was convicted of a lesser offense than the evidence warranted. Appellant argues that the evidence shows that the child's death did not result from drowning. It is true that the defendant himself testified that the death was caused by an overdose of chloroform. It is also true that some of the physicians testified that, from certain symptoms, death may have resulted from chloroform. There was also much evidence that death resulted from drowning. This question was one entirely for the jury, and, from a careful reading of the whole evidence, which need not be reviewed here, we are of the opinion that there was ample evidence that death resulted from drowning, and that, therefore, there was evidence to support a verdict of either degree of murder.

3. It is next assigned as error that the court submitted to the jury the question of murder in a lesser degree than the first. The court instructed the jury to the effect that: "Under this information and the laws of this state, the defendant can be convicted, if the evidence justifies it, of any one of three offenses. \* \* \* These offenses are murder in the first degree, murder in the second degree and manslaughter." The court then proceeded to define each of these degrees of murder. It is argued that because, under the evidence, but one of two verdicts could be returned, viz., guilty of murder in the first degree or not guilty, it was error to instruct the jury upon any other degrees of the crime charged. Many authorities are cited to the effect that, where there is no evidence which might authorize a verdict for a lower degree of the offense than that charged in the information, a charge defining other degrees should not be given. If we concede that these authorities state the correct general rule, they do not help appellant, because there was evidence of deliberation and premeditation. A charge of murder in the first degree contains all the elements or facts constituting murder in the second degree. The only difference under the statute between murder in the first degree and second degree is that in the former there must be deliberate and premeditated malice, while in the latter the killing must be done purposely and maliciously, but without deliberation and premeditation. The proof of deliberation and premeditation may, and frequently does, flow from the same circumstances as those which denote intent and malice; but one does not necessarily follow from the other. Where there are facts or circumstances from which intent and malice or deliberation and premeditation may be found, it is always the duty of the court to submit such facts and circumstances to the consideration of the jury under proper in-

structions. We have seen above there were facts and circumstances from which the jury may have found all the elements of murder in the first degree, and the evidence was sufficient to support such a verdict. It follows that there is sufficient to support one in a lesser degree. Furthermore, the question under consideration was, we think, settled in *State v. Greer*, 11 Wash. 244, 39 Pac. 874, and *State v. Howard*, 33 Wash. 250, 74 Pac. 382. Questions of fact are purely questions for the jury. Judges may not draw conclusions of facts from other facts or circumstances. They must declare the law, and not comment on the facts. Const. art. 4, § 16. If murder be charged, and the defendant plead guilty thereto, a jury must be impaneled to hear testimony and determine the degree thereof. Section 6907, Ballinger's Ann. Codes & St. From these sections we think it clear that the jury and not the court must determine the degree of murder of which a defendant is guilty.

4. When Dr. Powell, a witness on behalf of the defense, was on the stand, he was asked the following questions: "Q. If an examination was held upon a body for the purpose of ascertaining the cause of death, is it not necessary to take notes of the different steps, to measure the parts examined, and, in a case where drowning is suspected, to examine microscopically the contents of the lungs and stomach, to examine the brain, and all parts of the body, before coming to a conclusion, and particularly where a man's life is at stake, or murder is suspected? A. It certainly was. Q. Now, in an examination such as this one was, where the brain is not examined, the contents of the lungs are not microscopically treated, no test is made to see what the fluid in the lungs and stomach is, would you say that was a sufficient and thorough examination on which to base a conclusion as to the cause of death?" An objection was sustained to this last question, on the ground that it called for a conclusion which the jury must draw. Other questions of this same kind were asked of other witnesses, and objections sustained thereto. These rulings are assigned as error. We think there was no reversible error in this, and that the position of counsel for respondent is correct where he says: "The evidence was before the jury as to how the examination of the body of the child had been conducted. The previous question asked and answered by Dr. Powell indicated his idea of the requisites of such an examination, and the jury were required to judge whether the examination was conducted properly. Although great latitude is allowed in the examination of experts, it would seem wholly unnecessary for them, in a case like this, to characterize an examination in answer to a hypothetical question, especially when they had already detailed how such an examination should be conducted, and what should be done." The ruling of the court

excluded no evidence which was not in fact before the jury.

A number of physicians were called as expert witnesses by the state, and to each of these witnesses the prosecuting attorney propounded a hypothetical question for the purpose of obtaining an opinion as to the cause of the child's death. A sample of these questions is as follows: "I will ask you, doctor, to suppose the case of a child three weeks old, or thereabouts, was ordinarily healthy, was apparently well, was in its mother's arms at about 9 o'clock on Saturday evening, and a little after—on the following Sunday morning at about 6:30 o'clock, or thereabouts—the same child was found in a sack inclosed with a stone weighing about ten pounds, the child itself weighing between seven and eight pounds in life or immediately after death. The waters ebbed and flowed, at the spot where the body of the child was found, to a depth of from three to five feet at high tide. The child was securely inclosed in the sack by a string tied around the top of the sack or bag. When removed from the sack, a frothy foam was found in the nostrils and round about the mouth, and some milk curds were found in the back part of the mouth. The hands were rigid, and closed or clenched. The left hand was clasped or grasping the garment that was upon the arm by the fingers resting against the palm of the hand. The child was removed from the sack, and its clothing removed, and a post-mortem was held the following day, whereupon the sternum was removed, and it was found that the walls of the chest were expanded, and the lungs filled the cavity of the chest so that some pressure was exercised against the under side of the sternum or breast bone. The right side of the heart was gorged with blood. There was also some blood in the left side of the heart. The veins throughout were gorged with blood. The arteries were only slightly filled. The stomach was well filled, or contained a watery fluid or milk curds. The lungs were removed, and slight incisions made in the outer surface of the different lobes at different places. Immediately after the incisions were made a watery fluid would come from the outer surface of the lungs. Upon squeezing the nose, a foam or froth would come from the nostrils. The child was dead when found. In your opinion, if you could form an opinion from these facts, what was the cause of the death of that child?" These questions were objected to upon the ground that they assumed facts which were not established by the evidence, and included certain facts concerning which the state's own witnesses were contradictory, and that these questions, when the statements of the witnesses are conflicting, should state the facts most favorably to the opposing party, and not most favorably to the party propounding the question. It is true that some of the witnesses for the

state were not entirely agreed as to the symptoms and conditions of the child when it was taken from the sack and examined. But all the conditions named in the hypothetical questions were testified to by different witnesses, and were, therefore, facts which the jury had a right to find and consider. We think the rule is fairly well settled that, where the facts are in dispute, it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case. *Stearns v. Field*, 90 N. Y. 640; *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *People v. Sessions*, 58 Mich. 594, 28 N. W. 291; *Nave v. Tucker*, 70 Ind. 15. It is for the jury to determine whether the facts stated in such questions are true or proven, and, if they are not true, or not proven, it is the duty of the jury to entirely disregard opinions based thereon. The jury were so instructed in this case. There was no error in the ruling.

Error is assigned upon the refusal of the court to give an instruction requested relating to the good character of the defendant. This instruction is quite long and involved, but the substance of it is that, where a character witness testifies that he knows the defendant and his associates in the community in which he lives, and that he has never heard defendant's character called in question, such character is good. This is no doubt the law, and in a proper case should be given. In this case several witnesses stated that they had known defendant for a long time, and knew his associates, and that his reputation was good, because his character had never been questioned. This evidence was submitted to the jury, and, so far as the record shows, there is nothing to indicate that the prosecution questioned that it was the best evidence of good character. Not being questioned, and the court having submitted it to the jury, and said to them that evidence of previous good character is competent as tending to show that a defendant would not be likely to commit the crime charged, if they found that defendant had borne a good character among his neighbors and acquaintances, after the jury had considered all the evidence, including that bearing upon his previous good character, or if they entertained a reasonable doubt, they should acquit him. We think this was sufficient, and, under the circumstances, it was not error to refuse the instruction requested.

Appellant argues that two other instructions are erroneous. These two instructions tell the jury that, if they find certain enumerated facts to be true, "then their verdict should be 'Guilty of murder in the first degree,'" etc. It is argued that these two instructions are inconsistent with the facts, not supported by the evidence, and inconsistent with the theories of both plaintiff and defendant. We do not think these criticisms are well founded in fact. But, even if they are, they cannot avail appellant here. The

jury found the defendant guilty of murder in the second degree, which was an acquittal of the higher degree. No possible injury, therefore, could have resulted to the appellant from giving these two instructions.

5. Appellant argues that the court erred in refusing to grant a new trial, first, upon the misconduct of the jury. It appears that a juror by the name of Warson, upon his voir dire examination, qualified himself as a juror, and was permitted to remain upon the jury. After a verdict had been rendered, the appellant filed four affidavits, in which it was stated that the affiants in all of them were members of a jury in a case on trial in another department of the superior court of King county on September 22, 1902, while a jury was being obtained in this case; that said jury was out all night on said night, considering their verdict; that said juror Warson was also a member of said jury, and out all night with affiants; that during the night of the 22d of September, 1902, the jurors generally talked over the facts in the Underwood case, and generally and freely expressed their opinions respecting the defendant, Underwood, for the killing of his child; that juror Warson participated therein, and expressed his opinion to such an extent that affiants were surprised when they learned that he had qualified as a juror in the case. One of these affiants also stated that in a conversation with Warson some three or four days prior to the 22d of September, when he said to Warson that he could not qualify as a juror in the Underwood case, Warson replied, "Well, I think I will qualify." Another of the affiants, by the name of Watton, stated that on the night of September 22d Warson said to him that he (Warson) had read all about the killing of the Underwood child by the defendants; "that his mind was made up concerning the defendant's guilt, and all hell could not change it." In answer to these affidavits Mr. Warson denied that he made any of the statements attributed to him, denied that he was acquainted with or knew the affiant Watton, or had ever had any conversation with him about the Underwood case, and denied that he heard any of the discussion or opinions concerning the Underwood case by any of the jurors on the night of September 22d, or at any other time, or that he was in any way biased, but alleged that he was entirely qualified as a juror on the case. Another juror, who was out with Mr. Warson on the said jury during the night of September 22d, testifies that there was no discussion of the Underwood case in his presence that night, or in the presence of Warson, to his knowledge; and he also testifies that he was closely associated with Warson on that night, and that, if Warson had expressed any opinion, he would have known it. Three other influential business men make affidavit to the fact that they are intimately acquainted with Warson, and had associated with him

just previous to the trial of the Underwood case, and that, if said Warson had been biased in any way in the case, or had an opinion, they would have known it; that they believed he had no opinion, and believed him to be a fair, impartial juror, unprejudiced in the case. Appellant was no doubt entitled to a fair and impartial jury, and, if one of the jurors had made the statements above referred to, and had then willfully qualified himself to sit on the jury, this would have been such misconduct as to give the appellant a new trial. It, of course, devolved upon the appellant to show the fact of misconduct, or at least to create in the mind of the court a well-grounded suspicion that the fact may be true. The counter affidavits evidently convinced the lower court, as they convince us, that the charge was mistakenly or wrongfully made. We have gone carefully over all these affidavits, and it seems to us therefrom that the charge was entirely overcome by the answering affidavits on file.

It is finally argued that the court erred in denying a new trial on the ground of newly discovered evidence. This evidence consists, it is claimed, of a photograph of the dead child taken before the post-mortem examination was held, which picture shows the open hand and closed eyes of the child; and also consists of the evidence of the undertaker, Whitlock, to the effect that when he took the child out of the sack its eyes were closed and its hands were open. It was one of the main contentions of the appellant that closed eyes and open hands were symptoms of death by chloroform, and opposed to death by drowning. Much of the evidence of the 10 days during the time the trial lasted was devoted to this question. In other words, this evidence is wholly cumulative. The witness Whitlock was upon the witness stand, and could have been examined upon these points if appellant had desired to do so. But, upon the ground that the evidence is cumulative, we think the lower court was justified in denying the motion.

Upon the whole record we are satisfied that the defendant had a fair trial, and that no substantial errors to his prejudice were made. The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY and ANDERS, JJ., concur.

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BIER v. HOSFORD et al.

(Supreme Court of Washington. Aug. 4, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—  
ASSUMPTION OF RISK—OBVIOUS DANGERS—  
DIRECTIONS OF FELLOW SERVANTS.

1. An intelligent woman, 25 years of age, who had been working on a mangle in a laundry for

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§ 1. See Master and Servant, vol. 24, Cent. Dig. § 615.

about three months prior to an accident, caused by her having caught her hand therein, assumed the obvious risk to which she was exposed in working at the mangle while it had no guard attached thereto.

2. A servant is not obliged, in the presence of apparent and obvious danger, to obey the directions of a fellow servant and companion in work to rush the work unreasonably, and thereby put his life and limb in jeopardy.

3. While contributory negligence and assumption of risk are matters of defense to be alleged and proven, yet when it plainly appears from plaintiff's own evidence that he cannot recover in any event by reason of his contributory negligence, the court cannot ignore the facts so presented, although introduced in support of the main action, and not by the defense.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by Stella Bier against A. A. Hosford and others, copartners doing business under the firm name and style of the Washington Steam Laundry. From a judgment for plaintiff, defendants appeal. Reversed.

Post, Avery & Higgins, for appellants. Shine & Winfree and W. F. Townsend, for respondent.

**PER CURIAM.** Action brought in the superior court of Spokane county by plaintiff, Stella Bier, against A. A. Hosford, J. T. O'Brien, and J. Anthony Smith, copartners doing business under the firm name and style of Washington Steam Laundry, defendants, to recover damages for personal injuries. Verdict and judgment were rendered in plaintiff's favor for \$2,100, and defendants appeal.

It is alleged in the complaint that the defendants negligently and willfully permitted a five-roll mangle, owned and operated by them, to be run and operated without its guard, and ordered plaintiff to work around and upon, and to adjust the clothing for, and to feed the clothing to the said mangle, which was unsafe and insecure and unprotected by any of the ordinary guards usually maintained upon such mangles, and the said defendants willfully removed the guard from the said five-roll mangle with a careless disregard for the safety of others, and greatly increased the danger of working in and around said mangle, which danger, if the said guard had been allowed to remain upon the said mangle, would have been very slight, or none at all; that, in order that the said mangle should receive and turn out more work, the said defendants strained and forced their servants and this plaintiff to increased activity in a place carelessly and willfully made unsafe by the defendants; that said guard was removed from the said mangle by defendants prior to the time plaintiff commenced work at said laundry, and she was not informed and did not know that part of said machine was missing, and she had no knowledge of machinery, and said mangle was so constructed that she could not have seen and did not see any danger connected therewith; that the said defendants well

knew the dangerous condition of said mangle and of the risks incident to the work required upon and around and in feeding said mangle, and this plaintiff had no knowledge or means of knowledge thereof; that defendants had full knowledge and notice of plaintiff's ignorance thereof, and did not warn said plaintiff, nor impart said knowledge to her. It is also alleged in the complaint that on November 27, 1901, the plaintiff, without fault of her own, had her right hand caught under the first roller of said mangle, and the same was severely crushed between said roller and the heated concave iron underneath, and that said hand was also severely burned. Appellants, by their answer, deny the material allegations of the complaint, except that a portion of respondent's hand was caught in the mangle, but they deny any knowledge or information sufficient to form a belief regarding the extent of such injuries. For an affirmative defense it is alleged that the respondent was, at the time of the accident, and for a long time prior thereto, thoroughly familiar with the machine operated by her; that she had been advised of the dangers incident to the operation thereof; that such dangers were apparent and obvious, which she thoroughly knew and understood; that she assumed whatever risk there was connected with the operation of said mangle; that at the time of the accident she was operating such mangle in a careless and negligent manner; and that said accident was caused by her own negligence. The reply denies the affirmative matter alleged in the answer. At the conclusion of the evidence adduced in respondent's behalf at the trial, appellants moved in the lower court that this case be taken from the jury, and that judgment be rendered herein in their favor.

The assignment of error predicated upon this ruling of the trial court presents the pivotal question in this controversy. The record shows that the trial of this action began in the lower court on June 18, 1902. Respondent testified that she was then 25 years of age; that in the latter part of June, 1901, she commenced to work for appellants at their steam laundry as an ironer; that a month or so thereafter she went to work as one of the feeders on the mangle described in her complaint; that she had worked in a laundry about one year, but that this was her first experience in working on mangles. This mangle was installed in the Washington Steam Laundry between five and six years prior to the trial. James Thlerry, a former part owner in this laundry, and a witness for respondent, testified that a guard came with this mangle. "Q. Describe that guard to the jury. A. That guard is a piece of iron about eight feet six inches long, and is bent at an angle, and square, and one side of it is four inches and the other side is about an inch or an inch and a quarter. I could not say exactly." He testified further that this guard was intended to be placed between



the operator and the first roller; that he thought the machine "would be just as safe without the guard as with the guard, and be easier to work on the mangle." "Q. If that guard were on, could a person put his fingers into the rollers? A. \* \* \* I could not say if they would put them in with the guard or not. \* \* \* There probably was three-quarters of an inch between the plate and the guard; that is, from the plate to the guard. Q. How far was that guard placed in front of the first roller? A. That top of the guard comes close on the roller, and the bottom of it would be probably between an inch and a half and two inches from the roller." The five metal rollers or cylinders comprising a portion of this mangle were a trifle over eight inches in diameter. When in operation, these cylinders, enwrapped in blankets with an outside covering of cotton fabric, revolved toward the feeders, and approached the concave iron underneath sufficiently close to catch the clothes fed into the machine and carry them through. The cylinders were visible. Whether the concave iron was partly or completely hidden from view while the mangle was in operation does not definitely appear from the testimony. The respondent, however, admitted that she knew of this hot iron. She testified, "I thought it was necessary to have an iron to iron the sheets." The concave iron was bare. These cylinders and this iron were hot when the machine was in operation. If the fingers should come in contact with the cylinders, the covering thereon would prevent them from getting burned. Between the persons feeding and the foremost cylinder was a sheet-iron apron, attached to the machine, on which the goods were placed, then straightened out, and the wrinkles removed therefrom. The feeders stretched the goods out upon this apron, and held them in position till caught by the moving cylinder and carried over the concave iron. The purpose of this guard, when placed between the feeders and front cylinder, was to prevent the hands of the feeders from coming in contact therewith. Between 7 and 8 o'clock on the morning of November 27, 1901, one Mrs. Dick and respondent were feeding this mangle; respondent taking her position at the right and Mrs. Dick at the left in front of the machine. Mrs. Gladden was forewoman of the laundry at the time. Respondent testified that Mrs. Dick had charge of this mangle at that time; that respondent received her orders from Mrs. Dick; that the laundry at that date was overcrowded with work, and that she (respondent) was then under "hurry up" orders from Mrs. Dick to push the work; that there was no guard on this mangle at the time she was injured; that she did not know there was any place for a guard on such machine, or that a guard came with the mangle; that while she was engaged in feeding the mangle she "did not see any danger"; that she did not know there was any danger in feeding

without a guard. On respondent's further direct examination she testified in response to questions propounded to her, as follows: "Q. What were you feeding to the mangle at the time before this accident? A. I was feeding a round cloth. It was made of canvas, and there was a hole in the middle, and a cord drawn around the edge, and I was feeding that through, and in some way my hand got caught in the cord, and was jerked through. Q. This round cloth you describe, Miss Bier, what is it used for, if you know? Have you heard since then? A. I think for gambling tables. Q. The cloth that you describe had a hole in the middle—a small hole? A. Yes, for chips. Q. To drop chips through? A. I think that is what it is for. \* \* \* Q. Was this cord you speak of loose or tied? A. It was tied, gathered up. Q. What material did you say that cloth was made of? A. Made of something heavy. I think it was canvas. \* \* \* Q. Is it harder or easier to feed that cloth to the mangle or a plain, ordinary spread or sheet? A. I think it is harder to feed a cloth of that kind. \* \* \* Q. I will ask you now, in placing that cloth into the mangle and trying to keep it straight, to explain to the jury, if you can, how your hand got caught, as you are testifying? A. I don't know how it got caught, it went in so quick. Q. Where did your hand go to? A. It went inside, under the upper first roller." On cross-examination respondent testified concerning this cord, "I believe it was tied, or it would not have drawn up;" and, further, that she did not see either of the proprietors at the laundry that morning, prior to the accident.

In *Walker v. McNeill*, 17 Wash. 590, 50 Pac. 521, which was an action to recover compensation for personal injuries, the following language appears in the opinion of the court: "It has already been determined that contributory negligence is a defense to be pleaded and proven in this state. We view assumption of the risk of employment as of kindred nature. The better authorities seem to favor this rule, and it is certainly on principle the natural and orderly method of pleading and proof." This language would seem to imply that contributory negligence and assumption of risks of employment are matters of defense, and must be separately pleaded. This court held that it would not consider the question of assumption of risks in the above cause on appeal, because that proposition was not urged and presented in the trial court. In *Ball v. Gusenhoven* (Mont.) 74 Pac. 873, the court says that: "The defenses of contributory negligence and assumption of risk are entirely inconsistent with each other, and do not rest upon the same principles; and the existence of one necessarily excludes the existence of the other"—citing *Bailey's M. & S. § 938 et seq.*; *Miner v. Connecticut River R. R. Co.*, 153 Mass. 398, 403, 26 N. E. 994; *Texas & Pac. Ry. Co. v. Bryant* (Tex. Civ. App.) 27

S. W. 825; *Mundle v. Hill Manufacturing Co.*, 86 Me. 400, 30 Atl. 16. While these defenses may rest upon different principles, still we are not prepared to hold unqualifiedly that "the existence of one necessarily excludes the existence of the other." In the opinions of the ablest courts and jurists there may be found language which is proper and accurate as applied to the facts of the particular controversy under consideration, but is warped from its obvious meaning when applied in a different connection, or to a dissimilar state of facts. True, the text-books and reports contain many cases wherein the servant suffering injuries was careful in the line of his employment, but yet the rule that the employé assumed the risks of such employment was applied. Each controversy must necessarily depend in a great measure on its own particular facts. The case of *Greef Bros. v. Brown*, 7 Kan. App. 394, 51 Pac. 926, was an action brought by a Miss Brown against Greef Bros. to recover for injuries sustained while she was working at a mangle in a laundry. Her hand was caught between the cylinders and burned. "A guard board, designed by the manufacturer of the machine to protect operators, was in the building, but had not been used. Of this guard board and its use defendant in error was wholly ignorant." The servant, when injured, was nearly 17 years of age. The accident happened on the second day of her employment at the mangle. The court, commenting on the facts, observed: "She could not fail to see and understand the danger, for the reason that all the elements of it were wide open before her. The very thing happened which she knew was most likely to occur if she allowed her fingers to get between the cylinders, and no warning or caution could have increased her knowledge of the danger or the necessity for care. She therefore assumed the risk (*Luebke v. Berlin Machine Works*, 88 Wis. 442, 60 N. W. 711, 43 Am. St. Rep. 913), and was guilty of contributory negligence; for the assumption of risk is a species of contributory negligence. This being true, it could make no difference even if plaintiffs in error had neglected reasonable precaution." We therefore think, under the facts presented by this record, that the doctrines of contributory negligence and assumption of risk are closely related. See, also, *Luebke v. Berlin Machine Works*, supra; *Black's Law & Practice in Accident Cases*, § 338. "There are many classes of cases in which the courts have defined and fixed the standard of duty both in its application to the defendant and to the plaintiff. In such cases, where the facts are undisputed, or the inferences to be drawn from them are certain, the court should decide the question of plaintiff's contributory negligence as a matter of law. As a general principle, it is only where the circumstances of the case are such that the standard and measure of duty are fixed and defined by law, and are the same under all circumstances; or where the facts are un-

disputed, and but one reasonable inference can be drawn from them, that the court can interpose and declare, as matter of law, that there is such contributory negligence as will defeat the action of the plaintiff. As a general proposition, a question of negligence is a question of fact, and must be submitted to the jury." *Black's Law and Practice in Accident Cases*, § 279. See, also, *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191, and authorities cited; *Remington's Notes on Washington Reports*, p. 218. "Where an employé knows, or in the reasonable exercise of his faculties should know, the dangers which surround him, he must be held to have assumed the risk." *McDannald v. Washington & C. R. Ry. Co.* (Wash.) 72 Pac. 481. In *Danuser v. M. Seller & Co.*, 24 Wash. 567, 64 Pac. 783, Mr. Justice Dunbar uses the following language: "It is well established that the employer must furnish the employé with a safe place to work, but it is just as well established that the employé assumes the risks of apparent peril." Where the danger is obvious and apparent, and the servant is ordered by the master to work in a given place, he cannot recover if injured. It is the servant's duty to disobey orders of that nature. *Christianson v. Pacific Bridge Co.*, supra. In *Crooker v. Pacific Lounge & Mattress Co.* (Wash.) 75 Pac. 632, cited by respondent's counsel, an instruction given by the trial court, expressed in the following language, was sustained by this court on appeal: "A general rule of law is that a person working with a defective or unguarded machine, and without complaint, and knowing of the dangers of the same, assumes the danger of the defect or unguarded part; but there is no longer any doubt that, where an operator of machinery has expressly promised to repair a defect, the workman does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance; nor, indeed, is any express promise or assurance from the master necessary. It is sufficient that the workman may reasonably infer that the matter will be attended to. So you are instructed that if the plaintiff, at the time of his employment and at the time of the accident, saw the danger from the lack of the guard, and complained of the same to the foreman, and the foreman promised to put on a guard, and the plaintiff went to work and continued at work on the promise, and you further find that the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue at work on the saw, and that at the time of the accident the plaintiff was relying upon the foreman's promise to place on a guard, then you are instructed that the plaintiff did not assume the risk and danger of an injury resulting from the lack of a guard." In the case at bar it is not pretended that appellants ever promised to place any guard upon this mangle, or that respondent ever com-

plained in that regard. She testified that she did not know that there was any place for a guard on this mangle. Whatever dangers there were in operating the machine in question were apparent and obvious, known or should have been known by this respondent as well as on the part of appellants. Again, in the Crooker Case there was evidence tending to show that the plaintiff was exercising due care when he received the injuries of which he complained. The evidence in the action at bar discloses that the respondent is an intelligent woman, and was 25 years of age at the time of the accident; that she had been working on this mangle as a feeder about three months prior to the accident, which was a sufficient length of time to enable her to understand fully and appreciate the danger surrounding it. It was apparent and obvious that if, while running clothes through the machine, she should allow her hand or fingers to get caught between the nearest revolving cylinder and the hot concave iron underneath, she would suffer an injury. The bare statement of this proposition is sufficient to demonstrate its verity, notwithstanding respondent's statement that she was not aware of such dangers. Physical facts apparent to individuals of the most ordinary understanding, particularly those things capable of sensation and touch, cannot be overcome or discredited by word of mouth. Courts and juries in such instances are not warranted in making erroneous deductions from known premises. *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178. Moreover, we think, aside from this statement of respondent, taking her testimony in its entirety with reference to the nature of her employment and her description of this mangle and its movement while in operation, that she sufficiently understood and appreciated the risks and dangers to which she was constantly exposed while at work thereon without any guard being attached to this machine. Within the rule of law enunciated in *Christianson v. Pacific Bridge Co.*, supra, respondent was not obliged, in the presence of apparent and obvious danger, to obey the alleged directions of Mrs. Dick, her fellow servant and companion feeder at the mangle, to rush the work unreasonably, thereby putting life and limb in jeopardy. It would seem that, even if respondent was rushed with her work, as she claimed, this fact ought not to have prevented her, in the absence of any guard, from controlling her hand and fingers and watching the movements of the rollers, thus obviating this unfortunate accident. *Truntle v. North Star Woolen-Mill Co.*, 57 Minn. 52, 58 N. W. 832.

We are of the opinion that the facts appearing in the record bring this action within the reasoning of *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 502, 87 Pac. 679, wherein this court held that a person employed to work about dangerous machinery assumes the risk of all dangers which are obvious, and

cannot recover for injuries sustained, although the master failed to instruct the servant regarding his duties connected with the operation of such machinery and the danger of his employment in that behalf. This salutary doctrine enunciated in the *Olson Case* has been reaffirmed by several subsequent decisions of this court. *Remington's Notes*, p. 258. "The machine was dangerous only because there was danger in working upon it; and, if it was in fact dangerous, it was immaterial that the danger might have been averted by appliances protecting against it. \* \* \* If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have prevented the danger by guarding against it." *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368. Again, the same learned court, in *Connolly v. Eldredge*, 160 Mass. 570, 86 N. E. 471, uses this significant language: "The danger to fingers from two cylinders in contact with each other, and seen to be revolving inwardly, is obvious to any person of ordinary powers, and plainly was understood by the plaintiff. *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344. In *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 289, 32 N. E. 161, 34 Am. St. Rep. 275, it might have been found that the plaintiff could not see the revolving rolls by which he was hurt. In the present case, if there had been no guard across the shelf of the mangle, the plaintiff would have acted at her peril. But the guard did not convert the mangle into a trap. It manifestly was not intended to protect the hand except in the ordinary use of the mangle, when clothes were slid under the guard. The plaintiff was putting a cloth upon the cylinder, above the guard. She saw, or might have seen, all the elements of danger, including the distance between the guard and the cylinder on that side. To appreciate them required no warning or instruction beyond what is furnished by common experience." It is true, as respondent's counsel contend, that this court has frequently affirmed the proposition of law that contributory negligence and assumption of risks are matters of defense, which must be alleged and proven like other defenses. Still, when it plainly appears from the respondent's evidence introduced at the trial that she cannot recover, in any event, by reason of her contributory negligence, the court cannot ignore the presentation of the facts appearing in the record, which become a part of the case for all purposes, whether in support of the main action or of one or more of the grounds of defense. In several of our own decisions cited above, the doctrine of assumed risks was recognized and applied on defendant's motion for a nonsuit. See *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1128.

Photographs of this mangle from different positions were introduced in evidence by appellants, to which respondent's counsel refer as silent witnesses in their client's behalf. We are not prepared to say, from inspection

of these several views, that the concave iron above noted was partially or wholly invisible. Still, this inspection would seem to strengthen our conclusion that, if respondent had exercised simply ordinary prudence and caution in feeding that particular cloth into this machine, her fingers would not have been caught in the manner of which she complains. The counsel for respondent assert in their printed argument that "it is also true that respondent's hand became entangled in a peculiar combination of goods which were tendered her for passage through the mangle." We have read the testimony appearing in the statement of facts very carefully, especially that portion adduced in respondent's behalf, and fail to discover the reason for such contention. We assume that counsel refer to the cloth used as a covering for a gambling table, with a hole in the center thereof, through which chips may be dropped. The evidence fails to show that the feeding of such cloths through the mangle is attended with any extraordinary danger. These coverings came into the laundry the same as other goods, were run through the mangle, and then ironed out smoothly. In view of the testimony of respondent, to the effect that she did not know how her hand got caught, it went in so quickly, we fail to see the bearing of the evidence regarding this particular covering cloth on the issues involved in the present controversy. *Shine v. Cochecho Mfg. Co.*, 173 Mass. 558, 54 N. E. 245. On the facts appearing in the record, we are of the opinion that the appellants' motion for a nonsuit should have been granted.

The judgment of the superior court is therefore reversed, and this cause is remanded, with directions to dismiss the action.

**JOHNSON et al. v. WASHINGTON NAT.  
BUILDING, LOAN & INVESTMENT  
ASS'N.**

(Supreme Court of Oregon. Aug. 8, 1904.)

**BUILDING AND LOAN ASSOCIATIONS—LOANS—  
PAYMENT—ESTOPPEL.**

1. The contract between a building and loan association and a stockholder being in fact one of loan merely, the borrower is not estopped to claim payment of the loan by application of premiums, assessments on stock, etc., on the ground that, if he had earlier made such claim the moneys so received would not have been disposed of as they were.

Appeal from Circuit Court, Marion County; R. P. Boise, Judge.

Suit by H. A. Johnson and others against the Washington National Building, Loan & Investment Association. Decree for plaintiffs. Defendant appeals. Affirmed.

Peters & Powell and George G. Bingham, for appellant. Richardson & Richardson, for respondents.

BEAN, J. This suit is similar to many others that have been before the court in one

form or another, the purpose being to cancel a mortgage given to a so-called building and loan association on the ground that the debt secured thereby has been fully paid. The defendant appeared specially, and moved to quash the service of summons. The motion was overruled, and defendant given until a day certain in which to answer; but, failing to answer within the time allowed by the court, a decree by default was entered against it. Thereafter it moved to be relieved from the default, and for permission to answer, at the same time tendering the answer which it desired to file. The motion was denied on the ground that the answer tendered did not state facts sufficient to constitute a defense, and the defendant appeals.

The proposed answer attempts to set up an estoppel, and is substantially the same as the one held insufficient in the *Hubert Case*. *Hubert v. Washington N. B. L. Ass'n*, 42 Or. 71, 71 Pac. 64. The only difference is that it is now alleged that, if the defendant had been advised of the claim of the plaintiff that he was entitled to have all payments made by him in the form of premiums, assessments on stock, etc., credited as payments on the original loan, it would have prevented a withdrawal of other stockholders until their rights could be adjusted on the same basis, but that, relying in good faith upon plaintiff's acquiescence in the settlements and adjustments made with him, it had made settlements with other stockholders on the basis of its interpretation of the contract, and allowed them to withdraw from the association, to its irreparable loss and that of its existing stockholders. This averment does not aid the defense of estoppel. The contract between plaintiff and defendant, notwithstanding its form, was a mere loan of a sum of money by the defendant to the plaintiff. The plaintiff was nothing more than a borrower, and was entitled to have all payments made by him applied in discharge of his indebtedness. *Washington Investment Association v. Stanley*, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; *Western Sav. Co. v. Houston*, 38 Or. 377, 65 Pac. 611. The nature and character of the contract and the rule applicable to its adjustment are thus clearly stated by Mr. Justice Quarles in *Fidelity Savings Ass'n v. Shea*, 6 Idaho, 405, 415, 55 Pac. 1022, 1024: "In the case at bar we construe the entire contract to be one of loan; that it was entered into for the purpose solely of borrowing money by one of the parties and lending by the other; that the relation of corporation and stockholder exists not in fact, but purely in fiction; and that the object of the plaintiff in entering into the contract was purely for the purpose of increasing its capital by obtaining large returns for the use of its money. In no case where the two relations are blended together, as in this case, and the stock and debt are both contemporaneously extinguished by monthly payments upon the debt or upon the so-called stock, will the contract

be treated by this court other than a contract of loan." Since the contract is to be regarded merely as a loan of money by the defendant to the plaintiff, defendant's disposition of the payments made by plaintiff is immaterial. The money belonged to it, and could be disposed of as it saw proper. It is not in the position of an innocent agent or stockholder, who has parted with money on the faith or conduct of the one claiming it. It was the originator of the scheme to collect from the borrower more than the legal rate of interest under the guise of a building and loan association, and is not entitled to make the defense of estoppel as against one of its so-called borrowing members.

The decree is affirmed.

### WOLDENBERG v. BERG.

(Supreme Court of Oregon. Aug. 15, 1904.)

#### PARTNERSHIP—DISSOLUTION—PROFITS.

1. Where plaintiff and defendant entered into a partnership agreement—plaintiff to contribute the entire plant, and defendant, out of his share of the surplus earnings, to repay to him one-half the expenditure therefor—the increase in the value of the plant is to be considered part of the profits, on a dissolution, before the stipulated time, owing to their disagreement, as to which they were equally at fault.

Appeal from Circuit Court, Harney County; Morton D. Clifford, Judge.

Suit by L. Woldenberg against C. Berg. From the decree, plaintiff appeals. Modified.

Thornton Williams and Biggs & Biggs, for appellant. Parrish & Rembold, for respondent.

**WOLVERTON, J.** This is a suit for the dissolution of a partnership and an accounting. The parties entered into partnership relations by articles of agreement which provide that the business, consisting of the manufacture and sale of lager beer, steam beer, ale, and porter, in the town of Burns, Harney county, Or., and to be conducted under the firm name of Woldenberg & Berg, shall commence March 26, 1898, and continue during the term of 10 years; that the interest of the parties shall be equal, and that the profits and losses shall be shared accordingly between them; that Woldenberg shall contribute to the business the entire plant, with machinery fully equipped for brewing purposes; and that Berg shall repay him one-half of the actual expenditure therefor out of his share of the surplus earnings, after deducting among other expenses, \$30 per month each for plaintiff and defendant for personal use. Woldenberg to receive no interest on the excess of his investment above Berg. The business was entered upon in pursuance of the agreement, and was carried on with more or less success until September, 1901, when the parties disagreed, re-

sulting in a discontinuance of the business, and on October 24th following this suit was instituted to wind up the affairs of the firm. Much testimony was taken, covering a very wide scope in the negotiations leading up to the forming of the partnership, the manner of conducting the business, keeping the books, and their final disagreement, but the only matter that is particularly relevant is that which bears upon the disagreement and the accounting. It is clearly proven that the parties, owing to their differences of opinion as to the proper method of further promoting the business, could not longer operate in harmony, and hence it was necessary that the partnership affairs should be closed out. In this one party was not more at fault than the other, their mutual disapproval each of the other's methods culminating in the necessity for a dissolution of their relations. Each of the parties has rendered a statement showing the condition of the business, but differing widely. The trial court adopted in the main the statement of the defendant, and we are impressed that it is the more nearly correct. It is impossible, owing to the negligent and irregular manner in which the books were kept, to reach a thoroughly satisfactory result. Defendant's statement is more in detail, reference being made to much data whereby it may be verified, yet our judgment is that it is inaccurate as to the item of money drawn by Woldenberg. As to this there is no reference to any account kept by either of the parties, and we prefer plaintiff's statement concerning it. We are unable to concur, however, with the trial court's conclusions of fact and law; and, that the result may be clearly understood, we make the following brief summary of our conclusions, from which the proper statement of facts may be deduced, and the decree formulated. As no good purpose can be subserved by a discussion of the testimony, we will not attempt it, but rest the case with as clear a statement of the account as we can make. Parenthetically, it should be observed that the parties also engaged in conducting a saloon in the town of Burns during a portion of the time that they were in the brewery business, but the whole was considered and treated by them as one business, and the accounting has been conducted upon that basis. No further special reference, therefore, need be made to the saloon business. And further, as preliminary to the general accounting, it should be stated that the entire period in which the parties were engaged as partners, to the date of the institution of this suit, is 3 years, 6 months, and 28 days.

Under the agreement, each of the parties was entitled to an allowance of \$30 per month for his personal use, which is properly an expenditure of the business. The total amount payable to each, therefore, was \$1,288. Berg has drawn \$1,798.30—a sum in excess of that to which he was entitled by

\$510.30. Woldenberg, on the other hand, has drawn but \$1,178, leaving due him on his personal account, \$110. Now, to the general statement:

The cost of the plant by invoice, substantially agreed to by the parties, is ..... \$ 8,888 53

But as the value of the plant is, as practically conceded by plaintiff, \$10,000, the cost value ceases to serve as a factor in determining the relative interest of the parties in the assets of the concern; the increase in value becoming a part of the profits of the investment.

The cash receipts from all sources are ..... \$21,358 60  
Accounts due the firm..... 495 68  
Value of the plant..... 10,000 00

Total receipts and assets..... \$31,854 28

Upon the other hand, the total amount of moneys paid out is... \$26,608 46  
Accounts owing by the firm..... 739 34  
Amount due Woldenberg on personal allowance ..... 110 00

Total money paid out and liabilities ..... \$27,457 80  
From this should be deducted amount drawn by Berg above his personal allowance ..... 510 30

Balance actual expenditures and liabilities ..... \$26,947 50  
Deduct this amount from receipts and assets ..... \$31,854 28  
26,947 50

And we have..... \$ 4,906 78  
as the profits realized, one-half of which, or ..... 2,453 39  
represents the earnings of each partner.

However, as the defendant has drawn \$510.30 above his personal allowance under the articles of partnership, his interest remaining would be diminished by that sum, or ..... 1,943 09

The assets of the enterprise are:  
Accounts due the firm..... 495 68  
Value of the plant..... 10,000 00

Total ..... \$10,495 68  
This total, less the defendant's interest ..... 1,943 09

would represent the plaintiff's interest, viz. .... \$ 8,552 59

This gives us the proportional basis for final adjustment between the parties. It is necessary that the assets be sold, which will be the decree of the court, and the proceeds arising therefrom will be applied (1) to the payment of the costs and disbursements of this suit, including those arising in the trial court as well as this, and accruing costs incident to the closing up of the business; (2) to the payment of the liabilities of the firm, including \$110 to plaintiff, and the remainder will be divided between the parties in the proportion of 194309/1049568 thereof to the defendant, and 855259/1049568 to the plaintiff.

The trial court allowed the defendant \$30 per month during the entire time of the continuance of the litigation. This we deem

to be error. If he was entitled to that sum, plaintiff was entitled to a like sum. When, however, they ceased to engage in business under their articles of partnership, neither was entitled to the stipulated amount for personal use, and the accounting should not include the item. Neither should there be any decree against the plaintiff's surety on the injunction bond for costs or other amount. The decree will declare a dissolution of partnership, and direct the appointment of a receiver to wind up the business and distribute the funds.

Modified.

#### ELDRIDGE v. HOEFER et al.

(Supreme Court of Oregon. Aug. 15, 1904.)

TROVER — CONVERSION — EVIDENCE — LIMITATIONS — LANDLORD AND TENANT — MEASURE OF DAMAGES.

1. Where, in an action for conversion of a hophouse, there is an issue as to the ownership of it, and plaintiff shows, as an admission against interest by defendant, that, after plaintiff retook the building and sold it to A., defendant leased it from A. for a year, defendant may explain this by evidence that the reason he made the lease was that the building had been moved from his premises by plaintiff at the beginning of the hop-drying season, and he had no other house he could use, and so made the contract to save his crop.

2. The relation of landlord and tenant is created where, after sale under mortgage foreclosure, it is agreed between the purchaser and former owner that the latter may remain in possession, paying rent therefor, for two years after expiration of time to redeem, with right to redeem in such time.

3. Trover by a tenant, whose landlord wrongfully enters and takes possession before expiration of the lease, and forbids the removal of a hophouse erected by the tenant, and converts it to his own use, is barred only by the general statute of limitations.

4. The measure of damages in trover for conversion of an article which has been returned to and accepted by plaintiff, when special damages are not alleged, is the value of the property at the time of the conversion, with interest thereon to the trial, less its value when returned, with interest thereon from that date, and not the value of its use while in defendant's possession.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by F. J. Eldridge against John Hoefer and another, partners. Judgment for plaintiff. Defendants appeal. Reversed.

This is an action to recover damages for the conversion and use by the defendants of a hophouse for the years 1896 to 1901, inclusive. It is alleged in the complaint that plaintiff is the owner of the hophouse in question; that in August, 1896, the defendants wrongfully and unlawfully seized and took possession of it, and converted the same to their own use until August 20, 1902, when it was restored to the plaintiff; that during all such time the defendants continuously

¶ 3. See Trover and Conversion, vol. 47, Cent. Dig. §§ 253, 254, 263, 277.

used and occupied the house, to plaintiff's damage in the sum of \$1,930; that at the time of the conversion, in 1896, the house was worth \$840, and in August, 1902, at the time the possession was regained by the plaintiff, its value was \$500; that during the time defendants used and occupied the house, the reasonable rental value thereof was \$225 a year for drying hops, and \$40 a year for storing hops, and, by reason of the wrongful and unlawful withholding of the possession of the same, and the use and occupation thereof, by the defendants, the plaintiff was damaged in the sum of \$1,590. The answer denies plaintiff's ownership of the house, the wrongful possession thereof by the defendants, that the reasonable value of the use was any greater sum than \$50 a year, and, for an affirmative defense, alleges that the house was built by the plaintiff on the premises of the defendants in payment of the rent of a hopyard for the year 1895; that at the expiration of the lease the plaintiff surrendered to the defendants the possession of the premises, together with the house, and the defendants occupied and used the same until August, 1902, when the plaintiff wrongfully and unlawfully removed the house therefrom without the knowledge or consent of the defendants. The reply denies the material allegations of the answer, and affirmatively alleges that on and prior to December 19, 1894, plaintiff was the owner of the premises upon which the hophouse was built, and on that day a decree was rendered foreclosing a mortgage given by him to Goodman & Son, and ordering the sale of the mortgaged premises; that the property was subsequently sold under the decree, and purchased by Goodman & Son, who thereafter assigned and transferred the certificate of sale to the defendant; that, under an agreement made with the defendants, the plaintiff remained, in possession of the premises, agreeing to deliver to them one-third of the hops grown thereon each year, as rent; that defendants proposed to him that they would give him two years in addition to the time allowed by law in which to redeem from the sale under the foreclosure decree if he would build and equip at his own expense a hophouse on the premises, which should belong to him until the redemption; that, relying upon such agreement, he built and equipped the house, and remained in possession until some time in August, 1896, when the defendants repudiated the contract, ousted the plaintiff, and unlawfully took possession of the hophouse, and continued in possession thereof until August, 1902. The plaintiff had verdict and judgment for \$1,500, and defendants appeal, assigning as error the admission and rejection of testimony, the overruling of a motion for nonsuit, and the giving of certain instructions.

George G. Bingham, for appellants. P. H. D'Arcy and L. K. Adams, for respondent.

BEAN, J. (after stating the facts). The hophouse in controversy was built by the plaintiff in 1895 on premises formerly owned by him, but which had previously been sold under a decree of foreclosure, the sale confirmed, and the certificate of sale purchased by the defendants, who subsequently received a deed for the premises. About August 20, 1902, the plaintiff, without defendants' knowledge or consent, removed the house to an adjoining tract of land, and sold or pretended to sell it to one Aral. On September 5, 1902, the defendants, by contract in writing with Aral, leased the house for that year at a rental of \$15 a day for the time it should be used by them. This lease was introduced in evidence as an admission by the defendants of title to the house in the plaintiff, Aral's assignor. The defendants offered, but were not allowed, to show that the reason they made the lease was that the house had been moved from their premises by Eldridge at the beginning of the hop-drying season, and that they had no other house which they could use, and so made the contract of leasing in order to save their crop. This evidence was, in our opinion, competent, and should have been admitted. There was a sharp conflict between the parties as to the contract under which the plaintiff built the house, and its ownership; defendants insisting that it was built for them in payment of the rent for the year 1895, and therefore belonged to them. The plaintiff, however, contended that it was built by him in consideration of an agreement with the defendants by which he was to remain in possession of the premises for two years after the time allowed by law for the redemption thereof had expired, with the right to redeem within such time, and that such agreement was wrongfully terminated by the defendants, and the house converted to their own use. The lease of the house from Aral by the defendants was a circumstance tending to support the plaintiff's contention that the house belonged to him, and that the defendants so understood. If, however, the circumstances under which the lease was made were such as the defendants offered to show, the effect of the alleged admission would be materially lessened. The lease was not admitted to estop the defendant from denying Eldridge's title, but merely as an admission against interest. Its value as such would necessarily depend upon the circumstances under which it was made, and the reasons which prompted its execution by the defendants. The evidence offered was therefore admissible, and for the error in excluding it the judgment must be reversed.

In view of another trial, it is deemed proper to indicate briefly the opinion of the court upon some other points in the case:

A contention is made that the motion for a nonsuit should have been allowed, because the action was not commenced within a rea-

sonable time after the repudiation by the defendants of the alleged contract for the leasing of the premises to plaintiff, and an extension of time for redemption thereof from the sale under the foreclosure decree. Under our statute, a purchaser of real property at execution sale is entitled to possession thereof from the day of sale until a resale or redemption, unless it is in possession of a tenant holding under an unexpired lease. B. & C. Comp. § 253. The agreement, therefore, between the plaintiff and the defendants, if made, that plaintiff might remain in possession of the premises, paying rent therefor, for two years after the time for redemption had expired, with the right to redeem within such time, would constitute the relation of landlord and tenant between them; and if the contract was wrongfully terminated by the defendants, and the plaintiff ousted, he would be entitled to a reasonable time thereafter in which to re-enter and remove improvements put on the premises by him, if it could be done without substantial injury to the freehold. *Gear, Landlord & Tenant*, § 116; *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175; *Com'rs of Rush County v. Stubbs*, 25 Kan. 312; *Turner v. Kennedy*, 57 Minn. 104, 58 N. W. 823; *Waters v. Reuber*, 16 Neb. 99, 19 N. W. 687, 49 Am. Rep. 710; *Ombony v. Jones*, 19 N. Y. 234; *Meador v. Brown*, 5 N. Y. St. Rep. 839. What constitutes a reasonable time in which a tenant may remove a fixture after the tenancy has been wrongfully terminated by the landlord is to be determined from the facts and circumstances of each case, and the conduct of the respective parties. The question is not involved here, however, nor the right of the plaintiff to remove the house from the premises, if it belonged to him. The action is in trover, for an unlawful conversion of the house by the defendants. The evidence tended to show that plaintiff never intended to abandon the building, but promptly asserted his claim thereto; that his title and right to the possession was denied by the defendants, who wrongfully and unlawfully entered and took possession of the premises before the expiration of the lease, forbade the removal of the hophouse, and converted the same to their own use. Under such circumstances, a tenant may maintain an action of trover against his landlord. *Rosenau v. Syring*, 25 Or. 386, 35 Pac. 844. And his right of action is not barred until the general statute of limitations interposes. *Porter v. Foster*, 20 Me. 391, 37 Am. Dec. 59.

This action was brought and tried on the theory, apparently accepted by all parties until this appeal, that, if plaintiff was entitled to recover, the measure of damages would be the reasonable rental value of the house while it remained on the premises of the defendants. The action is in trover. In such an action the rule for the measure of damages is well understood. The title to the property alleged to have been converted is

regarded as having passed to the defendant, who is liable for its value, with simple interest. The measure of damages, therefore, in an action of trover, unless plaintiff, by reason of the unlawful act of the defendant, has suffered some special loss or injury, which must be alleged, is the value of the property at the time of the conversion, with interest thereon to the trial (4 Sutherland, Dam. [3d Ed.] § 1100; 2 Sedgwick, Dam. [8th Ed.] § 493; Field, Dam. § 792; Eggleston, Dam. § 288), unless, perhaps, the property is of a fluctuating value, when, under some of the authorities, the highest value at any time between the conversion and the trial will be taken as a basis for estimating the damages. See 2 Sedgwick, Dam. (8th Ed.) § 597 et seq.; Field, Dam. § 798 et seq. It is argued, however, that this rule does not apply where the property has been returned to and accepted by the plaintiff, but in such cases the true measure of damages is the value of the use of the property during the time it was in the possession of the defendant, and there are some authorities to that effect. *Ewing v. Blount*, 20 Ala. 694; *Fields v. Williams*, 91 Ala. 502, 8 South. 349. This position, it seems to us, overlooks the fundamental principle underlying an action of trover. It is based upon the theory that by the conversion the title to the property passes to the defendant, and he is liable for its value. The subsequent return to and acceptance of the property by the owner is admittedly no bar to an action of trover for its conversion, but goes only in mitigation of damages. *Murphy v. Hobbs*, 8 Colo. 17, 5 Pac. 637; *Curtis v. Ward*, 20 Conn. 204; *Bigelow Co. v. Heintze*, 53 N. J. Law. 60, 21 Atl. 109; *United States v. Pine River Logging & Improvement Co.*, 78 Fed. 319, 24 C. C. A. 101. Now, if an action may be maintained against the wrongdoer for the conversion, notwithstanding the return to the owner of the property unlawfully converted, it follows as a logical sequence that in such action the accepted rule for the measure of damages in an action of trover must be applied; the return of the property going only in mitigation of such damages. It is accordingly held by the better authorities that, in case of a return of property, the measure of damages in an action of trover for its conversion, when special damages are not alleged, will, in general, be the value of the property at the time of the conversion, with interest thereon to the trial, less its value at the time of the return, with interest thereon from that date, and not the value of its use during the time it was in the possession of the defendants. 26 Am. & Eng. Enc. Law (1st Ed.) § 851; 4 Sutherland, Dam. (3d Ed.) § 1159; 2 Sedgwick, Dam. (8th Ed.) § 494; *Gove v. Watson*, 61 N. H. 136; *Flagler v. Hearst* (Sup.) 86 N. Y. Supp. 308. *Gove v. Watson*, supra, was an action in trover for the conversion of oxen which had been returned and accepted by the plaintiff. During the time defendant had possession of



the oxen, he worked them without plaintiff's knowledge or consent. The plaintiff sought to recover the value of such work as an item of damages, but the court held that the measure of damages was the difference between the value of the oxen at the time of the conversion and their value at the time they were retaken by the plaintiff. *Flagler v. Hearst*, supra, was an action to recover damages for the conversion of a steam yacht, which was returned to the plaintiff before the action was tried. The trial court submitted to the jury as the measure of damages the fair rental value of the yacht during the time it was in the possession of the defendant, but the Supreme Court held that the true measure of damages was its value at the time of its conversion, with interest added, less its value at the time of the return, with interest on that sum, and that it was error to submit to the jury the question as to the value of its use during the time it was in the possession of the defendant.

The judgment will be reversed, and a new trial ordered.

#### PEOPLE v. WRIGHT. (Cr. 1,106.)

(Supreme Court of California. July 20, 1904.)

HOMICIDE — SELF-DEFENSE — MOTIVE — EVIDENCE—ADMISSIBILITY.

1. On a prosecution for homicide, where self-defense was relied on by defendant, evidence tending to show improper relations between defendant and the divorced wife of deceased is inadmissible to show motive.

2. On a prosecution for homicide, where self-defense was relied on by defendant, where it appeared that at the time of the killing deceased and defendant exchanged shots at each other, both missing on the first fire, defendant fatally wounding deceased on the second shot, evidence tending to show that the double-barreled shotgun used by deceased was defective, so that one barrel could not be discharged, is inadmissible; it not being shown that defendant had knowledge of the defect.

*Shaw, J.*, dissenting in part.

In Bank. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Hulbert R. Wright was convicted of manslaughter, and from the judgment and an order denying a motion for a new trial he appeals. Reversed.

W. E. Duncan, Jr., for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for respondent.

HENSHAW, J. The defendant, informed against for the murder of one Henry C. Farley, was convicted of manslaughter, and from the judgment and from the order denying his motion for a new trial he appeals. The defendant's plea was self-defense.

The undisputed facts are that upon the 23d day of May, 1903, defendant killed Farley under the following circumstances: Mrs. Farley had secured a divorce from her husband for his failure to provide, which divorce was absolute. She was living in her

own house, for which she was paying the rent, with her three children—the oldest a son, Joe, aged 20; the second, a daughter, Gladys, aged 11. Mrs. Farley, who was so poor that she did washing for certain of the neighborhood people—amongst others for the defendant—had bought from her ex-husband all the household furniture. Upon May 17th he told Mrs. Farley that he had sold his mining claim, and was going East, and bade his children good-bye. He returned again to Mrs. Farley's home upon the 20th of May upon a visit to his children, and went away again, not appearing thereafter until the day of the homicide. About 6 o'clock of the evening of that day the defendant went to Mrs. Farley's house for his washing. Mrs. Farley asked him to stay for supper, and he sat down at the supper table in the kitchen with Mrs. Farley and her children. While the family were thus seated, Mrs. Farley heard a sound as of some one entering the sitting room, and went from the kitchen into the sitting room, to see who it was. She came back almost immediately, and said, "It is Henry" (meaning Farley). There had been ill-feeling between the men. Farley had upon one occasion before the divorce shot at Wright; upon another occasion had tried to shoot him in the back with a rifle as he was walking along the lane, and was prevented by his wife and daughter; and upon a third occasion had been seen watching his wife's home with a rifle, and, when discovered, stated that he was waiting "to catch that son of a bitch Wright inside his yard." The last two occasions were after the divorce, and were both known to the defendant. Mrs. Farley told her son to go into the room and "make his father behave." The son, who admits his bias against defendant, testifies that under his mother's direction he did go through the sitting room into his bedroom, where he found his father. He talked with him a little while, but did not remember what he said. His father took off a shot pouch and powder horn, and started into the sitting room. In the meantime Wright, in the kitchen, had risen, drawn a pocketknife, and stood by the kitchen door, but under Mrs. Farley's protestations he put the knife back in his pocket. As Farley walked into the sitting room, his son said to his father, "Be careful," upon which the father jumped back into the bedroom, and seized a double-barrel shotgun. The son wrestled with his father for the possession of the gun, asking him not to shoot. The father threw him to one side, and started for the door leading from the bedroom into the sitting room. The son closed and held the door against his father, and was conscious that he was being aided in holding it by somebody upon the other side of the door. This was his mother. The father turned from the door, and climbed through a window of the bedroom onto the porch with the double-barreled shotgun in his hand. The son

then entered the sitting room, where he found the defendant and his mother. He told them that the father had gone through the window with the double-barreled shotgun. The defendant, who had picked up his rifle, asked if he should defend himself, and both mother and son told him no; to go. He started to make his escape by the front door, but Mrs. Farley, who had preceded him, looking out, saw Farley upon the porch, with his shotgun leveled at the door. She told Wright to go out through the kitchen door, which he did at a quick pace. Farley, either hearing or suspecting this, went from the front porch around to the back porch, and when Wright was about 30 feet from the house he heard Farley say: "Now, you son of a bitch, I have got you," and, looking, saw Farley leaning around the corner of the house with his shotgun aimed. Both men then fired and both missed. According to the testimony of the defendant and Mrs. Farley, Farley fired first. His shot was high, and in a direction that would have carried it about three feet over the head of the defendant. According to the testimony of the son, Joe, he could not tell which fired first. The defendant promptly worked his repeating rifle, and fired a second shot, which struck Farley in the back of the neck, and caused his death.

Upon this bald statement of undisputed facts it is no little surprising that the jury should have convicted a man whose life previous to the fatal affray had thrice been attempted by the deceased, and the more surprising is it when it is considered that the defendant was where he had a perfect right to be, doing what he had a perfect right to do, was using every endeavor to avoid a fatal combat, had narrowly escaped assassination when he started to go out by the front door, and was moving rapidly away when arrested by the call of the deceased, "Now, you son of a bitch, I have got you." Nor is it conceivable that such a verdict would have been rendered but for the admission of testimony impertinent to the issue, and highly prejudicial to the defendant. Under the guise of "showing motive" the prosecution was allowed to present much testimony bearing upon the intimidated or alleged improper relations existing between Mrs. Farley and the defendant. Proof of motive, it is true, is always admissible, and sometimes extremely important. *People v. Durrant*, 116 Cal. 208, 48 Pac. 75. In cases of circumstantial evidence, where the identity of the slayer is in doubt, evidence of motive is both important and valuable. Thus, in the application of this rule, where one spouse is killed, evidence of immoral relations existing between the defendant and the other spouse is admitted as tending to show motive which otherwise might be absent. But under the undisputed facts in this case, what possible "motive" for the killing of the deceased by this defendant could this evidence show?

Mrs. Farley was no longer the wife of deceased. She was living in her own home, with her own children. Farley had sold his property, and had announced his intention of going back to the state of Missouri. What conceivable light upon motive, therefore, could this evidence shed? If, as the prosecution sought to show, this intimacy had existed for the past four or five years, Mrs. Farley being a free woman, and Farley, upon his own statement, about to take his departure from the state, why should the defendant have seized such an occasion to wantonly slay him? If Farley had succeeded in killing the defendant, there would have been much pertinency in all this evidence as tending to show the passion and malice which Farley entertained. The simple truth of the matter is that this mass of testimony admitted against the defendant was meaningless as to motive, and could have but inflamed—as doubtless it was expected it would inflame—the minds of the jurors against the defendant. The case in this respect is analogous to that of *People v. Gress*, 107 Cal. 463, 40 Pac. 752. There the defendant was convicted of having murdered one Louis Assalena, and upon the trial his wife was allowed to testify to the influence which the defendant exerted over her, and to his efforts to induce her to leave her husband. This court said: "Under the circumstances of this case the evidence was not pertinent to any issue before the jury. Were the case one of circumstantial evidence, and the fact in doubt as to whether defendant did the killing, such evidence might be admissible upon the question of motive (*Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524), but here the killing was admitted, and the only issue was whether it was in necessary self-defense. In such a case evidence of this character serves no competent purpose, while its effect was necessarily prejudicial to defendant's case."

The second matter of evidence to which we have referred as being prejudicial to the defendant is that touching the condition of the shotgun which Farley used. It appears that, while both barrels of the gun were loaded, the lock of the left-hand barrel was defective, so that it could not be discharged. Testimony as to the condition of the gun was offered and received. It would have been proper for the prosecution to have shown, if it could have shown, that the defendant knew the condition of the gun, and knew that when Farley had fired his first shot he was practically unarmed, because, if, under these circumstances, and with sufficient opportunity for deliberation, the defendant had then fired his second fatal shot, the killing would, of course, have been unlawful. This proof, however, was not made, but Joe Farley was allowed to testify to the fact that the gun was broken, and was then asked and permitted to answer the question, "Did you ever talk about this gun being

broken around the house, or was it talked about that the gun was broken while at the Concow house?" and the witness answered that he did. The objection that the defendant was not shown to have been present when the defect in the gun was talked about was well taken. The question, with many others asked in the case, were like those criticised in *People v. Mullings*, 83 Cal. 145, 23 Pac. 231, 17 Am. St. Rep. 223. "It is quite evident that the questions, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense."

A challenge to the panel was interposed upon various grounds, but, as the alleged irregularities are not such as are likely to recur, it is unnecessary here to consider them. Upon the whole the jury was fairly instructed, though it might, perhaps, have been better if the court had omitted instruction 32, or at least in giving it had limited it more strictly to the language of the Code. *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: MCFARLAND, J.; VAN DYKE, J.

SHAW, J. I concur in the opinion of Justice HENSHAW, except the portion thereof relating to the admission of evidence tending to show a motive on the part of the defendant to kill the deceased, Farley. There was here no actual eyewitness who saw Farley at the moment he was shot, except the defendant. The evidence does not show the position and actions of Farley at the precise moment of the fatal shot. If the defendant had the purpose to kill Farley, he might well have taken advantage of the previous attack, which put him in a place where the right of self-defense arose, and, seeing that the danger had ceased, have fired the shot, not in self-defense, but in pursuance of an independent design to kill his previous assailant, who was then retreating. There was other evidence tending to show such a state of the case. All this was for the jury to determine, and I do not think the court erred in admitting the evidence. Evidence of that character is, however, likely to be misunderstood by the jury, and, if the object of it is not clearly explained, it may be very prejudicial to the defendant. It should therefore be made the subject of a special instruction explaining its purpose, and the jury should be directed to consider

it only so far as it may serve to explain the motives of the defendant. This was not done in the present case.

ANGELLOTTI, J. I concur in the judgment upon both of the grounds stated in the opinion of Mr. Justice HENSHAW. The evidence as to the intimated improper relations between defendant and the wife of the deceased was not, under the circumstances of this case, material upon the question of motive, and was therefore inadmissible for any purpose. It cannot be doubted that the effect was prejudicial.

Evidence as to the defective condition of one barrel of the gun was inadmissible in the absence of a showing that the defendant had notice thereof.

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Ex parte WHITLEY. (Or. 1,115).\*

(Supreme Court of California. July 22, 1904.)

PHYSICIANS AND SURGEONS—DENTISTRY—POWER TO REGULATE PRACTICE—CONSTITUTIONAL EXERCISE—DISCRIMINATION—DELEGATION OF JUDICIAL POWER—STARE DECISIS—DEPARTMENT DECISIONS—GRANT OF REHEARING—EFFECT.

1. Legislation prescribing regulations under which only those persons possessing proper qualifications shall be admitted to the practice of any profession or calling requiring special skill is a valid exercise of the police power of the state for the protection of the public against unskillful and incompetent persons.

2. The provision of St. 1885, p. 110, c. 127, § 1, regulating the practice of dentistry, which was carried into St. 1901, p. 564, c. 175, § 1, which exempted from the requirements of the act persons who were at the time of its passage engaged in the practice of dentistry, is not repugnant to the provisions of the state or federal Constitution, inhibiting special and class legislation, or the granting of special privileges and immunities.

3. St. 1901, p. 564, c. 175, § 12, as amended by St. 1903, p. 322, c. 244, regulating the practice of dentistry, which permits graduates of reputable dental colleges, graduates of high schools who have served an apprenticeship of four years with licensed practitioners, and dentists from other states who have been licensed practitioners for five years, to practice dentistry after examination by the state board of dental examiners, does not create an arbitrary classification of persons who may practice dentistry, but was within the legislative power to enact as a reasonable standard for determining the competency of applicants.

4. St. 1903, p. 322, c. 244, § 12, providing that no person shall be eligible for examination by the state board of dental examiners who shall not furnish satisfactory evidence of having graduated from a reputable dental college indorsed by the board of dental examiners, does not confer judicial power upon that board in the sense prohibited by the Constitution.

5. St. 1903, p. 322, c. 244, § 12, providing that no person shall be eligible for examination by the state board of dental examiners who shall not furnish satisfactory evidence of having graduated from a reputable dental college indorsed by the board of dental examiners, is not open to the objection of unconstitutionally conferring arbitrary power on the board of dental examiners to decide what colleges are reputable.

\*Rehearing denied August 20, 1904.

6. A department decision in which a rehearing was granted is not authority, where, before any hearing or further decision was rendered in bank, the proceeding was dismissed on motion.

In bank. Application for writ of habeas corpus by C. H. Whitley against George Wittman, chief of police of the city and county of San Francisco. Writ dismissed.

William M. Cannon and Arthur W. Perry, for petitioner. E. Myron Wolf, Jordan, Treat & Brann, James F. Peck, and Charles C. Boynton, amici curiæ.

LORIGAN, J. Petitioner was arrested for practicing dentistry without a license, contrary to the dental law of this state, and prosecutes this writ, claiming that said law is unconstitutional for several reasons.

The history of our dental law is found in enactments by the Legislature at its sessions in 1885, 1901, and 1903, and, in order to properly appreciate the points made by petitioner, it will be necessary to refer to some of the provisions of all these acts. The original act regulating the practice of dentistry was passed in 1885 (St. 1885, p. 110, c. 127), and it was provided in section 1 thereof that "it shall be unlawful for any person, who is not at the time of the passage of this act engaged in the practice of dentistry in this state, to commence such practice, unless he or she shall have obtained a certificate as hereinafter provided." Section 4 provided that, "within six months from the time this act takes effect, it shall be the duty of every person who is now engaged in the practice of dentistry in this state, to cause his or her name and residence or place of business to be registered with the board of examiners." The act further provided for the examination by the board of examiners of applicants for dental certificates other than those engaged in practice at its passage, and provided that, if the board should determine that they possessed the requisite knowledge and skill in dental surgery, they should issue a certificate, which would entitle them to practice, and might also indorse as satisfactory diplomas from any reputable dental college, and issue certificates for the same purpose thereon. In 1901 (St. 1901, p. 564, c. 175) an entirely new act regulating the practice of dentistry in this state was passed—one more full, complete, and detailed than that of 1885 (St. 1885, p. 110, c. 127), which it thereby repealed. Section 1 of this latter act provided that "it shall be unlawful for any person to engage in the practice of dentistry in the state of California, unless said person shall have obtained a license from the board of dental examiners, duly authorized and appointed under the provisions of this act to issue licenses; provided that this act shall not affect the right, under the laws of the state of California, of dentists to practice dentistry, who have a lawful right to practice dentistry at the time of the passage of this act." Subsequent sections of this act also provided, as in the act of 1885,

for issuance to others, desiring to engage in the practice of dentistry, of certificates or licenses entitling them to do so, upon compliance with certain prescribed conditions as to examination, etc., which it is unnecessary to state now, as they will be referred to more fully hereafter when we come to an examination of further objections particularly urged against the provisions of the act of 1901 and sections amendatory thereof in the act of 1903 (St. 1903, p. 322, c. 244). This, too, is all the reference required to the particular sections of the acts of 1885 and 1901, so as to fully understand and discuss petitioner's first contention.

1. He insists that section 1 of the act of 1885 was unconstitutional, because it discriminated between two classes, in this: that it made it unlawful for any person to engage in the practice of dentistry after the passage of the act without first obtaining a license, and, on the other hand, dispensed with the necessity of first obtaining such license in favor of those practicing at the time the act was passed. Notwithstanding this act of 1885 was repealed in toto by the act of 1901—and for that reason construction of its provisions would seem unnecessary—petitioner nevertheless claims that its construction is most important, and that a determination in favor of its validity is vital to the integrity of the act of 1901; that, if section 1 of the act of 1885 is unconstitutional, then he contends section 1 of the act of 1901 is equally so, because the persons provided for in the latter section, as a class exempt from obtaining a license, namely "persons who have a lawful right to practice dentistry" at the time of its passage, can only exist and be ascertained by virtue of the validity of the act of 1885, and must necessarily consist, in the aggregate, of those who were practicing dentistry when it was enacted, and who were exempted by its terms from obtaining a license, and those to whom licenses had been issued on examinations; in compliance with its conditions, at the time the act of 1901 was passed; that consequently, in order to ascertain what dentists had "lawful right" to continue in practice at the passage of the act of 1901, without an examination, there is necessarily involved a determination of the validity of section 1 of the act of 1885; and that, unless the act of 1885 was valid, there could exist no particular class in whose favor the act of 1901 would operate as an exemption, because, if it was void, then, as at the time the act of 1901 was passed, every person who saw fit to do so had an unrestricted and absolute right to practice dentistry, the exemption by the act of 1901 in favor of all those who had a "lawful right to practice dentistry" amounted to nothing. As everybody had a lawful right to practice, if there was no valid law prior to 1901, an exemption of all persons having "lawful right" from the provisions of that act left nobody upon whom the law could operate, because, if all had a

lawful right, all were exempt. The act of 1901 would, therefore, in its opening section, unless the act of 1885 was constitutional, be meaningless, inoperative, and self-destructive. Aside from this, a similar and independent attack is made upon the act of 1901 that is made on the act of 1885, as equally discriminating between classes, in requiring the procurement of a license by one and exempting the other from doing so. If, however, the act of 1885 was valid, notwithstanding it exempted dentists practicing at the time of its passage from obtaining a license, and requiring others to do so, then certainly the act of 1901, in as far as it carried into its provisions and also exempted those same persons as being within the class "having a lawful right to practice" under the act of 1885, was also valid. As to the other members of the exempt class under the act of 1901, being those who had obtained a license under the act of 1885, it cannot be successfully contended that it was not proper to exempt them. They had already complied with the conditions of the law and obtained a license, and it was unnecessary, if not also unfair, to require them to do so again. So that it will be sufficient to address ourselves to a consideration of the validity of section 1 of the act of 1885, because the law which determines that question will apply with equal force, and dispose of the similar objection to section 1 of the act of 1901, at least to the extent that it is claimed to be discriminating in this particular. While counsel for petitioner attacks both these acts upon the ground, generally, that they are discriminatory, he particularizes in that regard that they are obnoxious to various provisions of both the Constitution of this state and of the United States; that they are violative of the provisions of the one, because they constitute special legislation, making an arbitrary distinction in a class between dentists practicing at the time of the passage of the act and those seeking to practice afterwards, when it should equally apply to all dentists, and when there exists no natural, intrinsic, or constitutional reason why the discrimination between them should be made; that it is violative of the provisions of both Constitutions, in that it attempts to grant special privileges and immunities to one class of dentists which it denies to another.

Approaching, now, the discussion of these propositions, it is not questioned by counsel for petitioner but that the state has the right to regulate the practice of dentistry—to provide measures for the protection of the public against the incompetency and ignorance of those who, while they would assume the duties and responsibilities of that profession, are yet unfitted and unqualified to discharge them. In fact, it must be conceded that it is a common and valid exercise of legislative power to prescribe regulations under which only those persons possessing proper qualifications shall be admitted to the practice of

any profession or calling requiring special skill. This right of legislation is always recognized as a salutary and wise exercise of the police power of the state, for the protection and safety of the public against unskillful and incompetent persons. And it is the fact that the state has this power which must largely enter into a determination of the validity of the sections in question. The legislation of the state of California on this subject is not new. Similar legislation has obtained in a large number of the states, and in some of these the courts have had occasion to pass on the identical question presented here. In some instances the question arose under acts regulating the practice of medicine, and in others, as here, regulating the practice of dentistry; but the same reasoning would apply and the same constitutional principles govern as to the validity of provisions of a dental as of a medical act, because the profession of dentistry is but a special branch of the medical profession, and the power of the state to regulate as to both in the interests of the public is equally clear. An examination of these authorities shows that an exemption in favor of those practicing at the time of the passage of an act regulating the practice of dentistry, and which requires all others to obtain a license and certificate for that purpose, is open to none of the constitutional objections urged in the case at bar. Such legislation has been uniformly upheld. And, as the reasons therefor are stated in the opinions, it is unnecessary to discuss the point any further than to quote from them. They deal with all the objections urged by petitioner, both as to the provisions of the acts in controversy being special and discriminatory legislation, and as being a grant of special or exclusive privileges or immunities.

In the case of *State v. Randolph*, 23 Or. 74, 31 Pac. 201, 17 L. R. A. 470, 37 Am. St. Rep. 655, involving the validity of an act concerning physicians and surgeons, which exempted physicians in practice at its passage from its operation, the Supreme Court of that state said: "The first point is based on the assumption that this act, or section 13 of the act (Laws 1889, p. 147), is in conflict with section 20, art. 1, of the state Constitution, which provides that 'no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens'; and the second point is based on a like assumption that section 13 of the act is in conflict with section 2 of article 4 of the Constitution of the United States, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,' and also in conflict with that portion of the fourteenth amendment thereto which provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.' Both of

these contentions involve the same principle, and the discussion of one necessarily includes the other, so that their separate consideration is not necessarily to be pursued. Both proceed upon the hypothesis that the act grants privileges or immunities to one class of persons, while it denies the same privileges or immunities to another class. It is not thought that either of these contentions is tenable, or that the section referred to is in conflict with the Constitution of the state or of the United States. The right of every person to pursue any lawful business, occupation, or profession he may choose to pursue, subject to such restrictions as the government may impose for the protection of the health, welfare, and safety of society, is unquestioned. \* \* \* To provide means for the protection of the public health from the ignorance and incapacity of those who are unfitted to discharge the duties of a physician, our state, as other states have done, enacted the law in question; and unless it grants to some citizen or physician, or class of them, some right or immunity which, upon like terms or under similar circumstances, it denies to another, it is a valid exercise of the police power and must be upheld. Section 13 of the act in effect only permits physicians that were engaged in the practice when the law took effect, upon registering as required by its proviso, to apply to the board and obtain a certificate of qualification authorizing them to practice medicine or surgery without an examination. In a word, it permits persons who were engaged in the practice when the law took effect to continue in the practice without an examination. As it is the right of the state to prescribe qualifications based on knowledge or professional skill, necessarily the state must be the judge of such qualifications; and, if the rule established to determine them is reasonable and appropriate for that purpose, it cannot operate to deprive any one of the privilege or right to practice his profession. The test of qualification under the act is based on medical skill and knowledge. If the person seeking to practice medicine has a diploma or license from some reputable institution, it is sufficient evidence under the act of the requisite qualifications to entitle him to practice. It is only when the person wishing to practice has no such evidence of his qualification that the act requires that he shall submit himself for examination by the board. In establishing this rule, the state saw fit, for reason satisfactory to itself, to except from its provisions, by section 13, those physicians who were engaged in the practice at the passage of the act. In doing this it made the fact of being so engaged in the practice at that time sufficient evidence of qualification—equivalent to a diploma—rendering an examination unnecessary."

In *State v. Creditor*, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306, it is said, relative to a similar provision in the dental law

of that state: "No arbitrary or capricious conditions are imposed. The profession and practice are open to every citizen of the United States who is qualified, and who can produce evidence of the same. The Legislature saw fit to permit those practicing in the state when the act was passed to continue to practice without diploma or other evidence of competency. \* \* \* The Legislature proceeded upon the theory that the fact that they had been engaged in the practice within the state was sufficient evidence of their proficiency in the profession. This fact was made by the Legislature an evidence of skill and competency equivalent to a diploma from a dental college; and the wisdom of either test is a question for the Legislature, and not for the courts. The act cannot be held to unduly discriminate between persons or classes, and unconstitutional because it exempts those engaged in the practice within the state when the law was enacted from the necessity of obtaining a diploma."

In *Ex parte Spinney*, 10 Nev. 323, where an act exempting dentists who had been practicing for a period of 10 years next preceding its passage was involved, in sustaining the validity of the law, it is said: "It in effect declared that the physician or surgeon who was engaged in the practice immediately preceding the passage of the act was as well qualified, in the judgment of the state, to continue the practice of his profession, as the student coming fresh from the halls of college with his diploma was to commence it. But in establishing this rule as to these physicians and surgeons the state did not deny the privilege or the right of practicing medicine or surgery to any one. No class of citizens of this state is prohibited from the practice of medicine or surgery by the act, provided they have the proper qualifications and comply with the law in relation thereto. The error of the defendant's contention consists in assuming that the act grants 'privileges or immunities' to one class of citizens or physicians of this state, which it denies to other citizens of the state or other states. The act does not grant privileges or immunities to any citizen or class of citizens, either within or without the state. It only establishes a rule of evidence by which qualification to practice medicine and surgery is to be determined. It makes the fact of a person being engaged in the practice when the law took effect sufficient evidence of his fitness to continue the practice of his profession without an examination, in the same way that the diploma of the student is accepted as sufficient evidence of his fitness to commence the practice without an examination."

In *People v. Phippin*, 70 Mich. 6, 37 N. W. 888, construing an act excepting physicians who had practiced five years before its passage, the court said: "Statutes very similar to this have been upheld in many of the states, where their constitutionality has been

brought in question, and in many of the states very similar statutes have been enforced without question, and we are unable to find a case in the courts of any of our sister states, or in the federal courts, where such statutes have been overturned upon constitutional grounds as abridging the privileges and immunities of citizens of the United States, or as depriving any person of property without due process of law, or as being in conflict with section 2 of article 4, providing that the citizens of each state shall be entitled to all the privileges and immunities of the several states."

In the same line will be found the cases of *State v. Green*, 112 Ind. 462, 14 N. E. 352; *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; *West v. Clutter*, 37 Ohio St. 348. Citation is also made to 22 Am. & Eng. Ency. of Law (2d Ed.), page 781.

Several cases are cited by counsel for petitioner in support of his contention, those nearest approaching the point at issue being *State v. Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22, *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709, and *Scholle v. State*, 90 Md. 740, 46 Atl. 326, 50 L. R. A. 411. The first two cases involved the validity of an act regulating the practice of dentistry, which exempted all persons from an examination who had resided and practiced dentistry continuously in the same town or city of the state for five years last past. The act construed in *Scholle v. State* exempted physicians from examination also because of residence in one place. These acts were declared unconstitutional, and properly so. The language used in *State v. Hinman* points the defect in all: "By an arbitrary test having no reference to skill, learning, or fitness for the practice of the profession, certain persons are exempt from the payment of a license fee, to which others of equal, and perhaps superior, acquirements and experience, are subjected. It is a discrimination founded solely upon the accidental circumstances of residence, or of a change of residence, and falls within the prohibition of the Constitution." In these cases last cited particular individuals of a class of practicing dentists were exempted by reason of locality, and given special privileges. It was the exemption of a class within a class for purely local reasons. In the cases we have cited, however, fitness and learning are alone taken into consideration, and the fact of a person being in practice when the law took effect was deemed by the Legislature sufficient evidence of fitness to continue in the practice without further examination.

We think the cases we have quoted from and those we have cited fully sustain the view that the exemption from examination under the act of 1885, carried into the act of 1901, of those who were practicing the profession of dentistry when they were passed, and exacting from those who sought the

right to practice after its passage an examination as to their qualifications, is not discriminatory. All sections of the act operate equally upon all the actually practicing dentists in the state, which was the only existing class at its passage, and which was the only class concerned, and the only one upon which they could operate. They simply made the fact of actual practice at its passage such sufficient evidence of competency as a successful examination of those applying to practice after its passage. Without discussing this matter further, we think these cases sustain the propositions that the legislation complained of is neither special nor class, and that thereby no privileges or immunities are conferred upon one class to the detriment of another, and, as a consequence, that neither section 1 of the act of 1885, nor the similar section of the act of 1901, is violative of any of the provisions of the state or federal Constitution, as insisted upon by petitioner.

2. It is next claimed by petitioner that section 12 of the act of 1901, as amended by the act of 1903, arbitrarily creates three classes of persons who may practice dentistry in the state after examination by the state board of dental examiners, namely: First, graduates of reputable dental colleges; second, graduates of high schools, or similar institutions of learning, in this state, or any state of the United States, requiring a three years' course of study, who have served an apprenticeship of four years with licensed practitioners within this state; third, dentists from other states in the United States who have been licensed practitioners for five years. We find no merit in this claim of petitioner. It is entirely within the power of a Legislature to fix any reasonable standard for determining the competency of an applicant for admission to the practice of dentistry. It might, as under the act regulating the practice of medicine and surgery in this state (St. 1901, p. 56, c. 51), where only those who are graduates from a medical college can be admitted to practice, have also made a similar single standard, limiting admission to practice dentistry to those alone who had graduated from some dental college. As this might have been the sole condition upon which an applicant could be examined, it cannot be said that legislation which enlarges the right and extends it to others can be said to be discriminatory. The law does not operate to exclude any one from the profession. The field is left open to all who are in possession of the required qualifications. It simply fixes the standard under which all persons who desire to enter the profession are brought as nearly as possible to the same degree of professional competency. The law, no doubt, is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning

and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree of learning and skill, and those who have not; between those who are able, and those who are unable, to acquire it. It is not an unreasonable or capricious discrimination, applying to classes as such, or members of a class, but is based solely upon professional qualifications. It is a discrimination which, in the interest of the public welfare, it is the duty of the Legislature to make, and concerning the necessity for which, and its nature and extent—whether an examination and right to practice shall depend on the possession by the applicant of a diploma of a dental college only, or be extended to others and how far—depends primarily upon the judgment of the Legislature, which, when reasonably exercised, the courts cannot control. These principles will be found fully discussed and sustained in *State v. Vandersluis*, supra, and *Dent v. West Virginia*, 129 U. S. 122, 9 Sup. Ct. 231, 32 L. Ed. 623; as also in *Ex parte Gerino* (Cal.) 77 Pac. 166, the decision in which case was filed June 1st of this year.

3. It is further claimed that the operation of section 12 of the act of 1903, which provides that "no person shall be eligible for examination by the state board of dental examiners who shall not furnish satisfactory evidence of having graduated from a reputable dental college, which must have been endorsed by the board of dental examiners of California," is unconstitutional and void, and a delegation of power of a judicial nature to the board of examiners, which, if exercised in an arbitrary and unlawful manner, it is beyond the power of the court to control. There is no foundation for the claim that the statute attempts to confer judicial power upon the board, in the sense that it is prohibited by the Constitution. It is not at all uncommon for inferior boards or officers to be invested with power which calls for the determination of facts, and the exercise of discretion, in the discharge of the duties of their office. This power, it is true, is in a sense judicial; but it cannot be said that it is an exercise of "judicial power" as that term is used in the Constitution in conferring judicial power upon courts. The question is, however, not an open one in this state, and seems to have been settled adversely to petitioner's contention in *County of Los Angeles v. Spencer*, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217. Upon the other point, that the power conferred on the board is of such a character as, if exercised arbitrarily, it will be beyond the power of the court to control it, it may be said that petitioner does not seem to have applied to the court on any complaint that the board has taken such arbitrary action. He has not complained to any court that the board has unjustly and arbitrarily dealt with him, but is here con-

tending that the law is unconstitutional, and that, under it, his right to practice is not subject to action or determination by the board at all. If he has been unjustly and arbitrarily dealt with, and should apply to the courts for redress, it will be doubtless found, as is stated in *Dent v. West Virginia*, 129 U. S. 124, 9 Sup. Ct. 234, 32 L. Ed. 623, where the same objection was raised as to power conferred on the board of medical examiners of West Virginia, that "if, in the proceedings under the statute, there should be any unfair or unjust action upon the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state." *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *State v. Chittenden*, 112 Wis. 569, 88 N. W. 587.

It is further insisted that this section 12 of the act of 1903 is obnoxious to the constitutional provisions, because it delegates to the board of examiners the power to decide what colleges are reputable, not from any standard furnished by the Legislature, but from their own arbitrary view upon the subject. But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of the state to legislate for the safety, health, and welfare of the people. The boards which are selected under such legislative power are to that extent agencies of the state, and the board of dental examiners under the dentistry act is a particular instrumentality selected as a state agency in the regulation of the practice of dentistry. While the Legislature, in conserving the public welfare, recognized that the possession of a diploma from a regular dental college, where acquiring the theory and practice of medicine fully engaged the time and attention of the student, was a high evidence of his ability to practice dentistry, it also assumed that there might be institutions whose required standard of scholarship was so low that the possession of a diploma from them would be little, if any, evidence of proficiency in dentistry, or that there might be pretended dental institutions requiring no preparation and fraudulently issuing diplomas after a perfunctory, if any, examination, and in sole consideration of a fee. In this condition of things, while the Legislature intended that only diplomas from a reputable dental college should be recognized by the board, it realized that it was impracticable, if not impossible, for it to adopt any fixed standard by which that matter could be determined in advance. It realized, as said by the court in *Wisconsin v. Chittenden*, supra, that "what is reputable in a dental college must necessarily be determined from a standpoint of men of scientific attainments in the line of work it represents, not from that of



mere laymen," and committed the determination of that matter to the state agency it created, consisting of dentists, presumably learned, trained, and eminent in the profession, and obligated, under the law, to deal fairly and justly with all applicants and the colleges from which they presented their diplomas. We do not perceive that in so doing any provision of the organic law was violated. The power to determine whether a college was reputable had to be lodged somewhere, and it was properly committed to the only body which could fairly and intelligently determine, not only as to the qualifications of the applicant, but upon the reputation of the college whose diploma he claimed to possess. This is a power which seems to be usually given by the Legislature to boards of examiners, and its commission is sustained by the courts. *State v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *Williams v. Dental Examiners*, 93 Tenn. 627, 27 S. W. 1019; *People v. Dental Examiners*, 110 Ill. 180; *Dent v. W. Va.*, 129 U. S. 124, 9 Sup. Ct. 231, 32 L. Ed. 623; *State v. Call*, 121 N. C. 646, 28 S. E. 517; *Francis v. State*, 57 Ohio St. 1, 47 N. E. 1041; *Gothard v. People* (Colo. Sup.) 74 Pac. 891. Practically the same point was made by the petitioner in *Ex parte Gerino*, supra, and decided adversely to him.

The case of *Van Vleck v. Board of Dental Examiners* (Cal.) 48 Pac. 223, 44 L. R. A. 635, is cited by both sides in the case at bar on the question just disposed of. That was a department decision, in which a rehearing was granted, and, before any hearing, or further decision was rendered by this court, the proceeding was dismissed on motion here; hence the department decision in that case is not authority.

This disposes of the principal and main points urged by the petitioner against the validity of the various sections of these acts as affecting their constitutionality. The objections leveled against section 12 of the act of 1903, that it is discriminatory between classes, and unconstitutional, for the other reasons suggested, are equally asserted against similar provisions in the acts of 1885 and 1901, so that, without descanting particularly on those provisions, it may be said, generally, that the views we have expressed and the conclusion we have reached apply equally to them as to section 12 of the act of 1903.

Other objections urged against the provisions in several of these acts we deem untenable and requiring no special notice.

The writ is dismissed, and the petitioner remanded to the custody of the chief of police of the city and county of San Francisco.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; VAN DYKE, J.

# OTTO v. LONG et al. (Sac. 1,076.)

(Supreme Court of California. July 16, 1904.)

PROBATE HOMESTEAD — MORTGAGE — VALIDITY — STATUTES — CONSTITUTIONAL LAW — JUDGMENT — COLLATERAL ATTACK — COMMUNITY PROPERTY.

1. Real estate acquired during marriage is community property.

2. Where community property is set apart as a probate homestead by order of court to the widow on the death of her husband, leaving no minor child, the title vests absolutely in the widow, under the direct provisions of Code Civ. Proc. § 1468.

3. Where the order of court setting apart community property to a widow as a probate homestead was passed prior to a mortgage thereon being executed by the widow, but not entered until after the date of the mortgage, the validity of the mortgage is not affected.

4. Under the direct provisions of Civ. Code, § 2930, a mortgage includes an after-acquired title; and hence the validity of the mortgage of a probate homestead set apart to the widow out of community property possessed by the husband at the time of his death is not affected where the entry of the order setting apart the homestead was not made until after the date of the mortgage, even though a prior entry was necessary to give her title to the homestead.

5. Code Civ. Proc. § 1465, providing that the court must select, designate, and set apart and cause to be recorded a homestead out of decedent's exempt property, for the use of the widow, does not make the recordation of the order a necessary part of the process of creating a probate homestead.

6. The determination of the court in selecting and setting apart to the widow a homestead in the land of her deceased husband cannot be inquired into collaterally.

7. Where the pleadings in a cause attacking the validity of an order of court setting apart a probate homestead to a widow out of the real estate possessed by her husband at his death laid no foundation for a direct attack on the order, the fact that the husband had in his lifetime selected a homestead, which at his death had not been abandoned, is immaterial.

8. Persons who by grace of statute are designated as heirs and devisees have no grounds for a claim that they are deprived of their property without due process of law, within the constitutional inhibition, merely because the same statutory law which provides that they shall inherit and that property shall be disposed of by will has also provided that, notwithstanding such heirship or testamentary disposition, the court having jurisdiction of the estate of the deceased, before distribution, may under certain conditions, to be by it determined, set apart some or all of the estate absolutely to the widow by an unappealable order.

Department 1. Appeal from Superior Court, Lassen County; C. E. McLaughlin, Judge.

Action by A. Otto against John T. Long and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Goodwin & Goodwin and Garoutte & Goodwin, for appellants. Spencer & Raker, H. D. Burroughs, and N. J. Barry, for respondent.

SHAW, J. This is an action to quiet title to some 320 acres of land. The principal defense is made by the defendant John T. Long, as administrator of the estate of Allen Wood,

¶ 6. See Homestead, vol. 25, Cent. Dig. § 303.

deceased. The other defendants claim only as devisees under the will of the said Allen Wood. Judgment was given for the plaintiff, and the appeal was taken from the judgment within 60 days after its rendition; the evidence being brought up in a bill of exceptions.

The plaintiff claims title by virtue of a sale and deed to him under a decree foreclosing a mortgage on the land executed to the plaintiff December 1, 1893, by the defendant Mary Wood, widow of said Allen Wood, and by Mary E. Long, daughter of said Allen Wood, and her husband. Allen Wood died testate on August 1, 1890, and both Mary Wood and Mary E. Long were interested in the land as devisees named in his will. It is obvious that if, at the time this mortgage was executed, the title to the land therein described was in either of the mortgagors, it would now be vested in the plaintiff under the foreclosure sale. The appellants claim that the land was a part of the assets of the estate of Allen Wood at that time, and hence that the mortgage could not and did not affect the interest of the estate therein possessed by the administrator, nor the interest of any of the devisees under the will, except that of those who executed the mortgage.

We are of the opinion that when the mortgage was executed the land was not a part of the assets of the estate, but was the property of Mary Wood, having been vested in her by an order declaring it a probate homestead for her benefit, unless it be true that a part of it was vested in Mary E. Long by title paramount to that of Allen Wood in his lifetime. This latter proposition we need not decide, for, as Mary E. Long executed the mortgage, it would carry whatever right, title, or estate was vested in her, and by the foreclosure sale that estate would be transferred to the plaintiff.

The title and estate in the land possessed by Allen Wood at his death was acquired during his marriage to Mary Wood, and it was therefore community property. Allen Wood left surviving no minor children. On November 27, 1893, the superior court made an order in the matter of the estate purporting to set apart to Mary Wood, as his widow, all the lands here in controversy, as a homestead. By virtue of this order, under the provisions of section 1468, Code Civ. Proc., the title of the estate of Allen Wood vested absolutely in the widow, Mary Wood, and it was her property at the time she executed the mortgage.

The fact that the homestead order was not filed, and presumably was not entered, until December 4, 1893, three days after the date of the mortgage, is of no importance. The order on its face recites that it was made on November 27, 1893. The entry of the order was not necessary to make it valid or effectual to pass the title. In this respect it is subject to the same rule as a judgment, and becomes effectual as to the

estate, and those entitled to succession by law or devise, as soon as it is made or rendered. The entry of a judgment or order is a mere ministerial act of the clerk, and the lack of it does not take away or delay the effect of the adjudication, except where some statute expressly or by implication so provides. *Est. of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; *Los Angeles County Bank v. Raynor*, 61 Cal. 147; *Est. of Cook*, 77 Cal. 224, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267. Moreover, under the provisions of section 2930 of the Civil Code, a mortgage would include an after-acquired title of either of the mortgagors, the same as if such title was acquired before the mortgage was made, and therefore it would carry the title vested in the widow under the appropriate homestead, even if the entry was necessary to make her homestead good and effectual.

The failure of the widow, who was then also acting as the administratrix of the estate, to record the homestead order in the office of the recorder, does not render the order ineffectual. The provision of the Code that the court shall "select, designate, and set apart, and cause to be recorded, a homestead," does not make the recordation of the order a necessary part of the process of creating a probate homestead. There is not in section 1465, Code Civ. Proc., providing for the creation of probate homesteads, as there is in section 1265 of the Civil Code, relating to ordinary homesteads, a provision declaring, in effect, that the homestead does not come into existence until the declaration is filed for record. The probate homestead is the creation of the court, and its existence is complete when the court has concluded its action. The subsequent act of recording is ministerial only, and must take place after the action of the court is completed by the making of the order. The provision for recording it in the recorder's office is manifestly nothing more than a direction for the preservation of an additional record, to impart notice to third persons.

It is further claimed that the order setting apart the homestead is invalid because the deceased, in his lifetime, had selected a homestead, which at the time of his death had not been abandoned. Before making the order, it was necessary for the court to determine that the facts existed which authorized it to do so. This determination cannot be inquired into collaterally. *Est. of Moore*, 96 Cal. 530, 31 Pac. 584; *Fealey v. Fealey*, 104 Cal. 360, 38 Pac. 49, 43 Am. St. Rep. 111; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736. The pleadings lay no foundation for a direct attack, and hence the existence of a homestead in his lifetime is immaterial. The order is valid on the face of the record, and facts aliunde to show the absence of authority in the court to make it cannot be proved under the pleadings.

Nor can the fact that no notice is re-

quired to be given before making the order, or the fact that it is not appealable, affect its validity against the heirs and devisees. The right of inheritance, the power of testamentary disposition, the nature and mode of the proceeding for administration, as well as the character of the evidence by which proof of the fact of disposition shall be preserved, and the right of appeal in probate matters, are all within the exclusive control of the Legislature. The persons who by grace of the statute are designated or constituted heirs or devisees have no ground for a claim that they are deprived of their property without due process of law merely because the same statutory law which provides that they shall inherit and that property may be disposed of by will has also provided that, notwithstanding such heirship or testamentary disposition, the court having jurisdiction of the estate of the deceased before distribution may, under certain conditions, to be by it determined without notice, set apart some or all of the estate absolutely to the widow, and no appeal is allowed from the order. They take the estate subject to that very contingency, and they are not deprived of it, in the sense intended by the constitutional inhibition, when that contingency occurs.

There are other questions discussed in the briefs, but as they are all dependent upon the assumption that the homestead was invalid, it will not be necessary to consider them.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 115

DE LA CUESTA v. MONTGOMERY. (L. A. 1255.)

(Supreme Court of California. July 12, 1904.)

#### ACCOUNT STATED—FINDINGS.

1. An account between plaintiff and defendant, his employer, made when a successor was appointed for defendant's representative, who employed plaintiff, in form and substance an account stated, and intended as and for a full and complete settlement between plaintiff and defendant of the money indebtedness as it then stood between them in the middle of the year for which plaintiff was employed, is an account stated, which bears interest from date.

2. Findings that "in the month of July" the contract of employment at a salary was terminated, and all service rendered "thereafter" was on a quantum meruit, but that there was no evidence of the value of the services "after the month of July," and that "after said month of July" plaintiff rendered services, but that there was no evidence of their value, and they were not rendered under said contract of employment, mean that said month of July was included in the time during which said contract continued, and that only after said month were the services to be paid for on quantum meruit.

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Eduardo De La Cuesta against George Montgomery, the Roman Catholic bishop of Monterey, a corporation sole. Judgment for plaintiff. Defendant appeals. Affirmed.

Canfield & Starbuck, for appellant. Benjamin F. Thomas and James W. Taggart, for respondent.

McFARLAND, J. This is an action by plaintiff to recover for his services as agent and manager of certain farming lands of defendant known as the "College Ranch." Judgment was rendered in favor of plaintiff for \$855 and costs, which amounted to \$377.55, and from this judgment defendant appeals.

The predecessor of the present incumbent was Bishop Mora, who employed plaintiff as superintendent of said College Ranch in November, 1891, at a salary of \$1,800 a year, or \$150 a month. The plaintiff continued in the employment at the said salary under Bishop Mora until June, 1896, when Bishop Mora was succeeded as an incumbent by Bishop Montgomery, who continued to employ plaintiff as before until October, 1896, when the salary was reduced by mutual consent to \$1,600 a year, but the employment continued at the reduced salary. Plaintiff contends that his employment continued at the last-named salary until February, 1898, and his complaint is framed on that theory; while defendant contends that his employment on a salary ceased in July, 1897, and that, if he performed services afterwards, he was to receive only what they were reasonably worth. His duties were to conduct all the affairs of the ranch; to lease parts of it, and to collect the rents, and, if the rents were part grain, to see to the threshing of it, to sell and dispose of all the produce and property on the ranch, and to pay out all necessary expenses; and, in general, to attend to the business, "just as a man would manage his own property"; and to account to defendant for the receipts and disbursements. There are three counts in the complaint—the first upon an account stated on June 30, 1896; the second for services, etc., from June 30, 1896, to October 31, 1897; and the third for services from October 31, 1897, to October 31, 1898.

The court found that there was an account stated on June 30, 1896, of \$342.25, and allowed interest thereon from its date, amounting to \$119.12, and refuse to consider any items of account prior to that time. It found, however, that the contract for his salary ceased in July, 1897; that after that date plaintiff rendered services which were to be paid for upon quantum meruit; but that as plaintiff, who relied on the theory of a continuing salary, did not introduce any

1. See Account Stated, vol. 1, Cent. Dig. § 58.

evidence as to the value of such services, nothing could be allowed him for the same. The court allowed plaintiff's salary for the month of July, 1897, at the rate of \$1,600 per annum; and, taking an account of subsequent receipts and disbursements, found a balance in favor of plaintiff for \$885, for which amount, with costs, judgment was rendered. This subsequent account need not be considered, for appellant makes only two points: First, that the account of June 30, 1896, was not a stated account which bore interest, and the court erred in allowing interest thereon; and, second, that salary should not have been allowed for the whole month of July, 1897, but should have been allowed only to the 15th of said month. Before the trial defendant offered to allow judgment for \$750 and costs, and as the two items of \$119.12 for interest and one-half of the salary for July, 1897—\$66.67—would reduce the judgment below the amount offered, appellant contends that respondent should not recover costs, but appellant should have costs, under section 997, Code of Civil Procedure.

We think that the court properly found the account of June 30, 1896, to be an account stated which bore interest from its date. It certainly was in form and substance an account stated, having all the usual qualities and characteristics of that kind of instrument. It is attacked on the ground that before that time respondent and Bishop Mora had made previous settlements, and that the amounts then found to be due were merely carried forward as starting points for subsequent settlements, and no interest was charged thereon. Those settlements, however, were for the entire current agricultural year which ended November 1st, and which was also the end of the employment of respondent by the year; and we need not inquire if interest could have been properly demanded by respondent on the amounts thus found due. But the account here involved was stated on June 30th, in the middle of the current year; and it was done at the time when Bishop Mora was turning over the property to his successor, Bishop Montgomery, and for the express purpose of then fixing the amount of indebtedness due at that juncture. The court was fully warranted in finding that the stated account was "intended as and for a full and complete settlement between plaintiff and defendant up to that date." It was also objected that there were unsold products of the farm on the ranch—hay, etc.—which were not included in the said stated account; but there was no intention to wind up all the affairs of the ranch and then and there dispose of all the personal property. The business was to continue under the management of respondent as before, and the said account was only intended to be, and was only, a statement of the money indebtedness as it then stood between the parties.

The question raised by appellant as to the

salary for July, 1897, does not involve the matter of costs, if the foregoing view as to the account stated was correct. It involves only the one-half of the month's salary, \$66.67. We think that the court was right in allowing the salary for July. It is contended that the finding is defective on this point. In finding 12 the court found "that in the month of July, 1897, said contract was extinguished and employment thereunder was terminated by mutual consent of said plaintiff and said defendant, and all services rendered by plaintiff for defendant thereafter were on a quantum meruit," but that there was no evidence as to value of services "after the month of July, 1897." And, again, in subdivision 7 of finding 14, "that after the said month of July, 1897, said plaintiff rendered certain services to said defendant at said defendant's request, but there was no evidence of the value of said services produced on said trial, and the same was not rendered under said contract of employment." These findings clearly enough mean that the month of July, 1897, was included in the time during which the contract continued, and that only after said month were the services to be paid for upon quantum meruit, notwithstanding the previous expression "to and until the month of July." The meaning of any written instrument is to be gathered from all that is said in it. In finding 12, above quoted, the word "thereafter" clearly refers to the preceding words "the month of July." But it is also contended that, if the finding be sufficient, there is no evidence to support it. The most, however, that can be said on the subject is that the evidence was conflicting. There is no pretense that any change in the contract as to salary was made until some time during the month of July, 1897. The former relations between the parties certainly continued into that month. The court may have attached some importance to the fact that the salary was due monthly, and that the month was a unit as to payment; but, however that may be, there is the testimony of plaintiff that he was not notified of any change during that month, and that there was no such change. He said that when defendant's agent, Father Stockman, went to the ranch in July, 1897, he was to be merely an intermediary between the defendant and plaintiff, to whom plaintiff was to account—just as formerly Father James Villa had been; and this is somewhat corroborated by the testimony of Father Stockman, who said that he told plaintiff that "after that he would act under me." Moreover, there is a conflict of evidence as to the time in July when Father Stockman went to the ranch, at which time, according to appellant's contention, the former employment ended. Father Stockman thinks it was the 6th of that month, but it is clear that it was not until after the time of a certain conversation between plaintiff and Bishop Mont-

gomery at a place called "Surf." Plaintiff testified that the conversation at Surf was on July 20, 1897, and, although Bishop Montgomery testified it was June 20th, yet, in a letter written by him the next year, he refers to the conversation as having occurred on July 20th. Appellant contends that the date given in this letter was evidently a clerical mistake, and it may have been so; but all the evidence was submitted to the trial judge, and we see no reason for disturbing his conclusions.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

On Rehearing.

(Aug. 12, 1904.)

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. If the item of interest on the so-called "stated account" had been disallowed, the amount found due the plaintiff would have been less than the sum for which the defendant offered to allow judgment to be taken, and the plaintiff, instead of recovering his costs in a large amount, would have been compelled to pay the defendant's costs; making a difference of more than \$400 in the amount of defendant's liability. There was no account stated, in a legal sense. Bishop Mora was about to resign his incumbency, and for the benefit of his successor adjusted the account of his steward to date, and a balance was struck showing the state of the account to date; but there was no interruption to the employment of the plaintiff. His duties continued as before, at the same salary. He had property of the corporation in his hands, which he disposed of, and the proceeds of which he received. The balance found due him on settlement with Bishop Mora was entered in his current account as a new item, and against it he charged himself with the moneys collected on account of the defendant. There was no agreement, and no circumstance from which an agreement could be implied, and there is no finding that the balance ascertained on the adjustment of the account should be separated from the other items to form an independent obligation, payable at the date of the settlement, or at any time. On the contrary, the balance so ascertained was by the plaintiff himself treated as a new item in the current account of his stewardship, which continued without interruption for more than a year after the change in the incumbency of the bishop. And when his next account was rendered said balance was so entered without any charge for interest. In this account he credited himself with a final balance of \$1,585.59, a result reached by omit-

Cal.Rep. 74-77 P.—65

ting to charge himself with various sums collected for defendant, amounting in the aggregate to \$849.71. Deducting these items, the real balance due him on his own theory as to the settlement was less than \$750, the amount for which the defendant offered to let him take judgment. He refused this fair offer, and subjected the defendant to the expense of a protracted trial, all the costs of which the defendant must pay, together with the sum of \$119.12 as interest on his so-called stated account. If it is an essential element of a stated account that there must be a promise, express or implied, to pay the ascertained balance as a separate obligation, there was here no evidence to sustain the conclusion that the balance found due by Bishop Mora was a stated account, but, on the contrary, the strongest evidence furnished by the conduct of the plaintiff himself that he had no such understanding. In the only case ever decided by this court involving this precise point—a case in which the equities were all in favor of the party seeking to recover interest on agreed balances in a current account, a case not noticed in the opinion of the court—the decision was against the claim. *Chandler v. People's Sav. Bank*, 61 Cal. 402.

I think the judgment should have been reversed.

144 Cal. 155

SUMMERVILLE v. KELLIHER et al. (Sac. 1,054.)

(Supreme Court of California. July 19, 1904.)

JUDGMENTS—LIEN—LEASEHOLDS—CHattel MORTGAGES—VALIDITY—RECORDING—LOSS OF LIEN—LANDLORD AND TENANT—ASSIGNEES OF LEASE—RIGHTS OF LANDLORD—APPEAL—HARMLESS ERROR—NEGLECT TO FIND—DEPOSITIONS—NECESSITY OF ATTENDANCE—CONSTITUTIONAL LAW.

1. A judgment is not a lien on a leasehold, and, where execution is not levied thereon, the execution purchaser's right takes its inception from the time of sale, or from the giving of notice thereof.

2. A chattel mortgage of crops is not void because of a delay of 15 days in recording it, when no adverse rights are acquired or prejudice suffered during the interval between its execution and recording.

3. Where a mortgage of crops gave the mortgagee power to take possession and store the crops, his act in so doing, where he did not claim to hold otherwise than as mortgagee, was not tortious, and did not extinguish his lien.

4. In an action of claim and delivery for certain crops, where, under the facts found, defendant, a chattel mortgagee, had a superior right to the crops, and after satisfying his claim there would be no surplus for distribution to the other parties, the failure of the court to find on issues raised as to the respective rights of such other parties was harmless error, and insufficient to justify a reversal.

5. A trustee in bankruptcy has the option either to abandon or accept a leasehold held by the bankrupt.

6. Under Civ. Code, § 822, giving the lessor of real property any remedies against the as-

§ 2. See *Chattel Mortgages*, vol. 9, Cent. Dig. §§ 161, 434.

signees of the lessee which he had against the immediate lessee for any cause of action accruing while they are assignees, a trustee in bankruptcy of the lessee is bound by the conditions of the lease for the payment and delivery to the landlord of a proportion of the crops raised by the lessee as rent.

7. Under Civ. Code, § 822, giving the lessor of real property any remedies against the assignees of the lessee which he had against the immediate lessee for any cause of action accruing while they are assignees, an execution purchaser of the leasehold is bound by the conditions of the lease for the payment and delivery to the landlord of a proportion of the crops raised by the lessee as rent.

8. Code Civ. Proc. § 1991, authorizing the court to strike out the answer of a party for refusal to attend when required and give his deposition, is unconstitutional, as tending unduly to restrict the right to defend an action.

Department 1. Appeal from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by J. T. Summerville against D. E. Kelliher and W. J. Hersom, trustee in bankruptcy of J. D. Stuart. From a judgment for defendant Kelliher and from an order denying a new trial plaintiff and defendant Hersom separately appeal. Affirmed.

Isaac Joseph, C. H. Fairall, H. R. McNoble, I. G. Elliott, D. E. Alexander, and J. B. Webster, for appellants. Nichol, Orr & Nutter and R. C. Minor, for respondents.

SHAW, J. This is an action in claim and delivery for certain wheat and barley. The defendant Hersom, as trustee in bankruptcy of J. D. Stuart, the original owner of the grain, filed a cross-complaint against the other parties, upon which issue was joined. The judgment was in favor of the defendant D. E. Kelliher. The plaintiff and Hersom each moved for a new trial, which was refused, and each separately has appealed from the order denying the motion for a new trial and from the judgment.

In many of its features the case is the same as *Summerville v. Stockton Milling Co.* (Cal.) 76 Pac. 243. The plaintiff, as in that case, here claims the wheat as execution purchaser of the leasehold interest of Stuart under a judgment in favor of Watson against Stuart, the sale having been made on January 17, 1900. The defendant D. E. Kelliher claims one-fourth of the grain as guardian of the lessor, Lobdell, who, after the lease was made, was adjudged insane, and he claims the other three-fourths as mortgagee under a chattel mortgage of the crop to be grown on the leased land, executed by Stuart on October 16, 1899, and recorded October 31, 1899, to secure a note of \$3,000 from Stuart to Kelliher of the same date as the mortgage, and other advances to be thereafter made. Stuart was, upon his own petition, adjudged a bankrupt on January 25, 1900, and on February 14, 1900, Hersom was appointed his trustee in bankruptcy. He claims the property as a part of the estate of the bankrupt, Stuart.

1. The judgment of Watson was not a lien on the leasehold interest of Stuart, and, there being no levy of the execution, the plaintiff's right takes its inception from the time of the sale or from the giving of the notice thereof. This was expressly held in *Summerville v. Stockton Milling Co.*, supra. We adhere to what was said in that case on this and all other points involving the same transactions and questions as those here under consideration. It will be necessary to consider some points which were not presented in the former case. The mortgage was not void from the delay of 15 days in recording it. No rights were acquired nor was any prejudice suffered by either *Summerville* or *Hersom* during the interval between the date of execution and the date of the recording. *Ruggles v. Cannedy*, 127 Cal. 290, 59 Pac. 827, 46 L. R. A. 371, has no application. In that case there was a delay of more than six months in recording the chattel mortgage. In the meantime credit had been extended to the mortgagor, and it was against the creditors thus misled that the mortgage was declared void because of the delay. No such conditions appear here. The right of Kelliher, under this chattel mortgage, executed and recorded in October, was superior and paramount to that of *Summerville* under his subsequent execution and sale.

2. The claim that Kelliher waived his mortgage lien by forcibly taking possession of the leased land for the purpose of harvesting the crop covered by the mortgage is not sustained by the evidence. The mortgage provided that Stuart should care for and protect the crop until fit for harvest, and should then harvest, thresh, and sack the same, and deliver possession thereof immediately to Kelliher; and that, if Stuart failed in either of these particulars, then Kelliher should have the right to take possession of and protect the crop before harvest, and harvest, thresh, and sack the same. Kelliher testified that when the crop became fit for harvesting and required harvesting in the proper care thereof, he took charge and harvested it, and took the grain into his possession; that neither plaintiff nor Hersom ever offered to harvest the crops, or pay any expenses thereof, although they did go to the premises and attempt to interfere with him in the proper care of the crops. There was evidence that while he was in possession Hersom and the plaintiff's agent attempted to enter, and were prevented by Kelliher. It was not shown that they offered to recognize his rights and do the harvesting for his benefit. From the manner of their attempt the inference is very strong that they were hostile to him, and intended to deny his lien and right. There was no evidence that he ever claimed the right to harvest and thresh the crop otherwise than as mortgagee, and because of Stuart's failure to perform its conditions. Upon that failure

he had the right to take and hold possession as the mortgage provided, and thresh and sack the grain. Under these circumstances, his possession was not unlawful or tortious, and did not extinguish his lien.

3. Inasmuch as Kelliher had a superior right to the plaintiff under the facts found, it was not necessary for the court to find upon the affirmative allegation of the second, third, fourth, and fifth paragraphs of the plaintiff's answer to the cross-complaint of Hersom. Those paragraphs merely stated in detail the recovery of the Watson judgment, and the subsequent issuance of an execution and the sale thereunder of the leasehold interest of Stuart. That sale, as has been shown, was necessarily subject to the mortgage to Kelliher. Summersville, by reason of his purchase, would have the right, as against Kelliher, to redeem from the mortgage and take possession, or to take possession in subordination to the mortgage and lease, and to receive the surplus of the proceeds of the tenant's share of the crop, if, upon a sale, it realized more than sufficient to pay the claims accruing under the mortgage. But Kelliher has never asserted any claims antagonistic to these rights of plaintiff, and the judgment does not purport to give him any right except to hold the tenant's share of the grain for the payment of his claims, and enforce payment by a sale, and to hold the landlord's share as his guardian. Perhaps plaintiff could more justly claim some prejudice from the failure to find these facts in view of the issues between him and Hersom, the trustee in bankruptcy. If there were any surplus to form the basis of a contest, possibly the judgment would have to be reversed in order that the respective rights of plaintiff and Hersom in such surplus could be determined. But the court finds there is due to Kelliher on the mortgage the sum of \$3,000, with 10 per cent. interest from October 16, 1899, besides all the expense of harvesting, threshing, and storing the crop, and that the value of the entire crop, including the one-fourth which belongs to the landlord, was only \$1,541. There was no substantial conflict of the evidence on these points, and it is not contended in the briefs that the findings do not state the truth. It is therefore impossible that there can be any surplus. Nor does the plaintiff appear to desire a reversal on this point for the purpose of a further controversy between himself and Hersom over the imaginary surplus. The point is evidently made in order to obtain a general reversal of the judgment. This would merely prolong the controversy without profit to either party and to the prejudice of Kelliher. Under these circumstances we think the error is trivial and harmless, and insufficient to justify a reversal.

4. The plaintiff, as guardian of Lobdell, the landlord, was clearly entitled to one-fourth of the crop. The lease provided that

Lobdell was to receive one-fourth of the crops grown upon the land, and that the division was to be made on the premises in stock and in sack, when the crops were harvested. Neither the plaintiff nor Hersom can claim any interest in the crop except as the successor of Stuart. Upon the adjudication in bankruptcy and the appointment of Hersom as trustee, he, as trustee, had the option to abandon the lease or accept it. If he accepted it, he would be bound by its conditions to the same extent as Stuart was bound, at least so far as the payment or delivery of the rent was concerned. Civ. Code, § 822; 6 Cent. Dig. cols. 414, 415, 416; 16 Am. & Eng. Ency. 742. The plaintiff, as a purchaser of the leasehold interest, is also bound to observe its covenants for the payment of the rent. Neither of these parties can claim the benefits of the lease and repudiate its obligations as to rents subsequently accruing. *Bonetti v. Treat*, 91 Cal. 229, 27 Pac. 612, 14 L. R. A. 151; *Salisbury v. Shirley*, 66 Cal. 225, 5 Pac. 104; 18 Am. & Eng. Ency. (2d Ed.) 672; *Id.* 675; *Edmonds v. Mounsey*, 15 Ind. App. 401, 44 N. E. 196. Either would have been bound to deliver the one-fourth of the crop to the landlord, as provided in the lease, in case he had obtained possession. The landlord having himself obtained his share, neither of them is entitled to recover.

5. The appellants claim that the court erred in refusing to strike out parts of the answer of the defendant Kelliher to Hersom's cross-complaint and the entire answer to the plaintiff's complaint. The matters sought to be eliminated from the former were not of sufficient importance to require notice in detail. Hersom was not prejudiced by the action of the court in that particular. The motion to strike out the answer to the complaint was based on the refusal of the defendant Kelliher to attend and give his deposition in the cause. The court did not act on the motion, and the point must be considered in the same light as if the motion had been regularly denied. The motion was not well taken. The law authorizing the court to strike out the answer of a party for a refusal to attend when required and give his deposition (Code Civ. Proc. § 1991) is unconstitutional, as tending unduly to restrict the right to defend an action. *Foley v. Foley*, 120 Cal. 40, 52 Pac. 122, 65 Am. St. Rep. 147; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

6. The plaintiff complains that he has been put to the expense of printing some 29 pages of transcript by reason of the insertion of the entire judgment roll in the action of Watson against Stuart, instead of a brief statement of its substance. If there was anything in the record before us whereby we could determine who caused this unnecessary prolixity, we would make an order adjusting the costs so as to cast this expense upon the responsible party. All that

was necessary to be said on the point to present it fully to this court could have been put within the space of two pages of the transcript, and it would have been much more clear and satisfactory than the voluminous statement adopted. But as the record is silent concerning the party who caused it, we cannot act in regard to it.

7. With respect to the sufficiency and effect of the pleadings on the subject of the ownership and right of possession of the grain, the case is substantially identical with *Summerville v. Stockton Milling Co.*, supra, and the objections of the appellants are fully considered and disposed of by the sixth paragraph of the opinion in that case.

The judgment and order are affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

144 Cal. 148

BAKERSFIELD & FRESNO OIL CO. v.  
KERN COUNTY et al. (L. A. 1,288.)\*

(Supreme Court of California. July 18, 1904.)

TAXATION—PROPERTY SUBJECT TO TAX—PAYMENT UNDER PROTEST—RECOVERY—GROUNDS—PLEADING.

1. Under Pol. Code, § 3617, defining the term "real estate" as including the possession or ownership of, or claim or right to, land, and mines, minerals, and quarries in and under land, and timber growing on the lands of the United States, and all rights and privileges appertaining thereto, the possessory right to a mining claim is real estate, and, as such, may be sold or transferred, and is subject to taxes like other property.

2. Where the complaint in an action to recover taxes paid under protest shows that the assessment was made as of real estate, and in accordance with the statement furnished by the taxpayer on demand of the assessor, as provided by Pol. Code, § 3634, for the assessment of real estate, a statement in another portion of the complaint that the assessment was made as of personal property is a mere conclusion, not supported by the facts, and will be disregarded.

3. Under Pol. Code, § 3820, providing that taxes on all assessments of real estate shall be immediately due and payable on assessment, and shall be collected by the assessor, the fact that the assessor threatened to sell a taxpayer's interest in the land, which he was not authorized to do, whereupon the taxpayer paid the tax under protest, gave the latter no right to recover the amount paid, when the tax was valid, as it was the taxpayer's duty to pay it.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Bakersfield & Fresno Oil Company against Kern county and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. J. W. Ahern, for respondents.

VAN DYKE, J. The court below sustained a demurrer to the complaint in said action, and, the plaintiff declining to amend, judgment was entered in favor of the defendants

for their costs, from which judgment the plaintiff appeals.

It is alleged in the complaint: That "about the month of June, 1899, plaintiff herein became entitled to the use, possession, occupation, and control of certain placer mining claims located and occupied under the laws of the United States, which said tracts or parcels of land were then and are now situated in the said county of Kern, state of California, and are particularly described as follows, to wit: Tract No. 1: The southeast quarter of section twenty-eight (28), township twenty-eight (28) south, range twenty-eight (28) east, Mt. Diablo base and meridian. Tract No. 2: The northeast quarter of the northeast quarter, the west half of the southeast quarter of the northeast quarter, and the west half of the northeast quarter of the southeast quarter of section four (4), township twenty-nine (29) south, range twenty-eight (28) east, Mt. Diablo base and meridian." That said lands during the month of June, 1899, and prior thereto, had been duly located as placer mining claims under the laws of the United States by citizens of the United States authorized to make such locations, and they had located the same in compliance with the laws of the United States, and gone into possession thereof, and were engaged in the exploration and development of the mining claims and mining grounds duly located, and said locators during said month of June conveyed and transferred all of said lands to the plaintiff, and plaintiff thereupon entered into possession and occupation thereof, and has ever since, subject to the leases hereinafter mentioned, held, occupied, and possessed the same as mining claims and ground duly located and held as placer mining claims, under the laws of the United States. The complaint then proceeds to state that the plaintiff and its grantors entered into certain writings and contracts whereby the said mining claims were leased to certain persons and corporations for the purpose of prospecting, developing, and working the same for the period of 10 years, with the privilege of like contracts and privileges for 10 years thereafter, and that said lessees have entered into possession of said lands, and have sunk oil wells thereon, and are now extracting petroleum oil therefrom, and, in accordance with said contract of lease, are retaining six-sevenths thereof, and paying over to the plaintiff one-seventh thereof; that plaintiff is informed and believes that during the life of said contracts of lease the said persons and corporations holding the same and operating thereunder will be able to extract and remove all the petroleum and other mineral substances of value from said lands, and that the interest of the said persons holding said contracts and in possession of said land and minerals represents and amounts to at least three-fourths of the actual cash value of said lands and substances; that the only title or interest of plaintiff in and to said lands, or

\*Rehearing denied August 17, 1904.



any part thereof, consisted of its title and interest therein as successor of the mineral locators thereof under the laws of the United States, and that the same has been held by plaintiff as placer mining claims located, occupied, and possessed under the mining laws of the United States, and the title to all of said lands now is and remains in the government of the United States, subject only to the rights of the plaintiff as successor of the mining locators thereof; that prior to the assessment of said lands by the defendant herein, J. M. Jameson, as hereinafter stated, said Jameson demanded of plaintiff the statements of its property situated in said Kern county, and notified plaintiff that he intended to assess said lands and property above described, and all thereof, to plaintiff herein; that plaintiff thereupon, and upon receiving such demand, made out, verified, and presented, as required by law, a statement describing all of said real property above described, and showing that the same was held, leased, and occupied under such contracts in the manner and form and upon the conditions herelbefore set out; that notwithstanding the notice and demand of the plaintiff "not to assess said lands, and that the same were not assessable to plaintiff in any way, but belonged to the government of the United States, \* \* \* the said defendant Jameson, as such assessor, proceeded to, and did, assess said land, and all and every part thereof, as property of and belonging to plaintiff herein, and did make an assessment thereof and place a valuation thereon as follows, to wit: Tract No. 1, a valuation of \$28,000; tract No. 2, a valuation of \$52,000." And it is further stated that said assessor assessed said lands and plaintiff's interest therein as personal property under the laws of the state of California relative to the assessment of personal property, and gave notice to the plaintiff that it immediately pay said assessment as so levied and estimated upon the valuation aforesaid, at the rate for state and county purposes for the preceding fiscal year, to wit, the sum of \$1,360, and notified the plaintiff if it failed to pay said taxes he would proceed to advertise and sell the property so assessed, notwithstanding the notice of protest of the plaintiff that said assessment was void and illegal, and that said property was not assessable at all or assessable as personal property; that the plaintiff made out in writing, and caused to be served upon said assessor, copies thereof, notifying him that such assessment levied as aforesaid was invalid and illegal for the reasons stated, copies of which notice so served upon the defendant assessor are annexed to the complaint; that, after said notice and demands were so served upon the defendant assessor, and after his refusal to desist from said sale, and plaintiff believing that, "if said taxes were not then and there paid, the said assessor would sell said property, and thereby the title and interest of plaintiff therein

would be impaired and clouded, and great and irreparable injury and damage would be done to plaintiff and its interest in and to said property, and a cloud would be cast upon the title to same, \* \* \* thereupon paid to said assessor the amount demanded by him upon said assessment, costs, penalties, and expenses in connection with said levy and proposed sale, aggregating the sum of \$1,375.60." And upon information and belief it is alleged that defendant Jameson, as assessor of the county, "has paid the same over to said county, and to its officers by law authorized to accept and receive money turned over by such assessor, and said county now keeps, holds, and retains the same, and refuses to return the same to plaintiff"; that after said taxes were so paid under protest, on or about July 23, 1901, plaintiff caused to be made out its claim or bill against said Kern county, duly itemized, giving the names, dates, and particulars of said claim for taxes, and filed the same with the clerk of the board of supervisors of said county, which said claim was thereafter, in August, 1901, presented to the said board of supervisors, being in session at a regular meeting, and was considered by said board, and after such consideration, on the 6th day of August, 1901, said board rejected said claim and refused to allow the same, wherefore plaintiff asks judgment against said defendants for the sum of \$1,375.60, with interest and costs.

The appellant contends, first, that the plaintiff had no assessable interest in the land at the time the assessment was made; second, that, if there was any assessable interest owned by plaintiff at the time in said land, the same was not subject to be assessed as personal property.

The decisions of this court from an early period are to the effect that the possessory right to a mining claim is property, and as such may be sold, transferred, or levied upon, and is subject to taxes like other property. In *Merced Mining Company v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262, it was held that "the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated, until his title is divested by the exercise of the higher right of the superior proprietor. His rights and remedies in the meantime are not trammelled by the consideration that the higher right to reclaim the property exists in another, which right may possibly, but will not probably, be exercised. His right to protect the property for the time being, under the peculiar circumstances of the case, is as full and perfect as if he was the tenant of the superior proprietor, for years or for life." In *State v. Moore*, 12 Cal. 56, it was held that the interest of the occupant of a mining claim was property, liable to be subjected, at the will of the Legislature, to such burdens as are imposed on other property. This was affirmed in *People v. Shearer*, 30 Cal. 645. In the latter case it is said: "These

possessions, as before stated, are recognized and protected as property by the Legislature in many instances, and by the courts and the people always. And this property is property in the citizen or inhabitant having possession, and not in the United States. This property so recognized and protected, in our judgment, is clearly not exempt from taxation under the clause in the act of Congress of September 9, 1850, exempting the public domain of the United States from taxation." Pol. Code, § 3617, in defining the terms of property, says: "The term 'real estate' includes: (1) The possession of, claim to, ownership of, or right to, the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations growing or being on the lands of the United States, and all rights and privileges appertaining thereto." The claim or interest of the plaintiff in the lands in question clearly falls within this definition of real estate, and is made subject to taxation.

In this case, by the statement of the complaint, the plaintiff claimed property in the land in question, and has leased the same, whereby it receives a revenue as the lessor; and if said tenants of the plaintiff under said lease should fail to comply with the terms thereof, or attempt to hold the land adversely to the plaintiff, the courts, upon application, would afford a remedy to the plaintiff, the same as to a landlord being the owner in fee. The lien for taxes on the interest of the plaintiff in the land in question attached the first Monday of March preceding the assessment, and that lien, as against the interest of plaintiff in said land, could only be discharged by the payment of the taxes to be assessed. The assessment was made as of real estate. The complaint alleges that the defendant Jameson, as such assessor, proceeded to, and did, assess said land, and all and every part thereof, as property of and belonging to plaintiff, and did make an assessment thereof and place a valuation thereon, as follows, to wit: Tract No. 1, a valuation of \$28,000; tract No. 2, a valuation of \$52,000. Tract No. 1, according to the complaint, is the southeast quarter of section 28, township 28 south, range 28 east, Mt. Diablo base and meridian; and tract No. 2 is described in the complaint as portions of section 4, township 29, of the same range. This shows clearly that the assessment was made as of real estate, and it was made in accordance with the statement furnished by the plaintiff corporation, on the demand of the assessor, in accordance with section 3634 of the Political Code, for the assessment of real estate. The statement in another part of the complaint that it was made as personal property seems to be a mere conclusion, without any facts to sustain it, and cuts no figure. Appellant's attorney practically admits that it was as-

essed as real estate. He says: "It will be observed that no personal property whatever was assessed to the plaintiff in Kern county. It was assessed only with a claimed possessory interest in the lands described in the complaint. The assessment, as shown by the complaint, and in fact, being an assessment of 'possessory interest in' and describing the lands; and it is not pretended that any personal property was assessed or sold, or attempted to be sold." By section 3820 of the Political Code, "The taxes on all assessments of, possession of, claim to, or right to the possession of land, shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in this chapter." The assessment having been legally and properly made as required by law, and the taxes being due and payable, the fact that the assessor threatened to proceed and sell plaintiff's interest in the land in question unless said taxes were immediately paid is quite immaterial. He was authorized to collect the tax, though not by sale of real estate. The property of the plaintiff in the land being subject to taxation, and the assessment having been properly made, it was the duty of the plaintiff to pay the taxes. In *Phelan v. San Francisco*, 120 Cal. 1, 52 Pac. 88, this court said: "If the tax was valid and constituted a lien upon plaintiff's property, his protest at the time of making the payment gives him no right of recovery. Neither the lien of the tax, nor his obligation to pay it, ceased by reason of any defect in the proceedings for a sale of the land to enforce its collection; and the satisfaction of this obligation, as well as the release of the lien, was a sufficient motive and consideration for the payment to take from it all character of duress. The plaintiff's obligation to pay the tax is not affected by the omission of the tax collector to enforce its collection against other property."

From the facts stated in the complaint the plaintiff is not entitled to recover, and the demurrer was properly sustained. The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

144 Cal. 183

EDSON et al., Railway Com'rs, v. SOUTHERN PAC. R. CO. et al. (S. F. 3,624)\*

(Supreme Court of California. July 22, 1904.)

CARRIERS—LOWERING RATES—CONSTITUTIONAL LAW—JUDICIAL NOTICE.

1. In ascertaining whether by the issuance of limited tickets a rate has been lowered within Const. art. 12, § 20, providing that whenever a railroad corporation shall, for the purpose of competing with any common carrier, lower its rates for transportation of passengers from one point to another, such rates shall not again be

\*Rehearing denied August 20, 1904.

raised without the consent of the governmental authority in which shall be vested the power to regulate fares, the court will scrutinize the terms of the limited ticket and the conditions surrounding the traffic to determine whether what purports to be a special contract for inferior services is not in reality a lowered rate for the same, or substantially the same, service.

2. In a suit by the State Board of Railway Commissioners, in whom such power was vested, to compel a railroad corporation to restore an alleged lower rate between two points in the state than the established rate with an unlimited ticket, the court will take judicial notice that comparatively few of the traveling public exercise or claim any of the privileges of unlimited tickets, such as transfer, stopover, and liability for loss of baggage in excess of \$100 in value, which were denied by the limited tickets.

3. The mere restriction of privileges by a limited ticket coupled with the lowering of a rate will not prevent the act of lowering the rate from falling within Const. art. 12, § 20, unless the privileges withdrawn represent a service actually rendered on one side or claimed by the other.

4. Under Const. art. 12, § 20, providing that whenever a railroad corporation shall, for the purpose of competing with any common carrier, "lower" its rates for transportation of passengers from one point to another, such reduced rates shall not again be raised without the consent of the authority having the power to regulate fares, though a rate is lowered within the meaning of the section by the issuance of limited tickets at a lower rate than for unlimited tickets at the established rate between two points, where it appears that the lower rate and the limited ticket were preferred by almost the entire traveling public, yet the rate is not lowered within the qualification "for the purpose of competing with another common carrier" when lowered in self-defense to meet a lower rate inaugurated by a rival carrier.

5. Const. art. 12, § 21, relating to discrimination between persons and places by railroad corporations, provides that no greater charge shall be made for transportation over a shorter distance than is made for a longer distance including the shorter. As a qualification to this, a proviso as to excursion and commutation tickets is added. Section 20 relates to pooling and competition between independent transportation companies. *Held*, that section 20 is entirely unaffected by the proviso of section 21 as to excursion and commutation tickets.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Suit by E. B. Edson and others, as the Board of Railway Commissioners of the State, against the Southern Pacific Railroad Company and another. From a judgment for defendants and an order denying a motion for a new trial, plaintiffs appeal. *Affirmed*.

See 65 Pac. 15.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Frank H. Short, for appellants. J. E. Foulds and P. F. Dunne (John Garber, of counsel), for respondents.

BEATTY, C. J. The defendants in this action are railway corporations, and are respectively the owner and lessee and operator of a line of railway extending from San Francisco to Fresno, in this state. It is alleged that, having lowered their rate for the transportation of passengers between said

points for the purpose of competing with another railroad corporation, also engaged in transporting passengers between the same points, they afterwards raised said rate without the consent of the plaintiffs, in violation of that provision of section 20 of article 12 of the state Constitution, which reads as follows: "And whenever a railroad corporation shall, for the purpose of competing with any other common carrier, lower its rates for transportation of passengers or freight from one point to another, such reduced rates shall not be again raised or increased from such standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights." The object of the action is to compel the defendants to restore the lower rate by enjoining them from collecting any higher rate. The defendants deny that they have ever lowered their rates for the transportation of passengers within the meaning of said provision of the Constitution, and contend that, even if their acts could be held to have transgressed its terms or intent, this action must nevertheless fail, for the reason that the provision quoted is violative of the rights secured to them and all other persons by the fourteenth amendment to the Constitution of the United States. Both of these defenses were sustained by the superior court. From the facts found by him, the judge concluded that there had been no lowering of rates within the meaning of the provision in question, and he also held that the provision itself was void by reason of its conflict with the fourteenth amendment to the federal Constitution. Judgment was accordingly entered in favor of the defendants, and the cause is now here on appeal from that judgment and from an order denying the motion of plaintiffs for a new trial.

From the manner in which the case has been presented in the briefs and in the oral argument of counsel, we conclude that no importance is attached to the appeal from the order, since the discussion is based entirely upon the facts as admitted by the pleadings or found by the court, among which, however, are not included such general conclusions of fact as may be found inconsistent with the more specific findings. This being so, the findings themselves will clearly present the case to be decided. They are as follows:

"(1) For some time prior to July 18, 1898, the San Francisco & San Joaquin Valley Railroad Company owned and operated a line of railroad between Fresno and Stockton, this state. By arrangement with an independent line of steamers running from Stockton to San Francisco, said railroad company established a through first-class unlimited passenger rate between Fresno and San Francisco of \$3.75, which was in effect upon said date (and continued until December 9, 1898, when said rate was withdrawn).

"(2) On July 18, 1898, and for many years

prior thereto, defendant Southern Pacific Railroad Company owned, and defendant Southern Pacific Company, as its lessee, operated, a line of railroad from Stockton to Fresno, and another all rail line from San Francisco to Fresno.

"(3) Prior to said date defendant Southern Pacific Company charged, as a first-class unlimited passenger rate, with all the incidents prescribed by law, on its all rail line between San Francisco and Fresno, \$5.90, which rate was regularly established by the Board of Railroad Commissioners of this state, and has not been modified by said board. On said date defendant issued its Circular 86, referred to in the complaint, but said circular did not purport to modify or reduce the rate last aforementioned, or any rate on the first-mentioned line of railroad of said defendant between Stockton and Fresno, but purported to and did offer to the public over said last-mentioned all-rail line between San Francisco and Fresno a rate of \$3.75 for first-class passenger travel, subject to the following limitations and conditions, viz.: That the tickets issued thereunder should be good only on the day of sale, or upon such date as the agent selling the same should punch in the margin or stamp on the back thereof; that continuous passage must be made, and no stop-over privileges be allowed thereon; that liability for baggage should be limited to the sum of one hundred dollars, and no baggage should be checked thereon to any point short of the ultimate destination named therein.

"(4) That all of the tickets issued between San Francisco and Fresno by said defendant at the rate of \$3.75 contained said limitations and conditions plainly printed upon their face, and said defendant at all times strictly insisted upon the observance of said limitations and conditions, and all passengers purchasing and using said tickets accepted and used the same subject thereto.

"(5) That on the 20th day of March, 1900, said defendant withdrew and discontinued said rate of \$3.75 and the issue of the special limited tickets aforesaid.

"(6) That during the whole of said period between the 18th day of July, 1898, and the 20th day of March, 1900, the first-class unlimited passenger rate of \$5.90 first hereinbefore mentioned was in force and effect, and was not withdrawn by said defendant, but unlimited first-class passenger tickets, at said rate, with all their legal incidents, were at all times kept for sale by said defendant, and were, in fact, during the whole of said period sold by it to such persons as desired to purchase the same.

"(7) That the limitations and conditions contained as aforesaid in said tickets sold at the \$3.75 rate constitute substantial differences from the service rendered, and materially diminish the accommodations and privileges to which a passenger would be entitled, under the \$5.00 rate.

"(8) That the \$3.75 rate, with its inferior accommodations and privileges, was put into effect for the purpose of competition with the San Francisco & San Joaquin Valley Railroad Company, but by reason of the difference in service, and the fact that the \$5.90 rate was at all times kept in force, and tickets sold and kept for sale thereunder, said \$3.75 rate was not a reduction of or substitute for the \$5.90 rate.

"(9) That at no time during the whole of said period from July 18, 1898, to March 20, 1900, did the defendant lower its rates for transportation of passengers, nor has it since said period raised or increased said rates.

"(10) That during all said period from July 18, 1898, to March 20, 1900, the unlimited passenger tickets mentioned in finding No. 6 were at all times in good faith kept for sale and sold by defendants and used by purchasers thereof in accordance with and with the full benefit of the privileges conferred thereby."

Nos. 7 and 9 of these findings, and the latter part of No. 8, are not treated by plaintiffs as findings of fact, but as mere conclusions drawn from the specific facts found, which, according to the argument of counsel, involve an opposite conclusion.

This contention raises the first question to be considered, for, if we should agree with the judge of the superior court that there has been no infraction of the state Constitution, there would be no occasion to inquire whether there was a conflict between it and the federal Constitution, for courts do not go out of their way to decide constitutional questions, even when nothing more is involved than the validity of a clause of an act of the Legislature, and still less will they go to the extent of declaring void an important provision of our fundamental law in a case which demands no consideration of the question.

What, then, is a lowering of rates within the meaning of the Constitution? To answer this question it must first be determined what are the rates to which the Constitution refers. We think it clear that it refers to and comprehends all established rates for ascertained services, whether those prescribed by the railroad commissioners or fixed by the corporation themselves within the maximum so prescribed. We do not understand that the railroad commissioners do more than to prescribe the maximum charge allowable. Within that maximum a corporation may establish its own rates; but, whether it charges the maximum or less, it must have some established rate of fare, upon tender of which a passenger may demand a ticket entitling the holder at any time within six months to ride from the place of purchase to the depot of destination, or to any intermediate station, with the right to stop over, and afterwards, within the six months, resume his journey. Civ. Code, § 490; Rob-

inson v. So. Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773. Subject, however, to this strict obligation to provide and furnish what may be called an unlimited ticket—a ticket which secures to the passenger the stop-over and other statutory privileges—it is conceded that a railroad corporation may issue a limited ticket if the passenger, in consideration of some abatement of the regular rate, is willing to contract for a curtailment of the statutory privileges. Such a rate, we suppose, if regularly established, and offered to the public generally, would come within the meaning of the Constitution. This, however, is a question which does not call for a decision in the present case. The defendants are not charged with having first lowered and afterwards raised their rates on limited tickets. Their offense, if any, consists solely in the fact that for the purpose of competing with another railroad they sold to all persons desiring them limited tickets for \$3.75, when the regular fare for unlimited tickets was \$5.90, and that afterwards they withdrew the limited tickets, with the necessary effect of compelling all passengers to pay the higher rate.

In form it must be conceded this was not a lowering of the established rate. It was merely the fixing of a different rate for a different service—a lower rate for an inferior service. But for the purpose of giving effect to a statute, and a fortiori for the purpose of enforcing a provision of the Constitution, it is the substance, not the mere form, of a transaction that must be regarded; and to determine whether there was in this instance a substantial reduction of the rate of passage between San Francisco and Fresno we must look beyond the terms of the limited tickets to the conditions affecting the traffic for which the rival companies were competing. The statutes of the state secure to the purchaser of an unlimited ticket the right to travel over the designated route at any time within six months. To a passenger who happens to be delayed in starting, this is a privilege of substantial value. An unlimited ticket is good during the six months in the hands of any holder, and to a purchaser who desires or is compelled to abandon his journey the privilege of transferring his ticket is of substantial value. A passenger bound to a distant station sometimes desires to stop over at an intermediate station, and, if the through fare is less per mile than the local fares, the privilege of stopping over and afterwards resuming his journey is of substantial value to him. A passenger carrying baggage of considerable value might prefer to pay the full price of an unlimited ticket, rather than enter into a contract limiting his recovery in case of loss to \$100. In a legal sense, therefore, it cannot be denied that each of the privileges secured to the purchaser of an unlimited ticket and relinquished by the purchaser of a limited ticket was a substantial and valuable one. But we suppose a court may take judi-

cial notice of facts of common knowledge, and, among others, of the fact that but a small percentage of those traveling between places of the relative situation of San Francisco and Fresno have any occasion to avail themselves of all or of any of the privileges which purchasers of limited tickets were compelled to stipulate away. The evidence in this case shows without contradiction that during the time both classes of tickets were kept on sale fully 95 per cent. of the travel between San Francisco and Fresno was upon limited tickets at the \$3.75 rate. This may not sustain the conclusion that to 19 passengers out of 20 the privileges secured by the unlimited ticket were of no pecuniary value, but does clearly prove that they were to that number worth less than the difference between the two rates, and to many, no doubt, worth nothing at all. Assuming this to be so, it destroys the force of the proposition upon which respondents base their argument. They say that "the only possible way to lower a rate is to charge less for the same service." This may be conceded, but, if it happens that the extra service demandable by the holder of an unlimited ticket is one which he seldom needs and rarely exacts, the limited ticket in fact secures to the principal portion of the traveling public the same service secured by the unlimited ticket, and the rate fixed for the limited ticket is practically, for all purposes of competition, the only rate for the services ordinarily rendered. In view, therefore, of the conditions actually prevailing, the defendants did make a lower rate for the same service, as to a portion (and, it would appear, a very large portion) of the traveling public (a portion certainly important for purposes of competition), which is the controlling consideration in construing and applying this provision of the Constitution. So far as that portion of the public which makes no use of the privileges attaching to the unlimited ticket is concerned, a lowering of the rate, coupled with the restriction of the privileges, is an absolute lowering of the rate; and even as to others it is a lowering of the rate unless the privileges withdrawn are the pecuniary equivalent of the reduction in the price.

The fact that the old regular ticket was kept on sale at the old rate of \$5.90 does not invalidate this conclusion. If I have been offering to perform a certain service for \$10, and afterwards offer to perform a nominally different but substantially identical service for \$5, I cannot deny that I have lowered my rate merely because I have proclaimed my willingness to accept the old rate from those who are willing to pay it. If two rates are offered for what to 19 men out of 20 is the same service, the lower rate as to the 19 is the only rate.

Now, the meaning of the constitutional provision is sufficiently clear if its terms alone are considered. It was intended to secure legitimate competition by preventing railroad corporations from reducing fares below re-

munerative rates for the purpose of crushing weaker rivals, and thus securing a monopoly. To accomplish this object, they are warned that if, for the purpose of competition, they establish a confiscatory rate, they cannot raise it again without the consent of the state. This construction seems to assert itself in the very language of the provision, and is fully confirmed by the debates in the constitutional convention. If this view is correct, it can hardly be denied that a rate has been lowered within the meaning of the Constitution merely because it has been retained as to a fraction of the traveling public; for, obviously, if the rates and conditions are so arranged by the corporation that the privileges withdrawn are of very little value to any, and of no value to most, passengers, the very thing can be accomplished which it was the evident intention of the Constitution to prevent. The argument is, and of course must be, that the terms of the contract contained in the limited ticket are the subject of arrangement between the company and its patrons exclusively. It can give as large a reduction as it chooses for the relinquishment of all privileges beyond mere transportation, and it can give as large a reduction for the surrender of a single least valuable privilege as for all privileges, for in point of law the relinquishment of a single privilege is as good a consideration for a contract as the surrender of all privileges. The only alternative to this proposition is that the courts may scrutinize the terms of the limited ticket, and may inquire into the conditions surrounding the traffic for the purpose of determining whether what purports to be a special contract for inferior services is not in reality a lowered rate for the same, or substantially the same, service. If this cannot be done, one of two things must follow: either that the constitutional provision in question is a dead letter, or else that all such contracts are forbidden. In the Robinson Case it was assumed—and, we think, correctly assumed—that such contracts are lawful; but if the effect of holding such contracts lawful would make the law defeat the Constitution, we should feel constrained to modify the opinion then expressed, for a law, whether enacted by the Legislature or evoked by construction of the courts, can never nullify the Constitution. We do not, however, concede the existence of any conflict between the Constitution and what was said in the Robinson Case. Contracts for limited tickets are valid, but in a controversy of this complexion the courts will look behind the form of the transaction to determine whether such contract offered to the public generally amounts in fact to a lowering of rates. In so holding we do not question the legal principles for which the respondents contend. We concede that the same principles and rules of construction are to be applied to the Constitution as to a statute, that the power reserved to the state to interfere with the right of contract is not to be

extended or enlarged by implication, and that the only case to which this provision of the Constitution is to be applied is an actual lowering of rates. We do not, however, concede that the lowering of a rate for the purpose of competition, such as is found in this case, ceases to be such merely because it is coupled with restriction of privileges. Whether it does or not depends upon the value of the privilege as compared with the extent of the reduction in any case; and still more it depends upon whether the privileges withdrawn are by any considerable number of passengers exercised or claimed; whether, in other words, the privileges so withdrawn represent any service actually rendered on one side or claimed on the other.

The only difficulty in applying this doctrine to the present case arises from the fact that according to the findings of the superior court (No. 9) the defendant did not lower its rate. If this finding is to stand as a finding of fact, it ends the case so far as the appeal from the judgment is concerned, and the plaintiffs would be compelled to fall back upon their appeal from the order denying a new trial, regarding which, as above stated, nothing has been said in the argument. But we think finding No. 9 is merely a conclusion drawn from the specific facts found, and inconsistent with those facts, if, as we have above assumed, we are authorized to take judicial notice of the notorious fact (fully proved, but not found in this case) that comparatively few persons exercise or claim the privileges, or any of them, denied to purchasers of limited tickets. The great majority of persons traveling back and forth between San Francisco and points in the interior of the state purchase their tickets at the time of starting, and have no desire to transfer them, or to stop over at intermediate stations. If their baggage sometimes exceeds \$100 in value, the risk of loss is so slight that the premium on insurance against loss would be a trifle. To save \$2.15 on a fare to or from Fresno by taking a limited ticket would be a clear gain of that amount, not perhaps to 19 out of 20 passengers, but certainly to so large a number as to count heavily in the matter of competition. If this is so, the conclusion set forth in findings Nos. 7, 8, and 9 cannot stand. They depend necessarily, and are clearly made to depend, upon the assumption that the privileges demandable by the holder of an unlimited ticket stand for service rendered. But this is true only in the comparatively infrequent cases in which the service is required. In the great majority of cases the service is not rendered, and for all such cases the \$3.75 rate was practically a substitute for the \$5.90 rate.

Counsel for respondents have not on the present appeal renewed their former contention that the limited tickets sold for \$3.75 were the "excursion or commutation" tickets referred to in section 21, art. 12, of the Constitution, and it is perhaps unnecessary to

make any reference to that provision. It is sufficient to say that in our opinion the last clause of section 21 was not intended to modify section 20 in any respect, but is simply a qualification of the preceding clause of the same section. The two sections embrace distinct subjects. The first deals with pooling and competition between independent transportation companies. The second with discriminations between persons and places by the same company. To prevent discrimination between places, it is provided by section 21 that no greater charge shall be made for transportation over a shorter distance than is made for a longer distance including the shorter. As a qualification to this provision, and for no other purpose, the proviso as to excursion and commutation tickets is added, leaving the provision of section 20 as to competition between rival lines entirely unaffected.

For the reasons and upon the grounds stated, we hold that the defendant the Southern Pacific Company did lower its rate from \$5.90 to \$3.75, within the meaning of the Constitution.

But was the rate lowered for "the purpose of competing with another common carrier," within the meaning and intent of that qualifying clause? In the ordinary sense of the word, no doubt the rate was lowered for the purpose of competition, and the superior court has found as a fact that what we have held to have been, in substance though not in form, a lowering of rates, was for the purpose of competition. But if we consider the evident intent of the provision in question, and more especially if we consider the circumstances and history of its adoption, it is clear that the act of the defendants was not such as the framers of the Constitution or the people who adopted it had in view, or had any desire to punish. The whole object of the provision was to foster legitimate competition by preventing destructive competition. Its framers evidently anticipated that a more powerful corporation, for the purpose of securing monopoly of traffic, might sometimes be tempted to lower its rates to a point where they would cease to be remunerative, and keep them there until its weaker competitors were driven from the field, after which it would raise its rates above the point at which they could be sustained in the presence of legitimate competition. It was no part of their design to punish a corporation for merely lowering its rates in self-defense to meet a lower rate inaugurated by a rival carrier, and that is all that the Southern Pacific Company is found to have done in this instance. It is the corporation which lowers its rates for the purpose of destroying a rival, not the one which, for the mere purpose of self-preservation, meets the rate which the act of the other constrains it to adopt, that is the proper subject of the penalty imposed by the Constitution, and this case is itself an illustration of

the injustice and evil which might result from adhering to the literal terms of the Constitution in disregard of the broad policy it was designed to promote. Or take this illustration: There is an operating line of railway between two points, with established rates of fare. A parallel and competing line is constructed, and at the start its rates are made so much lower as to be unremunerative. If it is backed by sufficient capital, it may, by this means, drive the rival company out of the field, and, after securing the monopoly, may, without incurring any penalty, immediately raise its rates to the maximum allowed by the railroad commission. But if the attempt to destroy the old line has failed—if by lowering its rate to meet the rate established by its rival the old line has secured enough of the traffic to preserve its existence—it cannot, without the consent of the railroad commission, restore a remunerative rate, although the real transgressor of the policy of the Constitution may. We do not think the Constitution should be given a construction which would allow it to operate so unjustly, and so contrary to its spirit and intention. Properly construed, and limited in its operation, it subverts a policy which the people of the state approve; but by adhering too strictly to its literal terms it may be reduced to a dead letter by regarding merely the form of the limited ticket, while shutting our eyes to the conditions of railroad traffic; or, on the other hand, it may be made to defeat the very policy it was designed to promote. The same principle of construction should be applied to the phrase "for the purpose of competing" that is applied to "lowering of rates." Each should be construed with reference and in subordination to the main purpose and policy of the Constitution. A substantial lowering of the rates should not be allowed to pass unchallenged under the disguise of limited tickets; and, on the other hand, a corporation which merely meets a lower rate previously established by a competing carrier should not be held to have lowered its rates for the purpose of competition within the true meaning of that expression.

We think the judgment and order of the superior court should be affirmed, not because the rate was not lowered, but because it was not lowered for the purpose of competition within the proper construction of the Constitution.

It is so ordered.

We concur: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

McFARLAND, J. (concurring). I concur in the judgment of affirmance upon the ground last stated in the opinion of the Chief Justice. I dissent, however, from that part of the opinion which holds that the facts in this case constitute, under any view, a lowering of a rate within the meaning of

the Constitution. And, in my opinion, a still stronger and clearer ground for affirming the judgment is in the finding of the lower court "that at no time during the whole of said period from July 18, 1898, to March 20, 1900, did the defendant lower its rates for transportation of passengers, nor has it since said period raised or increased said rates." The provisions of the Constitution in question are not only new and unusual, but severely restrictive of ordinary personal rights, and highly penal in their character. The corporation coming within their penalty is deprived of the beneficial use and enjoyment of its property, and, if the section is in all respects valid, cannot invoke the aid of the courts against the enforcement of an unreasonable and unjust rate of fares or freights, because it has forfeited the right to do so. It has the mere privilege of asking a favor of the commissioners, and it is clear that such a provision of law, whether found in a statute or a Constitution, will not be carried by implication or strained construction to any act not coming clearly and beyond doubt within the language of the provision. The language used, given its full meaning, must itself include the case in hand. This principle is well stated by the Supreme Court of the United States in *Chesapeake, etc., v. Manning*, 186 U. S. 248, 22 Sup. Ct. 885, 46 L. Ed. 1144, a case quite similar to the case at bar, as follows: "While a Legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital, and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." Indeed, this principle is so well established as to be a part of received text-book learning. In *Endlich on Interpretations of Statutes*, in section 340, it is said that: "Statutes which encroach on the rights of the subject, whether as regards persons or property, are similarly subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons; and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt." (And in section 331 the same author shows that the rule of strict construction of laws which are in their nature penal is not confined to cases where the enforcement of the penalty is by criminal prosecution.) *Interstate Commerce Commission v. Railway*, 167 U. S. 494, 17 Sup. Ct. 896, 42 L. Ed. 243, is another case in which it is held that new and unusual pro-

visions in a law are not to be extended by implication. And these principles of construction are as applicable to the provisions of a Constitution as to those of a statute, although some authorities hold that there should be a stricter construction of the former than of the latter. However, in either case the intent is to be found in the language used. (See cases cited in notes on pages 921 and 922 of vol. 6 of *Am. & Eng. Ency. of Law.*)

Applying these principles to the case at bar, it seems quite clear that the acts done by respondents do not bring them within the prohibitory language of section 20. That language includes only the lowering and subsequent increasing of a rate. Of course, the lowering of a rate presupposes a previous existing rate which may be lowered; and a rate is clearly a sum fixed to be charged for a certain service. It is quite common for railroad companies to have different kinds of tickets offering different kinds of services, for which different rates are charged; and to lower the rate in one of such tickets would be simply to lessen the charge for the same, while leaving the service to which it entitled the passenger unchanged. In the case at bar the respondents had an established rate of \$5.90 for a ticket which entitled the purchaser to all the usual rights and accommodations of an unlimited first-class ticket—including the stop-over privilege, the right to use it at any time within six months, transferability, etc. Now, they did not directly, or expressly, or as a matter of fact, lower the rate on that ticket. They did not withdraw it, nor deny those desiring to purchase it any of the rights or services which it undertook to give. On the other hand, it was kept on sale, and was sold, and those purchasing it got all it purported to give. How, therefore, can it be said that they lowered the rate on such ticket? What they did was to also sell another ticket at the rate of \$3.75, by which they contracted for different and inferior services. They did not lower the rate for the services guaranteed by the \$5.90 ticket. The two different tickets, with two different rates, stood together. They, therefore, did not do anything which section 20 prohibits, under any possible construction which could reasonably be given to it.

Really, the contention of appellants rests upon the proposition that section 20 prohibited respondent from selling any other kind of ticket than the \$5.90 ticket for any other kind of service. But there is no such prohibition. Such prohibition could not be judicially put into the Constitution by any kind of reasonable construction—even without reference to the principle of interpretation, which, as hereinbefore stated, must be applied to provisions which restrain ordinary personal rights, and are penal in their character. Indeed, the case for appellants rests upon the unwarranted conjecture, founded upon something not apparent from the lan-



guage used, that the makers of the Constitution intended to prohibit a railroad company from issuing a limited ticket providing for a diminished service at a lower rate. But, in the first place, there is no warrant for such a conjecture; and, in the second place, if such intent on the part of the makers of the Constitution to prohibit such tickets could be reasonably imagined, the fact remains that they did not do it. And so, as to this point, appellants must rely upon a far-fetched and strained implication entirely discountenanced by the rules of construction which apply to provisions like those here involved.

There is still a further contention that there is no substantial difference between the services given under the \$5.90 ticket and those allowed under the \$3.75 ticket, and that, therefore, the asserted difference is merely colorable. If that be so, then upon the payment of the \$5.90 fare the passenger would not be entitled to the stop-over right, or the six-months time, etc., but the railroad company could compel him to accept the ticket which represented the \$3.75 fare, because, as asserted, there is "no substantial difference" between the two services. Certainly no one would contend for this proposition. The fact is that those rights which accrue under the \$5.90 ticket, and could not be asserted under the \$3.75 ticket, are substantial and material, and have been the foundation of a large amount of litigation. (See chapter 67 of Elliott on Railroads, vol. 4, p. 2482, on "Tickets, Fares and Passes," and the numerous cases there cited.) Indeed, the decision of this court in the important case of *Robinson v. Southern Pacific Co.*, 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773, rested entirely upon the important and substantial value of the stop-over privilege; where it was held that the ticket issued by the defendant in that case, taken in connection with certain statutory provisions, entitled plaintiff to a stop-over privilege, which was enforced by the judgment. But in that case the distinction between different kinds of tickets and fares was fully recognized. The court, in response to a petition for rehearing, said: "We do not hold, and it does not follow from the views herein expressed, or from anything decided or said by way of argument in our original opinion, that there can be no ticket sold on any line of road which is not a stop-over ticket. We only hold that there must be a regular passenger rate established from one depot to another, and that a passenger who tenders the regular fare is entitled to a ticket to his place of destination, which ticket, under the law, gives him a right to stop over at an intermediate station. And the railroad company cannot demand the regular fare, and at the same time deny the privilege which the law confers upon all who pay such rate. If, in consideration of an abatement from the regular established rate, a passenger voluntarily accepts an excursion or other

limited ticket, an entirely different case is presented."

It is argued that the acts of respondents constitute an evasion of section 20; the word "evasion" evidently being used in its worst sense. But, as stated in *Endlich on Interpretations*, "It is not evading an act to keep outside of it," and a provision of law "is always subject to evasion in that sense, for there is no obligation not to do what the Legislature has not really prohibited." Section 144. And there is no significance attaching to the fact that there was evidence to the point that a large majority of the passengers bought the \$3.75 ticket, while a comparatively small number bought the \$5.90 ticket. Whether or not respondents subjected themselves to the drastic and ruinous penalty of section 20 depends upon what they did, not on what others did. So remote a consideration is entirely beyond the principles of construction, which, as hereinbefore stated, apply to restrictive and penal provisions such as those here involved.

Under the foregoing views the second question—that is, whether or not the said section 20 is in conflict with the fourteenth amendment of the Constitution of the United States—need not be determined or discussed.

I concur: HENSHAW, J.

#### BIGGS et al. v. STATE.

(Supreme Court of Wyoming. Aug. 22, 1904.)

KIDNAPPING—EVIDENCE TO SUPPORT—CUSTODY OF CHILD.

1. Where a husband had abandoned his wife and family, and made no objection, though knowing that she was sending their child into another state, she is not guilty of kidnapping: he having abandoned to her the sole custody of the child, and given an implied consent to its removal.

Error to District Court, Natrona County; Charles E. Carpenter, Judge.

Viola Biggs and another were convicted of kidnapping, and bring error. Reversed.

Fred D. Hammond, for plaintiffs in error. J. A. Van Orsdel, Atty. Gen., for the State.

CORN, C. J. The plaintiffs in error were found guilty under an information which charged that they "did unlawfully, feloniously, fraudulently, and forcibly carry off and kidnap one Leonard Biggs, an infant child of the age of one month and under, from his, the said Leonard Biggs', place of residence, in said county, with felonious intention then and thereby of carrying said Leonard Biggs away from his said place of residence, and into the state of Colorado, and without the consent of the father of the said Leonard Biggs; said acts not being then and there done in pursuance of the laws of the state of Wyoming or of the United States." The

statute provides that "whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person, with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this state, or of the United States, is guilty of kidnapping."

The evidence is undisputed that the plaintiff in error, Viola Biggs, and the complaining witness, one John William Biggs, were married in November, 1902, and lived together as man and wife until about May 15, 1903, when he abandoned her, and they never lived together afterwards. She gave birth to this child on August 16, 1903, and about the 10th day of September following sent her mother, the plaintiff in error, Annie E. Trout, with it to Denver, for the alleged purpose of placing it in an orphans' home. At the time of the birth of the child, Viola Biggs was living with her mother, Mrs. Trout. Biggs was not present at its birth, and was not living with, supporting, or in any way caring for his wife. Upon the contrary, prior to this time he had notified the physician who, he understood, was to attend her, and who afterwards did attend her, in her confinement, that he would not be responsible for the charge for his services. He was never in the custody or possession of the child prior to its being sent to Denver, and did not make any attempt to obtain such custody or possession. Upon the contrary, he knew it was being sent away, saw them taking it to the railroad station, and made no protest or objection whatever. Indeed, according to his own statement, he never saw the child until after it had been sent away. Under these circumstances, it cannot be seriously contended that the evidence even tends to establish the crime of kidnapping. It is too plain for argument that the mere removal of the child to Colorado by its mother was not a crime. If she was its custodian, it was not only her right, but, if she performed her duty in regard to its care and nurture, it was a matter of necessity, that she should decide where it was to be kept and cared for. To say nothing of other elements necessary to constitute the offense, the removal must have been from the possession, actual or constructive, of the lawful custodian, or against the will of some one authorized to object. The child itself was incapable of objection, and it is not suggested that it was against the will of any person, unless the father. But not only is there no evidence that it was taken from his custody, or against his will, or contrary to his wishes, but his own testimony and all the evidence in the case rebut any such suggestion. He not only abandoned the sole custody to the mother, but, by standing by without objection when he knew it was being carried off, he gave an implied consent to its removal. There was no evidence in the case not entirely consistent with the innocence of the defendants, and the At-

torney General, representing the state in this court, concedes that their conviction was erroneous. This necessarily disposes of the case.

But it may be proper to say further that, so far as can be gathered from the record, it seems to have been the theory of the prosecuting attorney, concurred in by the district court, that, by law the father being entitled to the guardianship of the minor child in preference to the mother, he in some way in this case was the custodian of the child by force of the statute. But upon this proposition it is sufficient to say that, under such statutes, it is the actual state of things, and not the existence of a legal relation, that is contemplated. *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17; *State v. Ruhl*, 8 Iowa, 447. And in the case of an illegitimate child, though, as between the parents, the mother has the better claim to its custody, yet, when the natural father has the actual custody, he has been held to be its custodian, under the terms of a statute similar to the one in this case. *Bish. Stat. Cr. § 633*. But from the statement of facts already set out, it is evident that even if the father had been not only entitled to the custody, but in the actual custody, the plaintiffs in error were not guilty of any crime under the statute, for the reason that he was consenting to the removal.

The judgment will be reversed. Judgment reversed.

KNIGHT, J., concurs.

#### DURHAM v. COMMERCIAL NAT. BANK OF PORTLAND.

(Supreme Court of Oregon. Aug. 15, 1904.)

JUDGMENT — VACATION — SURPRISE — TROVER — DAMAGES — INTEREST — STIPULATION.

1. A judgment rendered pursuant to a stipulation, if contrary thereto, is within B. & C. Comp. § 103, authorizing the court, within a year after notice thereof, to relieve a party from a judgment taken against him by surprise.

2. The measure of damages in trover being the value of the property at the time of the conversion, with interest from such time, plaintiff in an action for conversion of stock is not deprived of his right to interest prior to entry of judgment by his stipulation that further proceedings should not be taken till final decision in another action for conversion at the same time of other shares of the same stock, when judgment should be rendered "in accordance with the legal import and effect of the decision" in the other case, though in the other case the court, after finding that the value of the stock at the time of the conversion was \$30 a share, or \$3,000 for the 100 shares, merely rendered judgment for \$3,000, with costs and disbursements, which was affirmed on appeal by defendant.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by Ella C. Durham, administratrix of S. A. Durham, deceased, against the Com-

mercial Bank of Portland. Judgment for plaintiff was modified, and plaintiff appeals. Reversed.

In 1899 Henry Weinhard, George H. Williams, and others, including the plaintiff, commenced separate actions at law against the defendant bank to recover damages for an alleged conversion by it of shares of its capital stock. After the issues had been joined in the several actions, a stipulation was entered into between the parties by which it was agreed that the case of Weinhard and Williams should be tried before the court without the intervention of a jury, and in the remainder of the cases no further action should be taken until a final decision of the court of last resort, which it was agreed should be the Supreme Court of the United States, in the Weinhard Case, and that "on such final decision by said Supreme Court of the United States, or judgment herein in accordance therewith in said cause of Henry Weinhard v. Commercial National Bank of Portland, judgment shall be rendered in each of said causes covered by this branch of this stipulation in accordance with the legal import and effect of the decision in said Weinhard Case, wherein the issues are identical with said cases, except as to the number of shares of the capital stock of the defendant involved; but, in the event that such decision or judgment in said Weinhard Case shall be for said plaintiff, said judgments shall, as to this particular, follow the allegations of the respective complaints as to the number of shares." In pursuance of this stipulation the Weinhard Case was tried, and on December 6, 1900, the court made and filed its findings of fact and conclusions of law, in which it found (1) that on May 5, 1897, Weinhard was the owner and holder of 100 shares of the capital stock of the defendant, of the par value of \$100 per share; (2) that on said date the defendant wrongfully and unlawfully converted the same to its own use and benefit, and the actual value at such time was \$30 per share, or \$3,000. And as a conclusion of law that Weinhard was entitled to judgment against the bank for \$3,000, and his costs and disbursements. Judgment was entered accordingly, and on appeal it was affirmed by this court in May, 1902 (*Weinhard v. Commercial N. Bank*, 41 Or. 359, 68 Pac. 806), and by the Supreme Court of the United States in January, 1904. (*Commercial N. Bank v. Weinhard*, 24 Sup. Ct. 253, 48 L. Ed. 425. Thereafter, and on February 26, 1904, the plaintiff in the present case moved for judgment in her favor, in accordance with the stipulation referred to, for \$2,190, the value of the shares converted by the bank and belonging to her, with interest thereon from December 7, 1900, the date of the filing of the findings of fact and conclusions of law in the Weinhard Case. The court, without notice to the defendant or its counsel, and without the

knowledge of either, rendered judgment accordingly. In April following, and at a subsequent term of the court, the defendant moved to vacate or modify the judgment because not in accordance with the pleadings and stipulation of the parties. The motion was allowed, and the judgment modified so that it is for the value of the stock converted, and interest thereon from the 26th of February, 1904, the day the judgment was rendered, instead of from the time the findings in the Weinhard Case were filed. From this judgment the plaintiff appeals.

Thomas O'Day, for appellant. R. T. Platt, for respondent.

BEAN, J. (after stating the facts). It is insisted that the court had no power at a subsequent term to vacate or modify the judgment rendered in February. The statute provides that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." B. & C. Comp. § 103. A judgment rendered against a party contrary to an understanding or agreement with his adversary is taken against him by "surprise," within the meaning of this section. *Thompson v. Connell*, 31 A. 231, 48 Pac. 467, 65 Am. St. Rep. 818. The judgment in this case was rendered in pursuance of a stipulation of the parties, and, if contrary thereto, was within the principle announced, and defendant may obtain relief therefrom under section 103.

The remaining question is whether the plaintiff is entitled to include in her judgment, as an item of damages, interest on the value of the stock belonging to her, and wrongfully and unlawfully converted by the defendant, from the date of the filing of the findings of fact and conclusions of law in the Weinhard Case. The contention for the defendant is that this question must be determined alone from the terms of the stipulation, and, unless it expressly provides for interest on the value of the stock converted prior to the rendition of the judgment, none can be allowed; but we do not consider the provisions of the stipulation in this regard as material. The action is in trover for conversion of the stock. It is clear and is admitted that, under the stipulation, the judgment in the Weinhard Case determined the liability of the defendant, the fact of conversion, the value of each share of stock converted, and that such stipulation, together with the complaint in the present action, shows the plaintiff to have been the owner of 73 shares of stock so converted. Her stock was therefore of the value of \$30 a share, or \$2,190, at the time of its conversion; and the rule of law is in an action of this kind that the measure of damages is

the value of the articles at the time of its conversion, with interest thereon from that date. *Eldridge v. Hoefer & Zorn* (decided August 15, 1904) 77 Pac. 874; 4 Sutherland, Dam. (3d Ed.) § 1109; 2 Sedgwick, Dam. (8th Ed.) § 493; Field, Dam. § 792. Although, therefore, the stipulation did not expressly provide for interest on the value of the stock converted, the plaintiff was entitled thereto as a matter of law, as an item of damages caused by the conversion. The stipulation and the decision in the Weinhard Case settled plaintiff's right to a judgment against the defendant for the unlawful conversion by it on May 5, 1897, of 73 shares of stock, of the then value of \$30 per share, and the law fixes the amount of the recovery at the value of such shares and interest.

It is true, interest is not recoverable as such on an unliquidated claim until the amount thereof is ascertained. *Pengra v. Wheeler*, 24 Or. 532, 34 Pac. 354, 21 L. R. A. 726. But in an action of trover it is allowed on the value of the article converted, not as interest, but as an item of damages, and the owner of the property may recover it as a part of the damages suffered by him. Under the law, therefore, the plaintiff would have been entitled to interest, if she had demanded it, on the value of the stock from the time it was converted by the defendant to the date of the judgment in her favor, but interest was not claimed prior to the date of the findings in the Weinhard Case. Judgment was, on motion of plaintiff, rendered accordingly, and by that judgment she is bound.

The order of the court made in April, 1904, modifying the judgment previously rendered, will be reversed, and the cause remanded, with directions to overrule defendant's motion to vacate such judgment.

SKINNER v. HORN et al. (L. A. 1,595.)  
(Supreme Court of California. July 28, 1904.)

APPEAL—RECORD—AFFIDAVITS USED ON HEARING OF MOTION FOR NEW TRIAL—AUTHENTICATION—SUPREME COURT RULE—PRESUMPTIONS.

1. Authentication of affidavits on the hearing of a motion for a new trial for use on appeal must be made under Sup. Ct. Rule 29 (64 Pac. xii), providing that all papers used or taken on the hearing of a motion for a new trial must be authenticated by being incorporated in the bill of exceptions; and hence an application by respondent on appeal pending from an order granting a motion for a new trial, to require the clerk of the superior court to certify affidavits to the Supreme Court, which were used on the hearing of the motion, will be denied.

2. Under Code Civ. Proc. § 952, requiring an appellant to furnish the Supreme Court with a copy of the notice of appeal, of the order appealed from and all papers designated under Code Civ. Proc. § 661, which includes affidavits used on the hearing of a motion for a new trial, and making it the duty of appellant to bring up not only the judgment roll, but also, properly authenticated by being placed in the bill of ex-

ceptions, such affidavits as may have been used on the hearing, the burden is on appellant to show error; and hence the presentation of the affidavits used on a motion for a new trial is not essential to the preservation of respondent's rights on an appeal from an order granting a motion for a new trial.

3. The presumption on appeal is that an order granting a new trial was properly made.

4. In the absence of a bill of exceptions showing what was used on the hearing of a motion for a new trial, unless the record on appeal establishes the contrary, it will be conclusively presumed in favor of the order granting the motion that the motion was in part based on some ground on which affidavits were used, that affidavits were in fact used on the hearing, and also that such affidavits were sufficient to justify the court in making the order appealed from.

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by M. F. Skinner against T. L. Horn, B. H. Pendleton, and others. From an order granting a new trial as to the defendant Pendleton, plaintiff appeals. On motion to direct the clerk of the superior court to certify to the Supreme Court, as a part of the record on appeal, the affidavits used on the hearing of the motion for a new trial. Motion denied.

Purrington & Adair, for appellant. Wright & Lukens, for respondents.

ANGELLOTTI, J. The superior court having granted a motion for a new trial as to defendant B. H. Pendleton, the plaintiff appealed from such order, and has filed in this court a transcript on appeal containing the judgment roll, the settled statement used on the motion for a new trial, a copy of the order granting a new trial, and of the notice of appeal.

Respondent Pendleton has suggested to this court that the transcript is defective, in that it does not contain certain specified affidavits, which, it is alleged in the affidavit filed herein on his behalf, were read, used, and considered by the trial court upon the hearing of his motion for a new trial, as well as upon the hearing of a motion made by him for leave to amend his motion for a new trial, and his motion for an order vacating and setting aside the judgment, and has, by motion, asked for an order directing the clerk of the superior court to certify to this court, as a part of the record on appeal, the said affidavits. It is not suggested that said affidavits have been incorporated in a bill of exceptions, or in any way authenticated as having been used on the hearing in the court below, and it was admitted on the argument that they had not been incorporated in a bill of exceptions. Under these circumstances it is clear that, even if the affidavits had been set forth in the transcript, or if they should be now certified by the clerk of the superior court to this court, they could not be considered by the court on the appeal from the order granting the mo-

¶ 3. See Appeal and Error, vol. 3, Cent. Dig. § 372.

tion for a new trial. It is now well settled that affidavits used on a motion for a new trial cannot be considered by this court on an appeal from the order made on such motion unless they are incorporated in a bill of exceptions. Rule 29 of this court (64 Pac. xli), provides: "In all cases of appeal to this court from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." There is no other mode provided by law for the authentication of affidavits used on the hearing of a motion for new trial, and a bill of exceptions is, therefore, the exclusive method by which such affidavits may be presented for the consideration of this court. *Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Von Glahn v. Brennan*, 81 Cal. 261-264, 22 Pac. 596. See, also, *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299. This question is elaborately discussed in the opinion in *Melde v. Reynolds*, *supra*, and it is there pointed out that affidavits used on a motion for a new trial may be incorporated in a bill of exceptions settled as directed in section 651, Code Civ. Proc. When so incorporated in a bill of exceptions, and by this means authenticated as having been used on the hearing of the motion, they constitute a part of the record on appeal. If they are not so authenticated, they are no part of the record on appeal, and cannot be considered by this court.

It is suggested that the respondent has had no opportunity to incorporate the affidavits in a bill of exceptions, inasmuch as, the decision on his motion for a new trial having been in his favor, and he, therefore, having had no exceptions to present and no appeal to take, the appellant did not propose any bill of exceptions, and he (respondent) had no occasion or right to propose any such bill, or to have the same settled. The transcript does not show that any bill of exceptions was proposed by appellant, and it was admitted on the argument that there was no such procedure followed. The suggestion appears to be well based, but these facts lend no aid to respondent on this motion. It still remains that we cannot, on the appeal, consider any affidavits that are not authenticated in the manner provided by law. This would be a harsh and unjust rule if a respondent could be deprived of the aid of his affidavits used on the motion by reason of the failure of the appellant to propose a bill of exceptions, and thus give him an opportunity to obtain proper authentication thereof. But we cannot see that under such circumstances the presentation of such affidavits to this court could ordinarily be essential to the preservation of a respondent's rights. It devolves on the appellant, under our law, to furnish this court "with a copy of the notice of appeal, of the order appeal-

ed from, and of the papers designated in section 661" of the Code of Civil Procedure (section 952, Code Civ. Proc.). It is thus made his duty to bring up not only the judgment roll and the bill of exceptions or statement on motion for a new trial, but also such affidavits as may have been used on the hearing (section 661, Code Civ. Proc.), properly authenticated by being placed in a bill of exceptions. The burden is on him to show error in the action of the trial court. The presumption is that the order granting a new trial was properly made, and, in the absence of a bill of exceptions, showing what was used on the motion, unless the record on appeal establishes the contrary, it will be conclusively presumed in favor of the order that the motion was in part based upon some ground upon which affidavits could be used, that affidavits were in fact used on the hearing, and also that such affidavits were sufficient to justify the court in the making of the order appealed from. *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396. See, also, *Nash v. Harris*, 57 Cal. 242; *Shain v. Eikerenkotter*, 88 Cal. 13, 25 Pac. 966. If, therefore, the appellant fails to present a record which shows affirmatively that the lower court erred in granting a new trial, such failure will operate solely to his own disadvantage.

The motion for an order requiring the clerk of the superior court to certify the affidavits to this court is denied.

We concur: SHAW, J.; VAN DYKE, J.

144 Cal. 246

FRATES v. SEARS et al. (S. F. 3,447.)\*

(Supreme Court of California. July 26, 1904.)

MORTGAGES — PRIORITY — FORECLOSURE — PARTIES — LIMITATIONS — PLEADING.

1. Where a second mortgagee was not made a party to a suit to foreclose the first mortgage, and, at the time suit was brought to foreclose the second mortgage, the time limited by law for suing on the first mortgage had fully elapsed, the second mortgagee was entitled to plead the statute of limitations as a complete defense to any rights acquired under the first mortgage.

Commissioners' Decision. In Bank. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Kate Frates against J. R. Sears and another. From a judgment in favor of plaintiff for less than the relief demanded, she appeals. Reversed.

B. McFadden, for appellant. Cary Howard, for respondents.

GRAY, C. This action is to foreclose a mortgage. The mortgagor and Redfield, a prior mortgagee, were made defendants. The plaintiff was denied all relief except a personal judgment against Sears, the mort-

\*Rehearing denied August 26, 1904.

¶ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 545.

gagor, for \$1,412.25, the amount of her claim, and she appeals from the judgment.

The defendant Redfield held a note and mortgage on real estate against the defendant Sears for \$800, dated April 21, 1893, and due one year after date. The plaintiff, Frates, held a note and mortgage on the same real estate against said Sears for \$750, dated December 6, 1893, and due March 1, 1894. On November 21, 1895, defendant Redfield commenced suit to foreclose his mortgage, and on February 29, 1896, had judgment of foreclosure therein, and thereafter the property was sold in said case, and bought in by Redfield for the amount of his judgment and the expense of the sale. In this Redfield foreclosure case the second mortgagee, the plaintiff herein, Frates, was not made a party, although her mortgage was recorded before the suit was begun. Thereafter, on February 23, 1898, this suit was begun by Frates to foreclose her said mortgage for \$750 on the same property. She made both Sears and Redfield parties defendant, and alleged in her complaint that Redfield "has or claims to have some interest in or claim upon the said real property, or some part thereof, as purchaser, mortgagee, judgment creditor, or otherwise," but that the same was subject to the lien of plaintiff's mortgage. A demurrer to the complaint was filed and overruled, and on March 22, 1901, the defendant Redfield filed his answer, in which he set out the facts in relation to the first note and mortgage, and the foreclosure thereof, as above stated.

Upon the trial of the case, defendant offered in evidence the judgment roll in the first suit, and plaintiff objected thereto as incompetent, on the grounds following: "(1) That plaintiff was not a party to the foreclosure action mentioned in said judgment roll, and is not and could not be bound or affected by the judgment given in said action, or by any of the proceedings had therein, or had under said judgment. (2) That said defendant Joseph R. Sears and J. B. Redfield could not by any act of theirs to which plaintiff was not a party, whether by voluntary agreement or by action of foreclosure, extend or prolong the time of payment of the Redfield note and mortgage so as to prevent the running of the statute of limitations against them in favor of plaintiff, and that, at the time the defendant Redfield filed his answer herein, said note and mortgage were, and are now, barred by the provisions of sections 312, 335, and 337 of the Code of Civil Procedure of this state. (3) That what said defendant Sears and Redfield themselves could not voluntarily do, the court could not, by its judgment in said action of foreclosure, do for them. They could not by any agreement to which plaintiff was not a party, nor could the court by its judgment in said action, to which plaintiff was not a party, extend or prolong the time of payment of said Redfield note

or mortgage so as to prevent the statute of limitations from running against them in favor of plaintiff. (4) That, to affect or cut off the plaintiff's right to plead the statute of limitations against the Redfield note and mortgage, it was not only necessary for defendant Redfield to commence action upon his note and mortgage within four years from date of maturity against the maker of the same, which he did, but also against the plaintiff, which he did not. (5) That the court, by its judgment in said action, in determining the matters in controversy therein, or in declaring or adjudging the rights of the parties thereto, or as affecting the rights of plaintiff, who was not a party thereto, had not the power to do anything which the parties themselves to such action had not the power to do by their own voluntary act in relation to the same matters or rights, without the aid of the court. (6) That the note and mortgage mentioned in said judgment roll, which are the same note and mortgage described in the answer of said J. B. Redfield, and alleged therein to have been executed to him by said defendant Sears, were at the time of the filing herein of said answer, and now are, and each of them is, barred by the provisions of sections 312, 335, and 337 of the Code of Civil Procedure of this state." This objection was overruled, as was also a similar objection made to the introduction of the Redfield note and mortgage, and the plaintiff excepted to the action of the court in both instances.

We think the court erred in overruling those objections. It is clear that plaintiff's interest and rights under her mortgage, antedating, as it did, the Redfield foreclosure, could not be affected by that suit without making her a party thereto. The statute of limitations, and the second mortgagee's right to rely upon it as against the first mortgage, cannot be affected by any agreement or act by or between the mortgagor and first mortgagee to which the second mortgagee is not a party. This is clearly illustrated, and the authorities very fully cited, in *Brandenstein v. Johnson* (Cal.) 73 Pac. 744. And the principle of that case applies here. Redfield has never foreclosed his mortgage as against Frates, and Frates has the right to treat the case as if no foreclosure of the first mortgage had ever been had. This is so laid down in *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 338—a case exactly similar to the one before us. In this Minnesota case a mechanic's lien had been foreclosed, and, though a mortgagee of the property was made a party to that foreclosure suit, no jurisdiction of the person of said mortgagee was obtained; and it was held that the commencement of the action to foreclose the mechanic's lien against the owner of the property did not preserve the lien as against other lienholders or incumbrancers, of whom no ju-

isdiction had been obtained beyond the statutory period for bringing such an action, and that, in a suit on the mortgage in such a case, the mechanic's lien being barred by the statute, the interest of the plaintiff under his mortgage was prior and superior to the interest of the lienholder, and the latter, as well as the mortgagor, was properly foreclosed by the trial court of all right, estate, or lien in or to the premises, except the usual right of redemption. All that was left to the lienholder was to stand in the shoes of the mortgagor, whose rights he had acquired by foreclosing his mechanic's lien, and redeem from the mortgage, against which his prior claims were barred by the statute of limitations. The appellant here not being bound by the judgment in the foreclosure of the prior mortgage to which she was not a party, and the prior note and mortgage being barred by the statute of limitations at the time they were first set up in the answer of the foreclosure case of the second mortgage, plaintiff's objection upon that ground to their introduction in evidence should have been sustained, and the overruling of that objection was fatal error.

Respondent cites and relies upon the case of *Carpentier v. Brenham*, 40 Cal. 221, to sustain the action of the lower court. It is not held in that case that the second mortgagee cannot rely upon the statute of limitations as against the prior mortgage, but, on the contrary, the right of the second mortgagee to avail himself of the statute as against the first mortgagee is expressly recognized, for the opinion says: "If the mortgage to Moss had not been foreclosed, and had remained a valid, subsisting, and unsatisfied lien upon the mortgaged premises, it would, of course, have been entitled to priority over the junior mortgage, so long as it was not barred by the statute of limitations." It would seem from the statement of the facts in this *Carpentier* Case that the statute of limitations was available to the plaintiff, who was seeking to foreclose a second mortgage as against the first mortgage, which had been foreclosed without making the second mortgagee a party. But the court does not in terms say whether the plaintiff had a right to rely on the statute of limitations as against the first mortgage. Indeed, in its discussion of the doctrines of merger and subrogation as applicable to the case, it seems to have lost sight of the statute of limitations and its applicability to the facts. If the court meant to hold that plaintiff could not avail herself of the statute of limitations as against the first mortgage by reason of the foreclosure of the first mortgage, we are inclined to distrust the logic of that opinion. It was clear on the facts of the case that more than four years had elapsed after the judgment of foreclosure on the first mortgage before the suit on the second mortgage was begun, and

that at the beginning of the latter suit the time limited by law for suing on the first mortgage had fully elapsed. If the first action had never been brought, the plaintiff's right to interpose the statute was clear. How that right could be taken away by a suit to which the latter plaintiff was not a party, and which (quoting from the opinion) "does not affect the rights of the latter," we cannot understand. Therefore the case affords us no light on the question of the statute of limitations, as it presents itself in the case at bar. The trial judge in that case seems to have overlooked one of the important rights of the second mortgagee, for, in the quotation from his opinion contained in the case, in stating the rights of the second mortgagee, he says nothing of his right to have the statute of limitations continue to run in his behalf against the first mortgage, notwithstanding the commencement of the suit and the judgment following it. Certainly, if the second mortgagee has the right to interpose the statute as against the first mortgage when it has run, and the period of limitations has expired, he also at every stage is entitled to have the statute continue to run in his behalf; and this right cannot be cut off midway by the commencement of an action against some person other than the second mortgagee, because, as is expressly stated in the opinion, his rights cannot be affected by a suit to which he is not a party.

We advise that the judgment be reversed.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: BEATTY, C. J.; MCFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; SHAW, J.

144 Cal. 251

PEOPLE v. RUIZ. (Cr. 1,080.)

(Supreme Court of California. July 27, 1904.)

GRAND LARCENY—INSTRUCTIONS—STATUTE—MOTION FOR NEW TRIAL—AUTHENTICATION—SUPREME COURT RULE—APPEAL—MOTION IN ARREST—VERDICT.

1. No appeal lies from an order denying a motion in arrest of judgment in a criminal case.

2. No appeal lies from the verdict in a criminal case.

3. Where a motion for a new trial is merely printed in the transcript, and stated to have been denied and exception taken, but such matters are not incorporated in the bill of exceptions as required by Sup. Ct. Rule 29 (64 Pac. xii), no question arising on the motion for new trial is reviewable on appeal.

4. In a prosecution for grand larceny, consisting in the alleged stealing of calves, an instruction defining grand larceny in the language of Pen. Code, § 487, as "when the property taken is of a value exceeding fifty dollars; when the property taken is from the person of another; when the property taken is a bicycle, horse, mare, gelding, cow, steer, bull, calf, mule, jack or jenny"—is not misleading.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2591.

5. In a prosecution for grand larceny, consisting in the alleged stealing of calves, an instruction that the jury could convict defendant only if they believed from the evidence, beyond a reasonable doubt, that he had stolen the calves as alleged in the information, or aided and abetted therein, was not erroneous in the use of the words "aided and abetted," because one who aids and abets is a principal.

6. In a prosecution for grand larceny, error cannot be predicated of the refusal of the court to instruct, in the language of Code Civ. Proc. § 2061, subd. 1, that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admission of the party with caution.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Jose Ruiz was convicted of grand larceny, and appeals. Affirmed.

F. W. Allender, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

VAN DYKE, J. Defendant was informed against by the district attorney of Los Angeles county for the crime of grand larceny, in stealing two calves. He was convicted and sentenced to imprisonment for six years. The notice of appeal states that the appeal is taken from the judgment, from an order denying a new trial, from a motion in arrest of judgment, and from the verdict. No appeal lies from the last two mentioned, and the bill of exceptions fails to show what, if any, action was taken by the court on the motion for a new trial. There is printed in the transcript what purports to be a "motion for a new trial," which, it was stated, was denied, and an exception taken, but these matters are not authenticated in the bill of exceptions as required by rule 29 of this court (64 Pac. xli).

Plaintiff's attorney, in his brief, urges two points in support of the appeal: 1. That one of the instructions of the court was in the language of Pen. Code, § 487, defining "grand larceny," to wit: "Grand larceny is larceny committed in either of the following cases: When the property taken is of a value exceeding fifty dollars; when the property taken is from the person of another; when the property taken is a bicycle, horse, mare, gelding, cow, steer, bull, calf, mule, jack or jenny." It is claimed by appellant that portions of the section quoted were inapplicable, confusing, and misleading. There may be exceptional cases where it would be inapplicable or misleading to give an instruction in the language of the Code definition of a crime, but ordinarily it is proper to do so; and in the case at bar it cannot be said that the definition of "grand larceny," as given in the instruction of the court, was erroneous or injurious to the defendant. In the instruction the jury were told that they could convict the defendant only if they believed from the evidence, beyond a reasonable doubt, that he had done the specific thing

charged, to wit, that he had stolen the calves as alleged in the information; and there was no error in using the words "or aided and abetted," for the reason that one who aids and abets is a principal. *People v. Riley*, 65 Cal. 107, 3 Pac. 413; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917.

2. It is contended further on the part of the appellant that the court erred in refusing to give the offered instruction as follows: "You are instructed that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." The instruction offered is in the language of section 2061, subd. 4, Code Civ. Proc., but it was definitely held in *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744, that a refusal to give such an instruction is not error.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; SHAW, J.; LORIGAN, J.

BEATTY, C. J. I dissent. Section 2061 of the Code of Civil Procedure provides: "The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: (1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence; (2) that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds; (3) that a witness false in one part of his testimony is to be distrusted in others; (4) that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution; (5) that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond a reasonable doubt; (6) that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore, (7) that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

The trial of this case was a proper occasion, if there is ever a proper occasion, to give the instruction specified in subdivision 4 of this section. There was evidence of verbal statements and admissions of the defendant introduced against him, and his co-



defendant, who had pleaded guilty, testified against him. The trial judge, however, refused the instruction, and the ruling is sustained on the authority of *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744. I concurred in that decision, but have since become convinced that it was erroneous, and in subsequent cases have so stated. *People v. Buckley* (Cal.) 77 Pac. 169; *People v. Moran* (Cal.) 77 Pac. 777. The *Wardrip* Case and the cases in which it has been followed upon this point leave it uncertain whether the refusal of this instruction is sustained upon the ground that section 2061, *supra*, is unconstitutional, or upon the ground that, being constitutional, the injunction it lays upon the court may be observed or disregarded at its pleasure. Whichever may be the ground of the decision I dissent from it. The law, in my opinion, is constitutional, and, if so, ought to be obeyed.

It is important, also, in my opinion, that the position of the court upon the constitutionality of the section should be clearly defined, for, if it violates the Constitution to give clause 4, is it not equally a violation of the Constitution to give clause 3? If clause 4 is unconstitutional, which of the other six clauses is not unconstitutional? And what is to be done with a criminal case in which one is given and another is refused, when the one given operates against the defendant? Suppose a witness for defendant has been contradicted on some point, and clause 3 is given at request of the prosecution, or by the court of its own motion, while the request of defendant for clause 4 is denied. If we are going upon the ground that the law is unconstitutional, that judgment must be reversed; and, if we are going upon the ground that the section in question contains mere commonplaces, can it be said that the defendant has been fairly tried, when the court has used even a commonplace argument against him, and has at the same time refused to state the commonplace argument in his favor? Such a course would hardly commend itself to any one as an example of fairness. In conclusion, on this point, I take occasion to restate the ground upon which I hold clause 4 to be constitutional. The Legislature has the undoubted power to declare what shall not be competent evidence. In the exercise of this power, it might have excluded absolutely the evidence of an accomplice, or the evidence of verbal admissions of a party. Having the power to exclude altogether, it has the power to admit subject to conditions or qualifications; and clause 4 merely states the qualification subject to which this kind of testimony is admissible—the condition upon which it is allowed to go to the jury at all. Parties are granted the benefit of a certain kind of evidence, when that benefit might have been wholly denied; and the principle is universal that the power to grant or withhold implies the right to an-

nex any conditions to the grant which to the granting power may seem desirable. I think the refusal of this instruction was error, and material error.

It is a mistake in the opinion, also (though an immaterial one in this case), to say or imply that our rule 29 requires the action of the court (64 Pac. xli) upon a motion for a new trial to be shown by a bill of exceptions. The rule relates in terms and intention only to the evidence and the papers (files, etc.) upon which a motion is made. If the order which follows is an appealable order, there is certainly nothing in the rule which prevents us from considering it on direct appeal when it comes in the form of a certified copy of the minutes of the court. An order denying a new trial in a criminal cause is appealable. The order exists only in the form of an entry in the minutes, and a certified copy of that entry is all that is necessary to inform us of the action of the court upon the motion. It makes no material difference, however, in this case, whether we review the evidence or not, for the same result follows in either case; the evidence being clearly sufficient in law to support the verdict. Whether the same verdict would have been returned if the jury had been properly instructed is another question.

For the error in refusing the instructions commented on in the opinion of the court, I think the judgment should be reversed.

7 Cal. Unrep. 190

WARREN v. MCGOWAN. (S. F. 4,035.)

(Supreme Court of California. July 23, 1904.)

#### APPEAL—DISMISSAL—DELAY.

1. An appeal will be dismissed; it having been perfected and the bill of exceptions settled and filed in the clerk's office for eight months, said clerk not having been requested to certify to the correctness of any transcript on appeal, no such transcript having been filed in the Supreme Court, and no extension of time to file it having been granted.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by F. M. Warren against James P. McGowan. From an order setting aside a judgment for plaintiff, he appeals. Dismissed.

Rigby & Rigby and Wal. J. Tuska, for appellant. Eugene D. Sullivan and Thomas P. Boyd, for respondent.

PER CURIAM. This is a motion to dismiss an appeal taken from an order made by the superior court vacating and setting aside a judgment that had been rendered in favor of plaintiff. From the affidavits and the certificate of the clerk it appears that the appeal was perfected on the 3d day of December, 1903, and that the bill of exceptions to be used on said appeal was settled by the judge who made the order on the 11th day of

December, 1903, and on the same day filed in the office of said clerk. It further appears from the certificate of the clerk that said clerk has never been requested to certify to the correctness of any transcript on appeal, and no such transcript has been filed in this court. It further appears that no extension of time to file such transcript has been granted.

It is ordered that the appeal be dismissed.

144 Cal. 287

**WARREN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO**  
et al. (S. F. 3,787.)

(Supreme Court of California. July 28, 1904.)

**CERTIORARI—DELAY IN PROSECUTION—DISMISSAL.**

1. A writ of certiorari will not be dismissed on the ground of negligent delay of petitioner in prosecuting it; he having promptly conformed to the views expressed in an opinion filed in another case, though after the hearing, that it was petitioner's duty to see that the return was made; the question as to the proper practice having theretofore been an open one; and there being nothing to indicate that he is not prosecuting the proceeding in good faith.

In Bank. Certiorari by F. M. Warren against the superior court of the city and county of San Francisco and Thomas F. Graham, judge. Heard on motion to dismiss. Denied.

Rigby & Rigby and Wal. J. Tuska, for petitioner. Eugene D. Sullivan and Thomas P. Boyd, for respondents.

ANGELLOTTI, J. This is a motion to dismiss a writ of certiorari heretofore issued from this court, on the ground that the petitioner has not prosecuted the same with reasonable or any diligence. The writ was issued on the 8th day of December, 1903, and commanded respondent to certify and send to this court a transcript of the record and proceedings in a certain cause pending in the superior court of the city and county of San Francisco. It was served upon the judge of said court on the 9th day of December, 1903. At the time of the giving of the notice of this motion, April 21, 1904, and at the time of the hearing of said motion, May 2, 1904, no return had been made to said writ; and it appears that no request had been made by petitioner of the clerk of said court that he make any return, and that no step had been taken to enforce the making and forwarding of the same. The position of petitioner, as shown by his argument on the hearing of this motion, was that, the writ having been served upon the respondent, he (petitioner) had no further duty to perform in the matter of procuring the certification of the record to this court.

Since the hearing of this motion, this court has decided, in the case of *The I X L Lime Co. v. The Superior Court* (Cal.) 78

Pac. 973, that it is incumbent upon the prosecutor of a writ of certiorari, rather than the party adverse to him, to see that the return is made, to use due diligence in having the same made, and to pay to the officer required to make the return any fees that may be provided by law for furnishing the copies of the papers and records and the making of the certificate. It was further stated in the opinion in that case that the authorities are to the effect that such a proceeding should be dismissed if the petitioner fails to use diligence in the prosecution thereof. Following the views expressed in that opinion, petitioner has, since the submission of this motion, caused to be filed in this court a certified transcript of the record of the superior court. As, prior to the decision above cited, the question as to the proper practice in the matter of procuring the certification of the record on certiorari was an open one, concerning which there was apparently much difference of opinion, and as there is nothing to indicate that petitioner is not prosecuting this proceeding in good faith, and as he promptly conformed to the views of this court as expressed in such decision, by causing the record to be certified and filed herein, we are not disposed to hold that he has been guilty of such negligence as should preclude his being heard on the merits of his application.

The motion to dismiss the writ is denied.

We concur: BEATTY, C. J.; VAN DYKE, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 219

**MULCAHY v. HIBERNIA SAVINGS & LOAN SOC. et al.** (S. F. 2,454.)

(Supreme Court of California. July 25, 1904.)

**BANKS—RESERVE—ACTION TO COMPEL DISTRIBUTION—COMPLAINT—NECESSARY ALLEGATIONS—SUFFICIENCY—STATUTE—INSTRUCTION.**

1. St. 1862, p. 200, c. 187, § 11, providing that banking corporations having no capital stock shall retain on each dividend day at least 5 per cent. of the net profits of the corporation, to constitute a reserve fund, to be used in paying any of the losses which the corporation may sustain, and that the corporation may provide by its by-laws for the disposal of any excess in the reserve fund over \$100,000, and the final disposal upon the dissolution of the corporation of the reserve fund or remainder thereof after payment of losses, does not prevent a corporation from creating a reserve fund in excess of \$100,000.

2. Where a discretion, unrestrained by the charter or by-laws or the statute creating a banking corporation, is lodged in its board of directors as to the maximum of its reserve fund, the courts will not attempt to control the acts of the corporation, unless its proceedings are unfair, or the officers act wantonly and in bad faith, or in disregard of the rights of the members relative to the fund.

3. In a suit to compel a banking corporation to distribute part of its reserve fund, the maxi-

mum amount of which is lodged in the discretion of its directors, an averment in the complaint that the directors acted in bad faith in endeavoring to exclude the plaintiff as a member of the corporation has no bearing on any question as to the reserve fund.

4. In a suit to compel a banking corporation to distribute part of its reserve fund, the maximum amount of which is in the discretion of its directors, the court cannot interfere with the discretion of directors, and compel a distribution, in the absence of a showing that, in violation of plaintiff's rights, the directors had refused to declare dividends to which he was entitled, without just reason, and notwithstanding they had in their hands ample funds which should be devoted to that purpose.

5. Where, under a statute creating a banking corporation, the minimum amount of reserve fund to be accumulated by it is \$100,000, and the maximum is lodged in the discretion of the board of directors, the accumulation of a reserve of \$2,500,000 does not of itself render the accumulation fraudulent.

6. In a suit to compel a banking corporation to distribute part of its reserve fund, an averment in the complaint that the directors refused to direct the surplus distributed, for the purpose of appropriating and dividing it among themselves on the dissolution of the corporation, is a mere conclusion of the pleader, and does not constitute an allegation of fraud; no facts being stated on which to predicate the averment.

7. In a suit to compel a distribution of the reserve fund of a banking corporation, an averment in the complaint that it was unnecessary for the corporation to keep in the reserve fund an amount specified as that kept by the corporation, because it was not indebted to any one except its depositors, and had no unpaid losses in its business, and because no banking corporation in the state carried a reserve of the size carried by defendant, is a mere conclusion of the pleader, in the absence of a statement of the amount of the indebtedness of the corporation to its depositors.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Suit by J. W. Mulcahy against the Hibernia Savings & Loan Society and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. T. Baggett, for appellant. Tobin & Tobin, Garber, Creswell & Garber, and T. I. Bergin (J. J. Dwyer, of counsel), for respondents.

LORIGAN, J. Plaintiff, in his own behalf, and on behalf of others similarly situated, alleging that he and they are members of said society, brings this action to compel the distribution of a portion of the reserve fund of said society among its members. It is alleged that said fund amounts to \$2,500,000, and plaintiff seeks to have all but \$750,000 thereof so distributed. Defendants demurred to said complaint on various grounds, many of which were sustained, and, plaintiff declining to amend, a judgment dismissing the action was entered. From this judgment he appeals.

One of the grounds upon which the demurrer was sustained (though sustained upon many others) was that the complaint did not

state a cause of action. In that regard it was urged in the court below, as it is insisted on here, that, for several reasons, said complaint is vulnerable in this respect, but particularly so because the facts therein stated do not show that plaintiff is a member of said society, or entitled to participate in said reserve fund, and, further, assuming that the complaint does show that he was a member, and that he would ultimately be entitled to participate, still there is an absence of those essential allegations which must appear in order to show that he is entitled to have a present distribution made by the society of any part of said reserve fund. As we are satisfied that the demurrer was at least properly sustained for this last reason, it will be unnecessary to dispose of any other of the various points raised, or to determine whether the complaint sufficiently shows that plaintiff is a member of said society, because, assuming that it does, nevertheless it fails to show sufficient grounds for any judicial interference with the action of the board of directors of said society relative to this fund. In order to properly point out their insufficiency in this respect, it is necessary to set forth the allegations of the complaint on that subject, which are as follows: "Plaintiff further avers that the directors of the defendant corporation have retained an amount of money on each dividend day far in excess of five (5) per cent. of the net profits of said corporation, to wit, more than two millions (\$2,000,000) of dollars, and has placed the same in a reserve fund, and now retains the same in the reserve fund of said society. And plaintiff further avers that said society and said defendant directors of said society have unlawfully and fraudulently refused to make any provision whatsoever, by its by-laws or otherwise, for the disposal of any excess in the reserve fund of said society over one hundred thousand (\$100,000) dollars, as provided by the said act of 1862, and for the purpose and object of depriving plaintiff and all others similarly situated from participating in said earnings, and for the purpose of dividing the same among themselves, and appropriating the same to their own use, upon the dissolution of the corporation. And plaintiff further avers that it is unlawful and contrary to the provisions of the said act of 1862 for the said society, or the said defendant directors thereof, to retain the said net earnings in said reserve fund in an amount in excess of one hundred thousand (\$100,000) dollars; and plaintiff further avers that it is not necessary for the uses, benefits, or interests of said corporation, or for its financial standing or otherwise, that there be kept in reserve the said surplus or reserve fund, the enormous sum of two million five hundred thousand (\$2,500,000) dollars, or any other sum in excess of seven hundred and fifty thousand (\$750,000) dollars, for the reason that said society is not now indebted to any one except its said depositors, and has not

¶ 6. See Fraud, vol. 23, Cent. Dig. § 37; Pleading, vol. 39, Cent. Dig. § 283.

made any unpaid losses in its business, and for the further reason that no other savings and loan society or banking corporation in this state carries in its reserve fund, for the purpose of paying any losses which it might sustain in pursuance of its lawful business, a sum in excess of one million (\$1,000,000) dollars. And plaintiff further avers that it is the duty of said defendant society and said defendant directors of said corporation to pay out to plaintiff, and all other persons similarly situated, who are by law entitled to participate in the profits of said society, all of said moneys now accumulated and held as a reserve fund by said society, except the sum of seven hundred and fifty thousand (\$750,000) dollars, and it is in fraud of the rights of plaintiff and all others similarly situated for the said society, and directors thereof, to deny and refuse to make distribution of the profits of said society as aforesaid."

The original certificate of incorporation of the Hibernia Savings & Loan Society was filed in 1859, under the act of 1853 (St. 1853, p. 87, c. 65). Thereafter, in 1864, another certificate of incorporation was filed under the act of 1862 (St. 1862, p. 200, c. 187). It is contended by appellant that the certificate filed in 1864 operated simply as a continuance of the existence of the incorporation formed under the act of 1853; by the respondents that it was the formation of a new and distinct corporation under the act of 1862. We do not purpose passing upon the merits of this contention as to what was the effect of filing the new certificate of incorporation under the act of 1862, but as both sides agree that the society is incorporated under this act, either as a continuing or as a new corporation—the dispute being solely as to the effect of the certificate—we refer to the act to particularly call attention to section 11 thereof, which, both parties concede, governs in the matter of the creation of a reserve fund by the society, and the disposition which may be made of it, immediately and ultimately. Section 11, referred to, provides that any corporation formed under the act, and having no capital stock, shall retain on each dividend day at least 5 per cent. of the net profits of the corporation, to constitute a reserve fund, which shall be invested in the same manner as other funds of the corporation, and shall be used towards paying any of the losses which the corporation may sustain in pursuance of its lawful business, and that the corporation may provide by its by-laws for the disposal of any excess in the reserve fund over \$100,000, and the final disposal upon the dissolution of the corporation of the reserve fund, or remainder thereof, after payment of losses. It will be observed from the language of this section that the allegation in that part of the complaint above recited which avers that it is "contrary to the provisions of said act of 1862 for the society or its directors \* \* \* to retain \* \* \* net earnings in said re-

serve fund in an amount in excess of one hundred thousand (\$100,000) dollars" is not correct. The plain provision of the section—and it requires no critical examination to discover it—is that the duty is imposed upon the society of creating a reserve fund of at least \$100,000. There is no provision that the reserve fund shall not exceed that amount. That sum is simply fixed as a minimum of reserve. There is no direction that it shall not exceed it. No maximum amount is specified. The question as to what sum in excess of \$100,000 shall be reserved is left by the statute entirely to the discretion of the board of directors. This being true, the familiar rule of law applies, that, where the powers of a board of directors of a corporation are unlimited and unrestrained with reference to the disposition that shall be made of the surplus funds of the corporation, they are at liberty to exercise a very large discretion in that respect; that, so long as they act in the exercise of an honest judgment, with honest motives, and for honest ends, their power over such funds is absolute. They have a right to act with regard to them as their best judgment determines is necessary or judicious, and, where they have done this, their action is not subject to control by the court. Particularly is this true relative to banking corporations, where it is generally committed to the directors to exercise their best judgment upon a knowledge of the affairs of the bank, the requirements of its business, and the extent of its liability to its depositors and other creditors; where it must devolve upon them to take such precautions and adopt such measures concerning a reserve fund and its amount as will amply enable them to provide for present and future contingencies, and fully conserve and protect the rights of their depositors by prudently providing for prompt payment of possible losses. In the nature of things, it would be practically impossible to determine in advance, with any precision or accuracy, just what amount would be safe to retain for such purpose, and hence a discretion on the subject must necessarily be left to the proper officers of the corporation. And where this discretion is unrestrained by either the charter or by-laws of the corporation or the statutes of the state, and is exercised in good faith, the courts will not interfere in the matter, or attempt to control the action of the corporation. *Excelsior H. & M. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Reynolds v. Bank* (Sup.) 39 N. Y. Supp. 626; *McNab v. McNab & Harlan Mfg. Co.*, 62 Hun, 21, 16 N. Y. Supp. 448; *Williams v. Telegraph Co.*, 93 N. Y. 162; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 118, 3 Atl. 162. As is said in *Reynolds v. Bank*, supra: "The propriety of accumulating some surplus is too palpable to require extended discussion. When the capital stock of a bank is impaired, the deficiency must be made good by an assessment on the stockholders, and, in case

the deficiency is not made good within sixty days, proceedings may be instituted against it as in case of insolvent corporations. Hence, if such a corporation should divide all its profits and accumulate no surplus, any business loss would subject it to the hazard of a receivership and the loss of its corporate life. The danger is so apparent that of late years it has been common, on the formation of banks or trust companies, to pay in 50 or 100 per cent. in addition to the nominal capital stock, so that the corporation may begin business with a surplus. Some banks have accumulated so much of their profits that the surplus is from 10 to 30 times the amount of the capital stock. These banks stand the highest in the commercial world. Nor is their conduct illegal." Also in *Williams v. Telegraph Co.*, supra, the court says: "When a corporation has a surplus, whether a dividend shall be made, and, if made, how much it shall be, and when and where it shall be payable, rests in the fair and honest discretion of the directors, uncontrolled by the courts." And in *McNab v. McNab*, etc., supra, the same rule is announced: "That the rate of dividends to be paid and the amount of surplus to be retained by a corporation must rest in the fair and honest discretion of the trustees. \* \* \* Whether it was wise to accumulate all the earnings, instead of distributing part to the stockholders in dividends, was a question which rested in the discretion of the directors, and as to which we are called upon to express no opinion. The plaintiff for some time seems to have sanctioned that course. However, even if the course was continued against his opposition, there is nothing in the case before us which would give the court the right to interfere with the action of the directors."

This is the general rule applying in cases where there is no express power conferred by the directors with reference to the accumulation of a surplus, and must apply all the more effectively where, as in the case at bar, the whole matter is left to the discretion of the directors under the statute which constitutes the society's charter. This discretion, it is true, is not an arbitrary one. It must be exercised fairly and honestly, and, when it appears that the proceedings of the corporation are unfair; that its officers are acting wantonly and in bad faith, or in disregard of the rights of the members of the corporation relative to such reserve fund—the courts will intervene. In order to warrant this intervention, however, there must be alleged in the complaint facts which show that the directors are guilty of such misconduct, and are improperly diverting into a reserve fund money which the members of the corporation are entitled to have distributed to them as dividends, because, where discretion is given to create a reserve fund, unrestricted as to its amount, the presumption is that such a fund as the directors have reserved was reserved for a lawful and proper

purpose, and in entire good faith. Now, when the allegations of the complaint are examined, we find no facts set forth in it to meet the requirements of this rule. It is true that, in other parts of the complaint than this we have quoted, the pleader has averred facts from which he insists that the directors of the society acted in bad faith in endeavoring to exclude him as a member. But assuming this to be true, and that any action of the society or its directors in that regard was inoperative, and ineffectual, and that plaintiff is a member, yet this unsuccessful effort would not affect the question as to the reserve fund. It was not only necessary for him to show that he was a member, which, for the purpose of this case we have assumed, but, in addition, it was necessary for him to aver and show that, in violation of his rights as such member, the directors had refused or neglected to declare dividends to which he was entitled, without legal or just reason for so refusing, and notwithstanding they had in their hands ample funds which should be devoted to that purpose. It is only upon such a showing that a court can interfere with the discretion of the directors and compel a distribution. Now, recurring to the quoted allegations of the complaint, which in reality form the basis of plaintiff's claim that the directors acted in bad faith in creating this large reserve fund, and as grounds upon which the court should intervene to compel its distribution, we find that such allegations as are made consist of an erroneous view of the terms of the statute, or of conclusions or conjectures upon the part of the pleader, without any recital of the facts upon which they are predicated, and which facts, if they existed, should have been set forth, in order that the court might itself determine whether they sufficiently warranted an exercise of the intervention invoked.

To particularize: It is alleged that the directors have retained on dividend day an amount exceeding 5 per cent. of the net profits, to wit, more than \$2,000,000, and placed it in this reserve fund; that the society and the directors thereof have unlawfully and fraudulently refused to make provision for the disposal of said reserve fund in excess of \$100,000 by its by-laws or otherwise, as provided in the act of 1862. When simplified, this allegation amounts to nothing more than a declaration that no provision has been made to keep the reserve fund within \$100,000. But section 11 of the statute does not require this, and no interpretation of the pleader can change the terms of the law. The section declares that not less than 5 per cent. shall be retained for a reserve fund, of not less than \$100,000, and declares that the society may, when it exceeds that amount, provide for its distribution. There is no direction that more than 5 per cent. of the profits shall not be retained, or that the reserve fund shall not exceed \$100,000. As

to what the amount of either of these shall be is left entirely to the discretion of the directors. Neither is the allegation that no provision has been made in the by-laws or otherwise to dispose of any part of the surplus exceeding \$100,000 of any moment. The adoption of a by-law providing for a disposition of such surplus among the members, intermediate to the dissolution of the corporation, could only be necessary when the discretion of the directors to so distribute was to be exercised. Until then there could be no dereliction of duty in that respect, as there would be no necessity for its adoption. And it does not follow, because no by-law was passed relative to the intermediate disposition of any amount in excess of \$100,000, that the society has failed to pass by-laws for the distribution of the entire surplus fund upon dissolution of the corporation, which seems to be the only positive duty relative to the distribution of such surplus fund enjoined by the act under which the society was created. Of course, the fact that the plaintiff charges their refusal to provide for a distribution of this fund as "unlawfully and fraudulently" made adds nothing to the strength of the allegation. We have pointed out that there was nothing unlawful about it, and hence it could not be fraudulent.

It is alleged, however, in this connection, that the directors refused to direct such surplus distributed, for the purpose of appropriating and dividing it among themselves upon the dissolution of the corporation. This, however, is simply the opinion of the pleader. He states no facts which warrant its expression, and it amounts to nothing as an allegation of fraud. If they are not entitled to it in law, they cannot get it; and, if it belongs to the members, and the plaintiff is one of them, they will get it upon the final distribution, if an intermediate distribution is never made, no matter what the disposition of the directors may be, or whether the money is kept in a reserve fund or not.

It is further averred that it is unnecessary for the uses, benefits, or financial standing of said corporation that there should be kept in the reserve fund the enormous fund of \$2,500,000, or any other sum in excess of \$750,000. But this also is simply a conclusion of the pleader—the expression of his opinion upon the subject. Whether it is necessary or not to retain such a reserve fund is the very matter in question, and this is not to be determined from the pleader's opinion on the subject, but upon the statement of essential facts in the complaint from which the court can determine it. It is not enough for the pleader to state the legal effect or force of the facts—his conclusion upon them. He must aver them so that the court itself can reach a conclusion in the matter. *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Cleveland, etc., Ry. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515. If the facts were stated, the court

might determine from them, counter to the pleader's conclusion, that it was necessary to retain such reserve, or at least that the facts stated did not disclose that the discretion committed to the directors under the statute had been improperly exercised. And to some extent the plaintiff realized this, because his general allegation that the retention of such a reserve fund is unnecessary is followed by a recital of his reasons for deeming it so. As a basis for that conclusion, he avers that it is unnecessary for the reason that said society is not now indebted to any one except its depositors, and has no unpaid losses in its business, and because no banking corporation in the state carries a reserve fund in excess of \$1,000,000. But what is its indebtedness to its depositors? That it is indebted to them is conceded by the allegation, and, of course, is the fact, and it is almost entirely to conserve the interests of these depositors and protect them that a reserve fund is ever created. That is the principal liability of a banking corporation. The complaint on that matter only says generally that the society is indebted to them, but to what extent it is so indebted is nowhere averred. Whether it is to the amount of \$1,000,000 or \$60,000,000 is not stated. The court is left entirely in the dark on the subject. No court could say whether a reserve fund of \$2,500,000 was justified, in the discretion of the directors, unless some idea was conveyed in the complaint as to the amount of the deposits, and the condition upon which they were received and are payable by the society. There is no claim that there is any limit to the amount of deposits which this society might receive, and no information as to the actual deposits. The liability of the society and the danger of loss is proportionate to the amount for which it is liable to its depositors, and to give no information upon this subject is to furnish the court with no data from which it can determine whether the retention of a given reserve fund was wise, judicious, prudent, and necessary, or not. The larger the deposits, the larger should be the reserve fund to protect them, and no fund can be said to be excessive when no information is furnished as to the extent of the liability it is intended to protect.

Neither does the allegation of the complaint that the society has made no unpaid losses in its business aid the court. The purpose of a reserve fund is to provide against losses which may happen. The fact that the society has made no losses in the past is no guaranty that they may not be made in the future, and the reserve fund called on to pay them. The extent of the liability for such possible losses can only be determined from the amount of the deposits. If a given reserve fund is unnecessary and superfluous, it must be because it is disproportionate to the liability which it is created to protect, and whether it is so superfluous

or disproportionate can never be determined unless the court is informed of the amount of that liability—the amount due depositors. No information whatever in this regard is furnished by the complaint, and it seems clear that a statement that the only indebtedness of the society is to its depositors, without showing what that indebtedness is, fails to impart to the court very essential information from which it may determine whether it is an abuse of discretion on the part of the directors to retain a particular amount as a reserve fund.

The same may be said of the allegation that no other bank provides for a reserve fund exceeding \$1,000,000. This is no criterion of itself by which to determine whether the reserve fund of the defendant society is excessive or not. Aside from this statement, there is no data furnished in the complaint from which the court can make comparison between other banks and the defendant bank. The amount of deposits, or liability to other creditors of either, is not given. There is nothing averred of the relative proportion of business done by these other banks and the defendant society. What would be a legitimate reserve fund as to one might be unwarranted as to the other, and this would depend entirely upon a comparison of the volume of business done by both. Of this the complaint fails to speak. The disparity between some unnamed banks and the defendant society is alleged, without any data being given whereby a comparison might be made which would be pertinent to the question.

The last allegation in the complaint quoted needs no comment. It states no facts. It is solely a conclusion of law.

We have discussed all the allegations of the complaint upon which the right to have the reserve distributed is based, and, as they fail to state a cause of action, the demurrer to the complaint was properly sustained for that reason, and the judgment appealed from is affirmed.

We concur: BEATTY, O. J.; HENSHAW, J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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MENDELSON v. McCABE. (S. F. 3,218.)  
(Supreme Court of California. July 25, 1904.)  
INJUNCTION—CONTINUING TRESPASS—ALLEGATION OF INTENT.

1. Where plaintiff, having a right of way across defendant's lot, subject to the right of defendant to maintain gates at each end thereof, continually leaves the gates open, and declares his intention to continue to leave them open whenever he uses the way, defendant, though not showing substantial damages, is entitled to have plaintiff enjoined from using the way unless he closes the gates immediately after passing through them, because leaving them open is an invasion of defendant's right, and an injunction is necessary to prevent a total

destruction thereof by the acquisition of an adverse prescriptive right, and because injunction is necessary to prevent a multiplicity of suits.

2. A cross-complaint for an injunction, alleging that plaintiff refuses to desist from, and threatens to continue, leaving defendant's gates open each time he uses the right of way, sufficiently shows plaintiff's intention to continue the injurious acts, especially in view of the admission that the averments are true, and the absence of a special demurrer for uncertainty in the allegation of intent.

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Isaac Mendelson against Edward McCabe. From the judgment, defendant appeals. Reversed.

H. C. Wyckoff (J. E. Gardner, of counsel), for appellant. Lindsay & Netherton, for respondent.

SHAW, J. The defendant appeals from the judgment upon the judgment roll alone. The material facts, as found by the court and admitted by the pleadings, are as follows: The plaintiff was the owner of a right of way across the rear of the lot of the defendant, subject to the right of the defendant to maintain gates thereon at the points of ingress and egress to his lot, and the maintenance of such gates was necessary to inclose the lot of the defendant and permit of his reasonable enjoyment of the same. The defendant for several years prior to the action had maintained a light and easily opened gate at each end of the right of way, which did not unreasonably obstruct the use by the plaintiff of the right of way. For a short period before the action was begun, the plaintiff and his family had habitually left both gates open after using the way; and, when requested by the defendant to close them, the plaintiff refused to do so, and declared his intention to continue to leave them open whenever he used the way. The defendant, in a cross-complaint, set up these facts, and prayed that the plaintiff be enjoined from using the right of way unless he should properly and securely close and fasten the gates immediately after passing through them. The cross-complaint did not allege that any actual damage had been caused by the acts of the plaintiff and his family in leaving the gates open. The court, as conclusions of law, decided that neither the plaintiff nor defendant was entitled to affirmative relief, but that the defendant was entitled to recover his costs, and judgment was entered accordingly. The plaintiff has not appealed from the judgment.

The defendant contends that, upon the facts admitted and found, he should have been granted the affirmative relief prayed for in his cross-complaint, and in this contention we think he is correct. His right to maintain the gates for the protection of his premises would be worthless if the gates were continually left open when the way was not in use. The grant of the right of way being subject to the right of the defendant to keep

and maintain the gates, it follows that it is the duty of the plaintiff to close and fasten the gates after passing through them. If the defendant has the right to maintain the gates, the plaintiff has the right to open them only for the purpose of passing through and over the way, and then it is his duty to close them. *Goddard's Law of Easements* (Ben-  
nett's Ed.) p. 331; *Jones on Easements*, § 412; *Phillips v. Dressler*, 122 Ind. 414, 24 N. E. 226, 17 Am. St. Rep. 375; *Amondson v. Severson*, 37 Iowa, 602. The right to an injunction is not defeated by the mere absence of substantial damage from the acts sought to be enjoined. The acts of the plaintiff in leaving the gates open, if persisted in as he threatens, will constitute a continual invasion of the right of the defendant to maintain the gates, which, if continued for a sufficient length of time, will ripen into a right by prescription, which will destroy the defendant's right to maintain the gates, so that thereafter the plaintiff would have an unobstructed right of way, and the defendant's property would be deprived of the protection arising from the maintenance of the gates. Moreover, the only remedy, other than that of an injunction, for the injury arising from such continued trespasses, would be an action against the plaintiff for damages upon each occasion when he left the gates open. The damage in each case would be very small—probably insufficient to defray the expenses of maintaining the action not recoverable as costs. Such remedy is inadequate, and would require numerous petty suits, which it is not the policy of the law to encourage. The right to an injunction, therefore, is clearly established upon two grounds: First, because it is an invasion of his right, and an injunction is necessary to prevent a total destruction thereof; and, secondly, because it is necessary to prevent a multiplicity of actions. As was said in *Moore v. Clear Lake Waterworks*, 68 Cal. 150, 8 Pac. 816: "The interposition of a court of equity was required to prevent defendant's wrongful acts from ripening into a right, and on that ground alone the interference of a court of equity was properly asked and granted." This proposition is thoroughly settled in this state. *Learned v. Castle*, 78 Cal. 461, 18 Pac. 872, 21 Pac. 11; *Walker v. Emerson*, 89 Cal. 458, 26 Pac. 968; *Mott v. Ewing*, 90 Cal. 273, 27 Pac. 194; *Lux v. Haggin*, 69 Cal. 278, 10 Pac. 674; *Conkling v. Pacific Improvement Co.*, 87 Cal. 305, 25 Pac. 399. So, also, on the second point it has been said: "A trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction." *High on Injunctions*, §§ 697-700; *Kellogg v. King*, 114 Cal. 388, 46 Pac. 166, 55 Am. St. Rep. 74; *Smithers v. Fitch*, 82 Cal. 158, 22 Pac. 935. The case of *Smithers v. Fitch* is substantially identical with the present case.

It was necessary to show an intention on the part of the plaintiff to continue the injurious acts, and a reasonable ground to apprehend that he could do so, in order to establish the right to an injunction. The cross-complaint avers that the plaintiff refused to desist from, and threatened to continue, these acts. This is a sufficient showing on this point, especially in view of the admission that the averments are true, and the absence of a special demurrer for uncertainty in the allegation of intent. *Ball v. Kehl*, 87 Cal. 506, 25 Pac. 679; *Gardner v. Stroever*, 81 Cal. 150, 22 Pac. 483, 6 L. R. A. 90; *Coker v. Simpson*, 7 Cal. 341; *High on Injunctions*, § 18.

The court below should have granted the injunction as prayed for in the cross-complaint.

The cause is remanded, with instructions to the court below to amend the judgment by inserting therein a clause to the effect that the plaintiff be enjoined from using the right of way across the defendant's lot, as described in the findings, unless the said plaintiff shall properly and securely close and fasten the gates at each end of said right of way immediately after passing through them, or either of them, and upon each occasion of such use.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

144 Cal. 200

# PEOPLE v. NIELL (Cr. 1,172.)

(Supreme Court of California. July 23, 1904.)

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—DISORDERLY CONDUCT—ARREST WITHOUT WARRANT—DRUNKENNESS—INSANITY—UNCONSCIOUS ACT—CAUTIONARY INSTRUCTIONS—WITNESSES—BIAS—CROSS-EXAMINATION.

1. Where defendant was arrested by a night watchman, at the direction of a city marshal, while he was loudly cursing and swearing within the hearing of women, and after he had several times been warned to desist, he was properly arrested without a warrant.

2. Where defendant, after being properly arrested by an officer for disorderly conduct, assaulted the officer because he would not at once release him, and not because the officer was not going to take defendant before a magistrate according to law, defendant was not entitled to claim that the assault was in self-defense.

3. In a prosecution for assault with a deadly weapon, the fact that defendant pleaded that he was unconscious of the act, as distinguished from the defense of insanity, did not render an instruction that the burden of proof was on defendant where the defense of insanity is relied on prejudicial.

4. An instruction in a prosecution for assault with a deadly weapon that the defense of insanity should be received with caution, etc., applied with equal force where the defense was that defendant was unconscious of his act, and was not prejudicial error.

5. Where, in a prosecution for assault with a deadly weapon, defendant claimed that he was unconscious of his act by reason of drunkenness, an instruction that evidence of drunkenness can only be considered for the purpose of determining the degree of the crime, and for this



purpose "it must be received with great caution," was not reversible error.

6. Where defendant, after being arrested for a breach of the peace, committed an assault with a deadly weapon on the officer in charge of him, it was immaterial, in a prosecution for the latter offense, that he had never been prosecuted for the former.

7. In a prosecution for assault with a deadly weapon, error of the court in refusing to permit defendant's attorney to ask the city marshal as a witness, on cross-examination, if he did not "visit defendant in jail for the purpose of securing evidence—getting a confession from him," was not prejudicial where the marshal's interest in the prosecution was otherwise fully shown.

Commissioners' Decision. Department 1. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Lawrence D. Niell was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Thos. S. Ford, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and George L. Jones, Dist. Atty., for the People.

GRAY, C. The defendant was convicted of assault with a deadly weapon, and sentenced to the county jail for 18 months. He appeals from the judgment and from an order denying him a new trial.

The defendant was drunk and disorderly in Nevada City, and while in that condition he was, by direction of the city marshal, taken into custody by the night watchman between the hours of 8 and 9 p. m. While on the way to the calaboose, the night watchman then having hold upon defendant, the defendant demanded that he be released, and drew a pocket knife, threatening to kill the watchman if the demand was not complied with. The watchman refused, and the defendant struck with the knife, wounding the watchman severely in the shoulder. The defendant was then knocked down with a cane, manacled, and taken to the calaboose. He urges two defenses. He says the facts show that the cutting was done in self-defense while resisting an unlawful arrest, and also that he was unconscious at the time of the alleged offense. He contends that the evidence warranted a verdict in his favor on both grounds.

We think the evidence ample in every respect to support the verdict. Defendant's conduct was that of a man conscious of what he was doing. He was intoxicated to a considerable degree, but there is no evidence, as now claimed by him, that he was in the throes of epilepsy at any time during the fracas. Whether he was in fact unconscious, as claimed, was a question for the jury; and, the evidence as to that being conflicting, we cannot interfere with the verdict. That the arrest was made while the defendant was loudly cursing and swearing within the hearing of women, and to the breaking of the peace, and after he had several times been warned by the marshal to desist and go home, also appears. An ar-

rest without a warrant under such circumstances was altogether lawful and proper. The assault was not made because the watchman was not going to take the defendant before a magistrate in accordance with the law, but because the watchman would not at once release him in disregard of the law requiring his detention until some reasonable disposition could be made of the prisoner under the law.

The instruction that the burden of proof is on defendant where the defense of insanity is relied on was, as a proposition of law, correct. It is contended, however, that the defense was not insanity, but that the defendant was unconscious of the act. But this cannot render the instruction prejudicially erroneous. The theory of the defense on the trial seemed to be that the defendant was unconscious from the dual effects of liquor and epilepsy. The jury could not fail to see that the instructions regarding insanity related to that peculiar mental condition that the defendant claimed to have been in, by whatever name it might be called. And, thus understood, it was correct to say that the burden was on him to establish the peculiar mental condition which he relied upon as a defense. Men are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem they must impart that knowledge by affirmative proof. The rule as to the burden of proof was correctly stated, whether it be applied to insanity or to unconsciousness as a defense; and the refusal of instructions recognizing the opposite rule was proper.

As to the cautionary instruction concerning the defense of insanity, which was copied from the case of *People v. Methever*, 132 Cal. 330, 64 Pac. 481, it has often been considered by this court, and, while it has been disapproved, yet no case has ever been reversed on account of the giving of it. See the cases cited in *People v. Methever*; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Suesser* (Cal.) 75 Pac. 1093; *People v. Manoogian*, 141 Cal. 592, 598, 75 Pac. 177. The instruction applies with equal force to any aberration of mind that may be claimed as a defense including unconsciousness, and is not ground for reversal. Instructions to the effect that evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose "it must be received with great caution," have also been often considered by this court, and it is apparently well settled that a judgment will not be reversed for the giving of such an instruction. *People v. Vincent*, 95 Cal. 428, 30 Pac. 581; *People v. Methever*, supra. As was said, however, in *People v. Suesser*, supra, of the instruction regarding the care with which the defense of insanity should be regarded, so of this; so far as it cautions

the jury that evidence of drunkenness shall be received with caution, "It would be better if such instruction were omitted altogether." We know of no rule of law which, in view of our constitutional provision as to charging juries upon matters of fact, justifies the giving of such instructions, but we cannot see that the giving of the same could have affected the substantial rights of the defendant. This information was for assault with a deadly weapon "with intent \* \* \* of his malice aforethought to kill and murder," and involved the same intent, and evidence of intoxication applied to it in the same way as in a murder case.

The ordinance introduced in evidence did not provide that the marshal should commit to the city prison a person arrested for a breach of the peace, as is claimed by appellant. The introduction of this ordinance could not have harmed the defendant, and we see no prejudicial error in the ruling of the court in connection therewith.

As to the alleged misconduct of the district attorney, there is nothing in the appellant's contention worthy of a discussion.

That the defendant was never prosecuted for the alleged breach of the peace for which he was arrested was not a material matter. The testimony sought from the witness George Nihell to the effect that the defendant did not know, on the morning following the assault, what he had done the night before, called for a mere opinion of the witness, based on what the defendant stated to him, and was clearly incompetent.

The testimony of Shearer as to the mental condition of defendant on the night of the assault was not objected to on the ground that it was incompetent, but only on the ground that it was not rebuttal. This last ground is not urged in appellant's brief, and would not be good if it was urged.

The defendant's attorney asked the marshal, Shearer, on cross-examination, if he did not visit the defendant in jail "for the purpose of securing evidence—getting a confession from him." The court erroneously sustained an objection to this question. It was asked for the purpose of showing the interest the marshal was taking in the prosecution of defendant, and was pertinent to the question of the weight of his testimony. The court should have allowed this question undoubtedly. However, the interest of the marshal in the prosecution of the case was very clearly shown, and we think an affirmative answer to the excluded question could not have added anything of importance to the weight of the circumstances already showing such interest. It is not often that a case will be reversed for error of the court in excluding evidence that can have no other bearing on the case except to disclose the interest of a witness. It is sometimes done, however, and it would always be more satisfactory if the trial judges would give full latitude to cross-examinations where they are

proceeding along pertinent lines. The error here is not of such vital importance as to call for a reversal.

Some other matters are urged by appellant, but they are not deemed of sufficient importance to warrant extended discussion.

The judgment and order should be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 205

TINGLEY v. TIMES-MIRROR CO. (L. A. 1,278.)

(Supreme Court of California. July 23, 1904.)

**LIBEL—VENUE OF ACTION—CORPORATION DEFENDANT.**

1. Under Const. art. 12, § 16, providing that a corporation may be sued in the county where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of the corporation is situated, a newspaper publishing corporation is properly sued for libel in the county where the paper containing the libel was circulated, that being the residence of plaintiff, though the principal place of business of the corporation was in another county.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; B. S. Torrance, Judge.

Action by Katherine Tingley against the Times-Mirror Company. From an order denying a motion to change the place of trial, defendant appeals. Affirmed.

W. F. Fitzgerald and Hunsaker & Britt. for appellant. J. W. McKinley, for respondent.

CHIPMAN, C. Action for libel. Defendant is a corporation organized under the laws of this state, with its residence and principal place of business in the city of Los Angeles. The action was brought in the superior court of San Diego county, the residence of plaintiff, and it is alleged in the complaint that the defendant "printed, published, and circulated in the county of San Diego numerous copies of the paper containing said article, and circulated many thousand copies of the paper containing said article in other portions of the state of California." Defendant moved to change the place of trial to Los Angeles county. The motion was denied, and defendant appeals.

Section 16, art. 12, of the Constitution of this state, provides that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such cor-

poration is situated, subject to the power of the court to change the place of trial as in other cases." This provision applies to torts as well as to matters of contract. *Lewis v. S. P. Co.*, 66 Cal. 209, 5 Pac. 79; *Miller & Lux v. Kern Co. Land Co.*, 134 Cal. 586, 66 Pac. 856. But the defendant contends "that the words 'or where the obligation or liability arises or the breach occurs' refer to some particular place; as, for instance, the case of a railroad corporation wrongfully ejecting a passenger from one of its trains, or the case of a lineman receiving injuries from a defective insulation of the line of a company incorporated for the purpose of transmitting electric power, or the case of a person whose lands are damaged by the bursting of the pipe line of a company incorporated for the purpose of supplying water to a community. In these and similar cases the person having a right of action could bring his suit either in the county where the damage was sustained or in the county in which the defendant corporation had its principal place of business." It is contended that the case here is one where the wrong complained of consisted in printing, publishing, and distributing the alleged libelous article, which it is claimed was done in Los Angeles. We cannot agree with appellant that the case here is in no sense parallel with cases given as illustrations of its construction of the Constitution. A corporation formed to publish a newspaper whose circulation is by the publisher extended into counties and places other than that of the principal place of business of the corporation is in a position to commit an injury by a libelous publication precisely as the electrical or water corporation or railroad company that extends its lines of operation beyond the boundaries of its residence or principal place of business is in position to commit an injury in effecting its objects. The newspaper corporation avails itself of the United States mails, the express companies, the railroad companies, and other established lines of communication and dissemination, to send broadcast its publications. These means of communication with the general public by the newspaper are in practical effect the same as the means used by railroad companies, water and electrical companies, to reach their patrons. The liability arises where the injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff resides, if, as is alleged, the plaintiff has published and circulated the libelous article there; and there it is that plaintiff is most injured by the publication. In the case of *Brady v. The Times-Mirror Company*, 106 Cal. 58, 89 Pac. 209, the court, in speaking of the construction to be placed upon section 16, art. 12, of the Constitution, said: "Under the provisions of this section, if the action had been brought against the Times-Mirror Company alone, the plaintiff's

right to have the action tried in San Diego would be undoubted." It is claimed that this expression in the opinion is obiter. In that case the plaintiff had joined certain individuals as defendants, and strictly what was said was perhaps not necessary to the decision. Of its correctness, however, we have no doubt. In our opinion, libel may be maintained in the county in which the plaintiff resides, when the newspaper is circulated in that county, though published in another county, which latter is the principal place where defendant's business is located. *Brady v. Times-Mirror Co.*, supra. It is advised that the order be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

144 Cal. 266

TUCKER v. BARNUM, County Auditor. (S. F. 3,715).\*

(Supreme Court of California. July 27, 1904.)

TOWNSHIPS—COMPENSATION OF OFFICERS—REGULATION BY POPULATION—FEES.

1. Const. art. 11, § 5, providing that the Legislature shall regulate the compensation of county, township, and municipal officers, in proportion to duties, and for this purpose may classify the counties by population, does not prevent the classification of townships by population for the purpose of fixing the compensation of township officers, where they are compensated by salary, and not by fees.

2. County Government Act (St. 1901, p. 712, c. 233) § 164, subd. 13, providing that, while justices of the peace in townships of 6,000 population may receive fees in criminal cases up to \$140 a month, those in townships of a less population may not receive such fees to exceed \$90 a month, contravenes Const. art. 11, § 5, providing that the compensation of officers shall be regulated "in proportion to duties."

Beatty, C. J., and Van Dyke and Shaw, JJ., dissenting.

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action in mandate by E. H. Tucker against H. E. Barnum, auditor of Fresno county. Judgment for plaintiff. Defendant appeals. Affirmed.

Johnston & Jones, Frank Kanke, and S. O. St. John, for appellant. M. H. Harris, Jos. A. Burns, W. D. Tupper, and Geo. Cosgrave, for respondent.

HENSHAW, J. Mandamus. Plaintiff is a justice of the peace of the Fifth Judicial Township of Fresno county, and seeks a writ of mandate commanding the defendant, as auditor of said county, to allow his claim for the sum of \$120; being his alleged compensation for trying 40 criminal cases during the month of March, 1903, at the

\*Rehearing denied August 26, 1904.

rate of \$3 for each case. The writ was granted, and defendant appeals.

The court found that there are 13 judicial townships in the county, and that the Fifth Township has a population not to exceed 3,500, and that the county belongs to the seventh class; that the plaintiff during the month of March, 1903, disposed of 40 criminal actions which had been commenced in his court; that he was entitled to fees in the sum of \$120 for said services; that defendant allowed the claim for \$90, and refused to allow any greater sum. Appellant contends that plaintiff's claim is not a proper legal charge for any greater sum than \$90, as provided by subdivision 13, § 164 (St. 1901, p. 712, c. 233), amending the county government act of 1897, subd. 13, § 166 (St. 1897, p. 515, c. 277), by which latter act justices of the peace were given "the fees allowed by law."

A general fee bill (St. 1895, p. 267, c. 207) fixed the compensation of justices of the peace throughout the state "for all services in a criminal action or proceedings, whether on examination or trial, three dollars," but limiting the total fees to \$75 in any one month in misdemeanor cases (St. 1895, p. 272, c. 207). This act was considered in *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372, the effect of the decision being to leave in force the fee bill established by the act, but removing therefrom the limitation attempted to be fixed upon the amount of fees the justice might retain; and this act thereafter fixed the compensation of justices of the peace up to the time the county government act of 1901 went into effect, amending the act of 1897, which later act, as already stated, provided that in counties of the ninth class, to which Fresno county then belonged, justices should receive "the fees allowed by law," which was the compensation fixed by the act of 1895. The act of 1901 provides in the fee bill of counties of the seventh class, to which Fresno county then belonged, as follows: "Justices of the peace, the fees provided by law: provided, that in townships of 6,000 population or more, any or all charges in criminal cases shall not exceed one hundred and forty dollars per month for any justice or other officer exercising the judicial functions of justices of the peace. They shall receive the fees allowed by law in civil cases. In townships having a population of less than 6,000, they shall receive fees allowed by law not to exceed ninety dollars per month for criminal cases. They shall receive the fees allowed by law in civil cases." The act of 1897, as amended in 1901, classifies the counties of the state by population for the purpose of regulating the compensation of the officers, and to this no objection is made. St. 1901, pp. 685, 687, et seq., c. 234. But it is claimed by plaintiff that section 164 of the act of 1901, p. 712, subd. 13, c. 234, goes further than is warranted by the

Constitution, and "subdivides the class for the purpose of fixing the fees of township officers of Fresno county, and places a limitation on the earnings of some of the justices not placed upon others. The Legislature has attempted to regulate the compensation of the township officers not simply according to their duties, as ascertained by a classification of counties by population, but in accordance with the population of the several townships within the county," the effect of which is to allow a justice of the peace in one of the classified townships \$140 for performing certain services in criminal cases, and to another justice of the peace in another township \$90 for performing precisely similar services. It will be observed, too, that the act gives the justices all the fees in civil cases, regardless of population. The claim that the act of 1901 is void in its entirety is not insisted upon, the question being otherwise settled in *Beach v. Von Detten* (Cal.) 73 Pac. 187. It is, however, contended by plaintiff that the provisions of the act in question violate article 1, § 2, of the Constitution, that "all laws of a general nature shall have a uniform operation"; also article 4, § 25, that "the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Twenty-Ninth. Affecting the fees or salary of any officer. \* \* \* Thirty-Third. In all other cases where a general law can be made applicable"; also, article 11, § 5, that "the Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population. \* \* \*

We think respondent's objection to subd. 13, § 164, of the act under consideration, is well founded. It is recognized—indeed, it has been said that the conviction is irresistible—that the Constitution has prescribed a single mode which must be adopted in fixing the compensation of officers of counties, and that mode is to adjust the compensation in accordance with their respective duties under a classification of counties by population made for this purpose. *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372. If, within the view of the framers of the Constitution, this was the proper mode for fixing the compensation of county officers—if there be no constitutional inhibition to the contrary—no reason can be perceived why a like method of classification of townships should be other than proper. And, notwithstanding the dictum in *Sanchez v. Fordyce* (Cal.) 75 Pac. 56, we can discover no such

inhibition in the Constitution. By the Constitution the Legislature is required to fix the compensation of county officers in a particular mode, but the method of fixing the compensation of township officers is left optional with it; the exercise of its choice of modes, however, being limited by the general constitutional provisions above quoted. The Constitution declares that the Legislature shall regulate the compensation of township as well as of county officers in proportion to their duties, and for this purpose may (must) classify the counties by population. That the Legislature may adopt the same scheme made applicable to counties, and classify townships by population for the same purpose, would seem to be not only permissible, but a course even suggested by this language. So long as the Legislature sees fit to compensate township officers for services performed under the system of fees, no occasion for such classification of townships by population need arise; but, when the Legislature undertakes to salary such township officers, it is difficult to perceive how this can fairly be done, within the requirements of the Constitution, if it were not permissible so to classify townships. The objection, therefore, to the section under consideration, comes not from the fact that it so classifies townships, but from the fact that within this classification there is a violation of the constitutional provision that the Legislature shall regulate the compensation of all officers "in proportion to duties." If two justices of the peace in townships of different population shall each dispose of 50 criminal cases in one month, they have rendered identical service, and that one, because he is a justice in a township of a smaller population than another, shall receive less compensation for identical services than shall the other justice residing in a township of larger population, is a manifest violation of the constitutional provisions to which we have averted. The law under consideration falls, therefore, not because it classifies townships by population for the purpose of regulating the compensation of township officers, but because, within the classification so made, it does not regulate the compensation "in proportion to duties."

For this reason the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

We dissent: BEATTY, C. J., VAN DYKE, J.

ANGELLOTTI, J. I concur in the judgment and in the opinion of Mr. Justice HENSHAW. A difference in the population of the townships of a county or class of counties may justify a difference in the salaries to be paid to the township officers of the re-

spective townships, and the determination of the Legislature as to what salaries constitute a compensation in proportion to duties, based upon differences in population, is probably binding upon the courts. But where a system of fees is prescribed by the Legislature for the compensation of township officers—as, in this case, where \$3 is fixed as the compensation of justices of the peace of Fresno county "for all services in a criminal action or proceeding, whether on examination or trial"—I can see no warrant, under our constitutional provision requiring the compensation to be regulated in proportion to duties, for prescribing different limitations as to the aggregate amount to be collected for such services in any one month, at such rate so fixed by law, by the justices of the various townships of such county, simply because of a difference in the population of such townships.

SHAW, J. I dissent. I concur in that part of the opinion of Mr. Justice HENSHAW which holds that the Legislature has the power to classify by population the townships within any given class of counties, in order to regulate the compensation of the officers of such townships. But I cannot agree to the proposition that the law in question violates the constitutional requirement that the compensation shall be regulated in proportion to duties. The power of the courts to declare an act of the Legislature unconstitutional requires the utmost delicacy in its exercise, and is never to be exerted except when the conflict between the statute and the Constitution is palpable and incapable of reconciliation, and, where there is a reasonable doubt whether the act is repugnant to the Constitution, the court should not pronounce it unconstitutional. *Stockton, etc., Co., v. Stockton*, 41 Cal. 159; *Bourland v. Hildreth*, 26 Cal. 161; *People v. Sassovich*, 29 Cal. 480; *Brooks v. Hyde*, 37 Cal. 375; *University v. Bernard*, 57 Cal. 613; *People v. Hayne*, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211. "In passing upon the constitutionality of the statute, we are not required to imagine some possible contingency in which its provisions may conflict with the Constitution, but we should determine whether, in its general scope, it is within the province of the lawmaking power." *Woodward v. Fruitvale*, 99 Cal. 562, 34 Pac. 239.

It will be conceded that the Legislature, in fixing the compensation of officers, is not required to provide a specific compensation for every specific service. It may provide specific compensation for certain services, and require other services for which no specific compensation is provided; it being then presumed that the Legislature intended that the whole of the service should be performed in consideration of the compensation provided for the particular service for which a fee is given. It is also competent for the Legisla-

ture, after a salary or fee is once fixed, and the officer has entered upon his term, to provide additional duties which he must perform without any additional compensation. In none of these cases can it be held that the compensation is not in proportion to duties.

It is apparently conceded that a law for the compensation of township officers would be valid if, for all the townships in a class of counties, it provided that each justice should receive \$3 for each criminal case, not exceeding a fixed sum in any one month, and that for the excess of services in any month he should receive nothing. It was so held in *Green v. Fresno*, 95 Cal. 332, 30 Pac. 544. The invalidity of this particular statute is said to lie in the fact that the maximum is larger in the larger townships than in the smaller class. This, it is said, makes it possible that two justices, in townships of different classes, may, in some one or more months of the term, each dispose of 50 criminal cases, for which duty one would receive \$30 less than the other, and therefore the compensation of either, as compared with the other, would not be in the same proportion to the duty required, and the law would not be uniform in operation. It is perfectly obvious that it is impossible for the Legislature to devise a scheme of compensation, which, if judged by the possibilities of any one month, or by exceptional cases, would be either in proportion to duty or of uniform operation. A few illustrations will demonstrate this proposition. If the law provided that justices in each of the townships should receive the fees provided by law, not exceeding \$100 in any one month, or that each should receive a certain fixed sum as a salary, or that each should receive whatever amounts he should earn, at \$3 for each criminal case, or a fixed sum for each hour occupied in official duty, in either case it would be subject to the same contingencies. One justice might have a preliminary examination, or a case of criminal libel, which would occupy a month, while during the same month another would have 50 petty misdemeanors to which the defendants would plead guilty. The first would obtain \$3 for his month's work, and the other \$150, if there were no limit, or, if there was a limit of \$140, one would receive the full maximum, while the other would get but the paltry \$3. One would be occupied continuously for a month, while the 50 pleas of guilty would require but a few hours. So, if the compensation were so much per hour, the capacity of men to dispatch business being unequal, one man might dispose of an important case in two weeks, while another would require a month for the same work. The public service would be the same, but the more capable man would receive only one-half as much as his inefficient colleague. In the case of a salary the service would vary, while the salary would remain the same. The conclusion is inevitable that some other standard must be applied, and greater

liberty allowed to the Legislature. If a month is taken as a convenient division of time by which to apportion the compensation allowed, the scale need not be so nicely adjusted that in each month the compensation will be in exact proportion to the duty performed in that month. The amount is not so fixed on any theory that the duty to be performed will not vary either in amount or cost of performance from month to month. On the contrary, the Legislature is presumed to take a year, or an entire term, and to consider the total service likely to be required for such year or term, and to give such compensation for the year or term as it believes sufficient. The division into monthly payments is merely for convenience, and has no just relation to the value of the services performed for any particular month. So, also, in the case of fees, they are not fixed on the theory that each fee represents the reasonable value or cost of the named service in any single instance, or even the average cost or value, but because it is believed that for an entire term the fees allowed will provide a reasonable compensation for all official services required.

The court has no right to say that the validity of a law for the compensation of officers must depend upon the possibility, or even the certainty, that there will be special instances in which it will operate unequally. The Legislature cannot take these special and unusual cases into account, so as to legislate especially for them. It can act only with reference to usual and ordinary conditions and general averages. The court, in determining the validity of legislative action on this subject, instead of searching for possible or actual instances of inequality or lack of uniformity, should rather inquire if it may not be true that in the long run, and in the average of cases, there will be substantial uniformity of operation. The Legislature, instead of considering the possible effect of the plan for a possible month, should, and doubtless did, consider the average conditions for an average year or term. Many contingencies may be supposed, different from that supposed in the prevailing opinion. For instance, it may be that in each class of townships there would be in some months less, and in some months more, than the maximum allowed for the class; that the average amount received for the year in the larger class would be \$1,200, and in the smaller class \$900; and that, in the months when the number of cases exceeded the maximum, the total excess in the larger townships would be 120 cases, and in the smaller 90 cases. Neither would receive any specific compensation for these extra duties, but the amount of such service required would bear the same proportion to the compensation received in the one case as in the other, and the compensation therefore would be in proportion to duties, and the law would be of uniform operation. It cannot be said that this is an

impossible condition, and, as the court cannot declare a law unconstitutional unless the repugnancy is clearly apparent, I think it is clear that in this case the act of the Legislature should be declared valid.

In 1883 the Legislature, in pursuance of section 5, art. 11, of the Constitution, endeavored to fix the compensation of officers in proportion to duties. At nearly every session since that time there has been either an entire new law on the subject enacted, or a revision or amendment of many of its sections. It has been the general understanding of both the legislators and of the courts that such legislation as that here involved was valid, and up to this time it has not been questioned. It is true that this long-continued acquiescence does not remove any substantial objection, but it should at least require careful consideration before deciding such provisions invalid; and where, as in this case, it can only be declared invalid by supposing unusual and exceptional cases, it is the plain duty of the court to give the Legislature the benefit of the doubt, and presume the conditions are such as would justify the legislation in question. The effect of this decision will be to declare a large part of the present county government act invalid, as far as it affects township officers.

If the principle of the prevailing opinion is carried out to its logical conclusion, it will apply with equal force to the laws regulating the compensation of county officers in the different classes of counties. For it must be admitted that the power to classify counties for that purpose, though given by a specific declaration to that effect, is of no greater force, with respect to the different classes of counties, than is the power to classify townships, with respect to the different classes of townships. Both are equally subject to other constitutional restrictions, and must be exercised accordingly. Laws passed to regulate the compensation of county officers in two or more classes of counties must fix the compensation as nearly in proportion to duties, and be as uniform in operation, as laws providing for the compensation of township officers in two or more classes of townships. Therefore if a township law of this nature is to be declared invalid whenever it can be demonstrated or reasonably supposed that an officer of one class may not or does not receive as much compensation for some particular month, or for some particular duty, as the same officer of another class for a like amount of service, then, by the same principle, it must be held that a law fixing the compensation of the county officers of two or more classes of counties is unconstitutional, if it does not give to an officer of one of the classes the same compensation for a particular time or specified duty as it gives to the same officer of another class of counties for substantially the same service. An examination of the provisions for the compensation of the county officers in the several classes

of counties will disclose many inequalities of this character, and, upon the principle here established, the provisions of the county government law as to compensation of many of the officers would be declared unconstitutional.

For these reasons I am of the opinion that the law is constitutional.

144 Cal. 276

McCAULEY v. CULBERT, County Auditor.  
(Sac. 1,240.)

(Supreme Court of California. July 27, 1904.)

CONSTITUTIONAL LAW—CHANGING COMPENSATION OF OFFICERS.

1. County Government Bill (St. 1903, p. 201, § 192, subd. 13), in fixing the compensation of justices of the peace of townships at a monthly salary, varying according to a classification of townships by population, in place of the prior fees, does not, in the case of a justice whose compensation is not thereby increased, contravene Const. art. 11, § 9, prohibiting increase of an officer's compensation after his election and during his term of office.

In Bank. Appeal from Superior Court, Amador County; R. C. Rust, Judge.

Action in mandate by James McCauley against C. L. Culbert, auditor of Amador county. Judgment for petitioner. Defendant appeals. Affirmed.

C. P. Vicini, for appellant. Wm. J. McGee and W. H. Willis, for respondent.

HENSHAW, J. Petitioner, as justice of the peace in and for township No. 2 of Amador county, brought his action in mandate against the defendant auditor to compel him to draw his warrant in favor of the petitioner upon the county treasurer of Amador for the sum of \$35 in payment of his salary as justice of the peace for the month ending May 1, 1903, pursuant to the provisions of the county government bill (St. 1903, p. 201). Section 192, subd. 13, of this act, classifies townships by population, and fixes the monthly salary for justices of the peace and constables in the respective townships so classified. Judgment passed for petitioner, and the auditor appeals.

Two propositions are advanced upon the appeal. First, that this amendment is repugnant to the Constitution, which prohibits the classification of townships by population for the purpose of fixing the compensation of township officers. This proposition has been disposed of in the case of Tucker v. Barnum, S. F. No. 3,715 (recently decided) 77 Pac. 919. The second contention of appellant is that the law is, at least, inapplicable to the case of petitioner, for that it increases his compensation after his election and during his term of office, and thus violates article 11, § 9, of the Constitution. There is nothing upon the face of the record here presented to show that such is the fact, and the finding of the court is to the effect that the salary pro-

vided for is not an increase of the salary of the petitioner after his election and during his term of office, but is merely a different mode adopted by the Legislature of compensating such officer. "And the court further finds that the evidence introduced has not proven that said act of the Legislature increases the salary of petitioner after his election and during his term of office." Within the limits of the constitutional restriction above cited, the Legislature has the power to change the mode of compensation. In *Vall v. San Diego County*, 126 Cal. 35, 58 Pac. 392, it was held that in the case of the county surveyor a legislative change in his compensation from fees to a salary after his election and during his term of office was legal. In the case at bar the Legislature has made a like change in the form of compensation, and the finding of the court in this case is conclusive that it is not an increase of compensation, and therefore not violative of the Constitution.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 224

Ex parte DICKEY. (Cr. 1,123.)

(Supreme Court of California. July 25, 1904.)

CONSTITUTIONAL LAW—POLICE POWER—LIMITING CHARGES OF EMPLOYMENT AGENTS.

1. St. 1903, p. 14, c. 11, § 4, limiting the compensation which an employment agent may receive to 10 per cent. of a month's wages in the employment furnished, is not within the police power, but contravenes the constitutional guaranty of protection in the possession of property. Shaw, J., dissenting.

In Bank. Application of C. E. Dickey for a writ of habeas corpus, directed against the sheriff of the city and county of San Francisco, who restrains petitioner of his liberty per order of George H. Cabanis, police judge. Petitioner discharged.

William H. Davis, for petitioner. H. W. Hutton, for respondent.

HENSHAW, J. By this writ the petitioner attacks the constitutionality of an act of the Legislature defining the duties and liabilities of employment agents, making the violation of the act a misdemeanor, and fixing penalties therefor (St. 1903, p. 14, c. 11), and in particular section 4 of this act, under which he was charged and convicted of a misdemeanor.

Section 4 reads as follows: "It shall be unlawful for an employment agent in the state of California to receive, directly or indirectly for registration made or for information or assistance such as is described in section two hereof, any money or other consideration which is in value in excess of ten per cent. of the amount earned, or

prospectively to be earned, by the person for whom such registration is made or to whom such information is furnished, through the medium of the employment regarding which such registration, information or assistance is given, during the first month of such employment: provided, that said value shall not be in excess of ten per cent. of the amount actually prospectively to be earned in such employment when it is mutually understood by the agent and person in this section mentioned, at the time when said information or assistance is furnished, that said employment is to be for a period of less than one month." Whether or not the act be a valid exercise of the police power is the single question here calling for determination.

As to the scope of the legislative exercise of the police power, the Supreme Court of the United States, in the recent case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, discussing the question of the right of one to pursue an ordinary and legitimate vocation, to acquire property, and to make contracts to that end, says: "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'" And Judge Cooley—*Constitutional Limitations* (7th Ed.) p. 337—declares: "The limit to the exercise of the police power in these cases must be this: The regulation must have reference to the comfort, safety, or welfare of society." In the same connection this court has said (*Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674): "A police regulation or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that harm may not come to the public, or that the threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the



power of taxation for revenue." It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation. The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals. Nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts—a right free to those who follow other vocations—and arbitrarily to fix the compensation which he may receive for the services which he renders.

Here, then, is laid down a most drastic rule governing the conduct of a man in the prosecution of a harmless, legitimate, and beneficial business. Under the Constitution of the United States and of this state, the protection guaranteed in the possession of property and in the pursuit of happiness is extended, as of necessity it must be, to cover the right to acquire property, and the right to acquire property must and does include the employment of proper means to that end. Says Judge Cooley (Constitutional Limitations [7th Ed.] p. 889): "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. This general right cannot be done away with." And this court has said (*Ex parte Newman*, 9 Cal. 517): "The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire. The right to acquire must include the right to use the proper means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The Legislature therefore cannot prohibit the proper use of the means of acquiring property, except the peace and safety of the state require it." In strict accord with this is the language of the Supreme Court of the United States in *Holden v. Hardy*, supra: "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision [due process of law]. Indeed, we may go a step further, and say that, as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or hav-

ing as their object the acquisition of property, would be equally invalid." And says Judge Cooley, treating of this same subject-matter: "The doubt might also arise whether a regulation made for one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negated."

The application of these principles to the statute under consideration leads to the following irresistible conclusion. The petitioner is engaged in a harmless and beneficial business. As part of his "property" in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon any one to employ him, and who so seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to all legitimate occupations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted—"entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities" of one class of citizens "in a manner before unknown to the law." For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority

therefor, "instead of calling upon others to show how and where the authority is negated." And where, it may be asked, could the line be drawn, if the Legislature, under the guise of the exercise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessities of life, be restricted in their right of contract, and consequently in their profits, to 10, 5, or 1 per cent.? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the Legislature fix the price and value of the services of labor? The law is clearly one of those, the danger of whose enactment was foreshadowed by this court in *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664, when it said: "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurk no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

We have not, in this discussion, been called upon to consider adjudications from any sister states, for the reason that no such enactments as this have been passed by their Legislatures, or, if passed, have come before their courts for review. We have been referred to no cases by the respondent. In Illinois, however, an act not dissimilar in character was passed, requiring that all coal produced in the state should be weighed on scales at the mines, and that such weight should be taken as a basis for computing the wages of the operators, and prohibiting the owners and employes from contracting for labor on any other basis. In *Milliet v. People*, 7 N. E. 631, 57 Am. Rep. 869, the defendant was convicted of having failed to furnish a track scale as provided in the act, and he appealed. In stating the proposition the Supreme Court of Illinois said: "The question is thus presented whether it is competent for the General Assembly to single out owners and operators of coal mines, as a distinct class, and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make." The court, in its discussion, quoted Judge Cooley, as above, and, in declaring the law invalid, said: "What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which

all other property owners and agents may contract?"

There are but two classes of legislation standing upon the books which bear any similarity to the law here under consideration, but an examination of those classes discloses that the similarity is superficial and not substantial. The first is found in the laws against usury, not recognized in this state, saving in the particular case of pawnbrokers, who are forbidden to charge more than 2 per cent. a month interest. But usury laws, without regard to their wisdom, are a heritage to us from the common law, which we have adopted as the basis of our jurisprudence, and had their origin in the somewhat spiritual and theological notion that it was against the law of God that a thing which was by nature unfruitful should be made to bear fruit, and from time immemorial have been upheld as police regulations. *Ex parte Lichtenstein*, 67 Cal. 359, 7 Pac. 723, 58 Am. Rep. 713. The second is the law of Congress, apparently impairing the right of contract, in declaring that no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of the pension act shall demand, receive, or retain for his services any sum greater than \$10, and making a violation of the act a misdemeanor. But the constitutionality of the act is upheld by the Supreme Court of the United States upon the express ground that no pensioner has a vested legal right to his pension. The pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion, and, being at liberty so to give or withhold, "may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others." *Frisbie v. The United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

For the foregoing reasons, the provision of the act under consideration is declared void, and the prisoner is discharged from custody.

We concur: MCFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; ANGELLOTTI, J.

BEATTY, C. J. I concur. While no valid distinction can be made between this act and a usury law, it is equally true that no valid distinction could be made between this act and a penal statute limiting the charges of surgeons and physicians, and compelling them to repay all fees collected in case of failure to cure. The impolicy of such a law might be more evident, but in principle it would be no more vicious than other laws limiting the price of commodities, and it could be much more easily vindicated as an exercise

of the police power. The sick, the diseased and infirm constitute a much larger class than the unemployed, and no class is under stronger compulsion to make improvident bargains in hope of relief. But the preservation of the public health—a prime object of the police power—has not been deemed a justification for a law making it a crime to charge more than a fixed maximum for medical or surgical services. It is also essential to the public health that people should have a sufficient quantity of wholesome food, and there are numerous statutes designed to guard the purity of food stuffs, but none limiting their price. The law considered in *Holden v. Hardy*, 169 U. S. 368, 18 Sup. Ct. 383, 42 L. Ed. 780—a law limiting the hours of labor underground—was properly sustained as a valid exercise of the police power. It is of a piece with the whole course of factory legislation in England, the United States, and other civilized countries during the last century—legislation by which the condition of all operatives, and especially of children, has been so greatly ameliorated. It is based upon the unquestioned right of the state to prohibit its citizens from engaging, even voluntarily, in occupations destructive or dangerous to health or morals—or when an industry, though dangerous or detrimental, is nevertheless essential to the general welfare, from pursuing it in a manner unnecessarily hazardous or detrimental. Such legislation can never be cited as a precedent or justification for interference with freedom of contract in occupations useful, legitimate, and free from danger to the public health, safety, and morals.

The usury law stands alone as a precedent for this act, but that is an anomaly, and, if it could be held to justify the enactment here in question, it would justify special laws fixing the prices of all commodities, and for labor and services of every description and in all vocations.

SHAW, J. I dissent. There can be no doubt that the Legislature possesses the power, in cases where the comfort, health, well-being, or prosperity of the community demand it, to make reasonable regulation of the right of persons to make such contracts with others as they please. In *Holden v. Hardy*, 169 U. S. 361, 18 Sup. Ct. 383, 42 L. Ed. 780, the Supreme Court of the United States says: "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers." *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Dobbins v. Los Angeles*, 139 Cal. 183, 72 Pac. 970, 96 Am. St. Rep. 95; *Odd Fellows' Cem. Association v. San Francisco*, 140 Cal. 235, 78 Pac. 987; *Commonwealth v. Alger*, 7 Cush. 104; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Cooley*, Const. Lim. pp. 837, 887. In *Holden v. Hardy*, supra, the court had under consideration

the validity of a law prescribing the number of hours of labor per day of workmen in underground mines. The law was held valid on the ground that it must be presumed that the Legislature believed that labor in underground mines for an excess of eight hours per day would be detrimental to health. The police power, however, is not limited in its application to such laws as may be deemed necessary for the preservation of the general health and comfort. It embraces also the preservation and promotion of the general welfare and prosperity. In considering the validity of laws which have no specific relation to health or comfort, but which are enacted in the exercise of the police power, for the general welfare of society, many of the same principles are applicable as in those involving health or comfort. The people can usually be trusted to look after the preservation of their own health in their own way. But owing to their necessitous circumstances, they are sometimes unable to do so properly, and in such instances the Legislature has the power to determine for them what shall be done for that purpose. So, also, people generally may be depended on to make such contracts as their several interests demand, and under all ordinary conditions the right freely to do this cannot be interfered with or controlled by the legislative power. But under some circumstances, a class of persons may be so situated with respect to another class that they are subject to oppression, and, though nominally free and at liberty to do as they please, they are in reality compelled to act at the dictation of others, whose self-interest leads them to take an undue advantage; and in such cases the Legislature may, in the exercise of police powers, declare that certain contracts, which, in its judgment, it deems injurious to the general welfare and prosperity of the people, shall not be made, and, if made, shall not be enforceable. In this connection the observations of the United States Supreme Court in the case last cited concerning the validity of a law prescribing the hours of labor in certain exceptional occupations are pertinent. Speaking of the miners and the mine owners, the court says: "The proprietors of these establishments and their operatives do not stand upon an equality, and their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may interpose its authority."

The right of the Legislature to enact laws prescribing the rate of interest, usually denominated "usury laws," is essentially a part

of the police power. I think it is a mistake to say that our heritage from the common law in this respect consists solely of the specific right to pass such laws, without regard either to their wisdom, or to the conditions which sanction the exercise of the power. Our heritage is rather the sound principle that, in the performance of its duty to promote the general welfare—a declared object of the Constitution of the United States—the Legislature may pass such laws as may reasonably be found necessary to protect the helpless and weak from the exactions of the strong. Originally, indeed, the usury laws were said to be founded upon the notion that it was contrary to the law of God to make a charge for the use of money, which was said to be in itself inert and unfruitful. But that has long ceased to be considered as the foundation on which they rest. Eighty years ago Lord Chief Justice Best, in the House of Lords, said: "The supposed policy of usury laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth." 3 Bing. 196. Chancellor Kent, on the same subject, says: "Civil government is continually placing guards on the weaknesses, and checks upon the passions, of men; and many cases might be mentioned in which there is, equally with usury laws, an interference of the lawgiver with the natural liberty of mankind to deal as they please with others." *Dunham v. Gould*, 16 Johns. 380, 8 Am. Dec. 323. In *First National Bank v. Plankinton*, 27 Wis. 177, 9 Am. Rep. 453, the court says that usury laws are "enacted to protect the weak and necessitous from being overreached and oppressed by the powerful and rich." Our state law regarding the rate of interest which may be lawfully charged by pawnbrokers is an instance of the exercise of this power for the object of promoting the general welfare. In *Ex parte Lichtenstein*, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713, this law was declared constitutional. It was not disputed that the Legislature could thus restrict the power to contract, and the principal ground of attack was that the law was special and not of uniform operation. But the court manifestly considered that it was an exercise of police power, saying: "It is well known that persons frequenting the offices of pawnbrokers are generally the reckless and needy and improvident, who require the protection of the law. To no other class of money lenders do the same reasons apply. Men driven by the necessities of their situation resort to the pawnbroker, and pledge any and all articles in their possession in order to raise money, and they are not particular about the rate of interest charged them. \* \* \* Pawnbrokers are not allowed to do a certain act because the Legislature, in its wisdom, deemed it injurious and harmful to the community to permit them to do the pro-

hibited act." Page 361, 67 Cal., page 730, 7 Pac., 56 Am. Rep. 713.

I can see no real distinction between laws of the character above considered and the one here involved. If one who desires to borrow money, or the miner in an underground mine—the one having property to pledge, and the other being already employed—are likely, from their necessities, to submit to unjust exactions by those with whom they deal, how much more likely to do so is the person who is out of employment, who depends on his daily wages or monthly salary for his daily bread, and who sees before him starvation for himself and a dependent family if he does not speedily secure remunerative employment. The number of this class of persons far exceeds the number of those who borrow from the pawnbroker, or those who work underground in the mines. The general welfare and prosperity of the community will be affected in proportion to the numbers of the class which is subject to the oppression and exactions of the more fortunate and prosperous. It is upon the same principle that authority is found for the power of the Legislature to restrict and limit the right of persons to make such contracts as they please in many other respects. Thus the Legislature may provide that oral contracts for the sale or conveyance of real estate, or of personal property above a certain value, or to pay commissions to a real estate agent for negotiating a sale, shall be void, or that certain classes of contracts for the erection of buildings or other structures, unless put in writing and filed for record, shall be invalid in part, and that certain stipulations in such contracts, although in writing, shall be void as against persons claiming a lien on the premises. All these constitute instances of the exercise of legislative power to interfere with the liberty to make contracts, the reason being that the general welfare will be promoted by such interference.

It is, of course, not to be denied that there are just limitations to the exercise of the power for the protection of the unfortunate and weak. It is not absolutely free from the supervision of the courts. But we cannot hold the law void because we think it may prove ineffectual for the purpose intended, owing to the refusal of those to whom it is directed, or for whose benefit it was designed, to obey its mandates. The validity of a law is to be determined upon the assumption that it will be obeyed. The possibility of its enforcement is a matter solely for the Legislature to consider when the law is enacted. Nor can we place our own judgment against that of the Legislature in respect to the necessity for the protection which the Legislature has seen fit to provide, unless we can clearly see that there can be no such necessity. "Though reasonable doubts may exist as to the power of the Legislature to pass a law, or as to whether a law is calculated or adapted to promote the health, safety, or

comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of that department of the government." *Holden v. Hardy*, supra. To quote further from the same case (page 308, 169 U. S., page 890, 18 Sup. Ct., 42 L. Ed. 780): "The question in each case is whether the Legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

With these rules for our guidance, there can be but one answer to the question as to the constitutionality of this law. In the light of history, and even in the face of present conditions, we cannot say that the law was not passed in the exercise of a reasonable discretion, nor that there may not exist a reasonable necessity for the protection of those classes which are peculiarly liable to be thrown out of employment at every check to the current of industrial progress, from the possible rapacious demands of those to whom they are generally compelled to apply for another opportunity to earn subsistence by their toil. For these reasons, I am of the opinion that the law under consideration is valid.

144 Cal. 539

SOUTHERN PAC. CO. et al. v. CITY OF POMONA et al. (L. A. 1,249.)

(Supreme Court of California. Aug. 5, 1904.)

RAILROADS—DEDICATION OF HIGHWAY—OSTENSIBLE AGENT.

1. A railroad company, unless forbidden by its charter, may dedicate as a public highway land conveyed to it for railroad purposes.

2. Under Act Dec. 25, 1877 (St. 1877-78, p. 6, c. 10) § 2, declaring that all roads shall be conceded as public highways which have been or shall be used for five years by the public as highways, the use of land by the public as a highway for such period constituted a dedication thereof as a highway.

3. A railroad company is bound by dedication of a street by an agent permitted by it to appear to possess authority to dedicate it.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Southern Pacific Company and the Southern Pacific Railroad Company against the city of Pomona and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Bicknell, Gibson & Trask, for appellants. Robert G. Loucks and Gibbon, Thomas & Halstead, for respondents.

CHIPMAN, C. Plaintiffs bring this action to enjoin defendants from interfering with plaintiffs in the construction of a track partly laid along the south side of First street, in the city of Pomona, part of a tract of land claimed to be owned by the Southern Pa-

cific Railroad Company (hereafter referred to as S. P. R. R. Co.), and leased to plaintiff Southern Pacific Company (referred to hereafter as S. P. Co.); praying also that their title be quieted and for damages. The tract of land of which said First street is a part is a parallelogram, containing 20 acres, including the right of way, and is 400 feet wide north and south, and 2,200 feet long east and west, through which the main track of plaintiffs' road runs; its center being 150 feet from the south boundary and 250 feet from the north boundary of said tract. The city of Pomona is situated on all sides of this tract. First street is situated along the south side, and Bertie street along the north side, of said tract. Garey avenue, Elizabeth (or Main), Gordon, and Ellen streets cross the tract north and south, all of which streets are claimed by defendants to be public highways, dedicated as such by plaintiffs, and accepted by defendants and the public. On April 13, 1901, the S. P. Co. commenced to lay a track along the south side of First street, the south rail of which would be 5 feet 10 inches from the south line of the tract and street, along which are blocks of land improved by buildings erected from time to time, facing this tract. The company proposed to erect warehouses along the north side of the track it had begun to build, thus entirely obstructing First street. Defendants interfered by such force only as was necessary, and compelled plaintiffs to desist from laying this track. Hence the action. In their answer, defendants set up title as highways to all said streets, and prayed that the title be quieted to them as public highways. The court found the facts in favor of defendants, and gave judgment accordingly. Plaintiffs appeal from the judgment, and from the order denying motion for a new trial.

1. In reply to one of appellants' points, it may be stated at the outset that, unless forbidden by their charters, railroad corporations, as well as other corporations, may dedicate the right to occupy and use as a public highway land conveyed to the corporations for railroad purposes. *People v. Eel River, etc., R. R. Co.*, 98 Cal. 665, 33 Pac. 728; *Sussman v. San Luis Obispo County*, 126 Cal. 536, 59 Pac. 24. See, also, *Elliott on Roads & Streets*, § 146; 2 *Elliott on Railroads*, § 425; 9 Am. & Eng. Enc. Law, p. 33.

2. As to the point that plaintiffs should recover damages in any event, it need only be said that plaintiffs were proceeding to build a track and cause warehouses to be erected in such a way as to entirely obliterate First street. If the street was a dedicated highway, plaintiffs were not damaged by being prevented from taking possession of it unlawfully, and for an unlawful use, and to the entire exclusion of the public.

3. It appears that the S. P. R. R. Co. acquired the right of way through the site of the town from one Louis Phillips in 1873,

¶ 1. See Dedication, vol. 15, Cent. Dig. § 5; Railroads, vol. 41, Cent. Dig. § 209.

who, being owner in fee, on March 9, 1875, also conveyed by deed to the company the tract in question. The company's main track was completed in 1874, and there is evidence that the town of Pomona existed as early as that year, with streets laid out as they appear on a map of the town which was recorded August 20, 1875, and appears in the record. This map locates the streets in accordance with defendants' contention. The county board of supervisors attempted to establish a highway in December, 1875, and did lay out and record as a public highway a road which included as a part of it the strip of land in question, known as "First Street." The company was not notified of this action, and was not compensated for its land thus included. The road, however, was improved and worked by the county, and treated as a highway by the public, from that time forward, as were all the other streets, except Gordon street, which latter street, for the moment, may be left out of view. There is much evidence showing that these streets, except Gordon street, were graded, worked, and cared for at the expense of the county, and generally used by the public, without objection or interference by the company. This began in 1875, and continued down to the time when Pomona became a city of the fifth class, in 1888, and the streets were thereafter worked and cared for by the city. We will not undertake to set forth this evidence. There was, however, an attempt made by the company to occupy a portion of First street in 1875, as to which the evidence may be briefly stated. One O'Connor was section foreman of the company at Pomona from 1876 to 1884 or 1885. He testified that he had orders to build a fence around the section house, running south to the boundary line of the tract in question, thus inclosing a strip 75 feet in length of First street; that he commenced the work, when he was waited upon by a committee of citizens who objected; that he wrote to the resident engineer, Mr. Lambie, or to Mr. Hewitt, the division superintendent, for instructions; that Mr. Lambie came personally the next day, and was told that the citizens objected to putting the fence on the public road. "He said, 'Mr. O'Connor, we did not know that there was a street here.' I said, 'Well, the citizens claim there is.' I was referring to First street. Mr. Lambie says: 'Mr. O'Connor, put that fence back 40 feet from the line north.' I said, 'Well Mr. Lambie, they claim a 70-foot street.' He says, 'Well, I guess for the present, with the travel that is over it now, 40 feet will be plenty.'" O'Connor moved the fence back as directed, and it has remained there ever since, and the court found the width of First street at this point to be 40 feet. O'Connor testified to putting crossings in 1876 on Garey avenue and on Elizabeth street by Mr. Hewitt's orders, and that these streets were traveled at that time;

that First street was worked in 1876 by the county roadmaster along the tract in question, both before and after he put up the fence; and that the road was traveled generally, and looked like a worn track, and continued to be traveled. There was another portion of this street found by the court to be 60 feet wide, the balance being 70 feet wide. This was because a park had been laid off on the company's land, in the improvement of which the city and the S. P. Co. became interested, and this park was inclosed and beautified, and encroached upon the streets to the extent found by the court. We do not understand that this feature of the findings is objected to.

The court found that the S. P. R. R. Co., prior to February 28, 1883, dedicated the strips of land constituting the streets above named, except Gordon street. This dedication is claimed by defendants to be valid and binding on several grounds, but one of which need be noticed, namely, that it became so by virtue of the act of December 25, 1877, entitled "An act relative to highways in Los Angeles county." St. 1877-78, p. 6, c. 10. Section 2 of the act declares: "All roads shall be conceded as public highways which have been used as such for five years, or which may hereafter be used for five years by the public as highways." A similar act, similarly entitled, was passed at the same session of the Legislature, March 30, 1878 (St. 1877-78, p. 716, c. 463), which appellants claim repealed the former act. Whether or not this be so, they were similar in their provisions, so far as concerns the five-years user; and one or other of the acts was in force more than five years prior to the repeal by the act of February 28, 1883, amending the Political Code (St. 1883, p. 6, c. 10), which took effect 60 days after its passage (Pol. Code, § 323).

As to these statutes, appellants make several contentions: First. That they are invalid because they embrace more than one subject expressed in their title; citing article 4, § 24, of the old Constitution. It is claimed that many provisions are general in their terms, including provisions with which plaintiffs are concerned, and in no way limited to Los Angeles county. What these general provisions are, is not pointed out, and we fail to discover any such. Both acts relate only to roads, alleys, streets, and bridges in the county, and not elsewhere. Second. That the act of 1878 repealed the act of 1877. We have shown that, if this be conceded, it is immaterial. Third. That the statute referred to should be construed merely as fixing the period, not as defining the character of the use necessary to establish a dedication, and does not dispense with the requirement that use alone, to create a right in the public, must be adverse; and this in analogy to the construction given section 1007, Civ. Code, in *Thomas v. England*, 71 Cal. 456, 12 Pac. 491. In the case cited the right was express-

ly claimed as secured by adverse user, and the question of fact related to such user under the statute. The cases presently to be cited make no such distinction as is urged by appellants, and the statute does not, in our opinion, admit of the construction contended for. Fourth. That the streets in question were used merely as convenient approaches to the railroad tracks and grounds, and by sufferance of the company. The evidence does not bear out this assumption. Fifth. That the extent of the use would limit the amount of the land acquired, and that the use alone marks the width of the streets claimed to have been dedicated. We think the evidence sufficient to show the width of the streets as used by the public and as found by the court. The fact that the principal travel, as shown by the well-worn track of vehicles, appears to have been less in width than is claimed for the road, is by no means conclusive of such width. Few roads are well worn to their entire width, and much travel may occur along the sides of the beaten track without leaving a permanent impress. There is evidence tending to show use of the streets to the width found by the court, although the main travel was confined to narrower limits. Similar statutes to the ones now before us have had consideration by this court, and it has been held that the use of land as a road by the public as a highway for the statutory period constitutes a dedication of the land as a highway, and the right of the public to continue to use the land as a road is thus fixed and established. The cases bearing upon the subject are *Bolger v. Foss*, 65 Cal. 250, 3 Pac. 871; *Hope v. Barnett*, 78 Cal. 9, 20 Pac. 245; *Gloster v. Wade*, 78 Cal. 407, 21 Pac. 6; *McRoe v. Bottyer*, 81 Cal. 122, 22 Pac. 393; *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87; *People v. County of Marin*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659. See, also, what is said in *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 Pac. 448, at page 593, 108 Cal. page 449, 41 Pac. There is nothing in *Huffman v. Hall*, 102 Cal. 26, 36 Pac. 417, contrary to the doctrine laid down in *Bolger v. Foss*, supra, and other cases cited. We think the finding and conclusion of law as to the streets above referred to are supported by the evidence.

4. The findings as to Gordon street rest upon dedication by plaintiffs in 1896, as found by the court. The S. P. Co. leased the S. P. R. R. Co.'s property and went into possession on February 5, 1885, at which time the streets, other than Gordon street, were being used by the public under their dedication prior to 1883. The S. P. Co. must have known the relation these streets bore to the property leased, and the use being made of them, and must be held to have taken the lease subject to this dedication. The facts as to Gordon street are briefly as follows: In 1884 there was a large brick warehouse on the street in question, resting partly

on the company's right of way and partly outside of it, on the north side of the main track between Ellen street and Gordon street. The building extended across this latter street, completely obstructing passage over it. The question of opening this street "had been agitated for years," as testified by witness Gerber, who had control of the warehouse as lessee of one Phillips. Gerber testified: "Finally Mr. Muir said to me, if we would satisfy Mr. Phillips for his building, they would give us the street." Witness raised the money to pay the cost of removal and the damage to the owner, and then went to Mr. Muir for leave to go ahead with the work of removal. Mr. Muir "said that matter would be all right. 'You will get that street. Just wait a little. This is a club we want to use to get down White avenue.'" At that time the Southern Pacific Railroad Company had an application before the board of trustees for a franchise to build a branch upon White avenue. This franchise was granted November 11, 1895, to Mr. Muir, and by him assigned by the S. P. Co. Witness testified: "Afterwards, in the summer of 1896, we took off 73 feet of the warehouse in order to open the street. The building extended entirely across what is now Gordon street, and three feet north. Gordon street was then opened. I didn't see Mr. Muir any more about it. It was not necessary. Since that time it has been traveled as a public street. \* \* \* After Gordon street was opened, the Southern Pacific Railroad or the Southern Pacific Company fixed the crossings and the track by putting in planks and some gravel. The crossing extended about entirely across the street. Gordon street is used as much as any street, I think, between the north and the south. About the same time that the portion of the warehouse was moved, the western side of the fence that fenced in the section house was set back to the edge of Gordon street by the section hands of the Southern Pacific Company. Gordon street has since been graded by the city. There is one of the regular forms of danger signs or crossing signs maintained at the crossing of Gordon street. It was put there soon after the street was opened." In 1899 Mr. Muir wrote to the city clerk as to certain other matters, and, as to Gordon street, said: "As regards the opening of Gordon street, that matter was settled some time ago, when it was proposed to the board of trustees that, if they would make the proper arrangements with the parties owning buildings on our right of way, our company would make no serious objections to the opening of the street." Mr. Muir testified: "Since 1886 the station at Pomona has been under my jurisdiction, as superintendent of the Southern Pacific Company, which is operating this track through Pomona. \* \* \* I occasionally act as agent of the Southern Pacific Railroad Company." There is much record evidence showing that

both plaintiffs dealt with the corporate authorities of Pomona relative to franchises and privileges involving all these streets after the city was incorporated both before and after the opening of Gordon street. Some of the significant facts are recited in the findings, and still others might be instanced if it were necessary. We think the evidence sufficient to sustain the findings as to Gordon street, if the plaintiffs are bound by the acts of their agents.

Perhaps the contention most seriously urged by appellants is that there is no evidence whatever of any authority from the principal to dedicate Gordon street, and that the agents, so far as it appears, could not dedicate the land of their principal, even if they tried to do so. It is true that no express authority was shown as emanating directly from the directors of either corporation and given to any agents, and no official action by such directors was shown. The situation is in many respects unusual, and must be dealt with in the light of all the facts and circumstances. Appellants take the position that the S. P. Co. could not dedicate the land, because that company is but the lessee of the owner, and that the S. P. R. R. Co. could not do so, because the land was subject to a lease, from which it must follow that only by the joint act of the two plaintiffs could there be any dedication. To further render impregnable their position, appellants claim that, even under the doctrine of constructive dedication, the cases go no further than to hold that a corporation can be estopped by its agents only when they act within the scope of their ostensible authority, and no officer of a corporation, as such, has authority to make or permit a dedication of the corporation's property for a street. These contentions apparently lead to the proposition that there can be no dedication of the land of a railroad corporation for a public highway except by grant formally made by the directors of such corporation. This position is not tenable. People v. Eel River, etc., R. R. Co., supra. We have seen that the S. P. R. R. Co. dedicated the streets, other than Gordon street, prior to 1883, and that both plaintiffs recognized that dedication down to the commencement of the action. These facts show that plaintiffs sustained such relations to the municipality as to justify the presumption that they understood the situation of all these streets with reference to the tracks and the ground in question. Persons who were in the employ of plaintiffs at Pomona, or had some authority to act for plaintiffs, assumed to act for them in obtaining franchises involving the use of some, if not all, these streets, and these franchises were subsequently accepted and enjoyed by one or both of plaintiffs. The station of Pomona has grown to be of very considerable importance. The population of the city from a small number in 1875 had reached in 1885 3,000 or more, when the S. P. Co.'s lease was

made, and in 1896 was much increased. The unobstructed use of Gordon street by the public was deemed by all parties to be important to the convenience of the city and plaintiffs, and was to their mutual advantage; and from 1896 to 1901, when the action was commenced, it has been, and still is, unobstructed, and treated in all respects by plaintiffs' agents at Pomona as the other streets crossing the railroad company's tract have been treated. Except the warehouse and the section-house fence above referred to, no obstruction was ever placed upon the street by plaintiffs, and these were removed. Plaintiff the S. P. Co. made the usual crossings and erected the usual danger signals on Gordon street immediately upon its being opened, and these have been maintained, and city ordinances regulating the time that trains might remain on this and other cross-streets have been observed by the S. P. Co. Plaintiffs' Exhibit 4 shows Gordon street to be an open, unobstructed street, with the Phillips warehouse moved back on the line of the street, and the Gerber warehouse also on the line. Numerous buildings, corrals, and inclosures for various railroad purposes erected on the tract at different times by plaintiffs are all located so as to leave Ellen, Gordon, Main streets, and Garey avenue open and unobstructed. The only cross-street appropriated and used by plaintiffs is Thomas street, which at the track is occupied by the station or depot buildings, and was so occupied from the completion of the road, in 1874, and is not involved in this action.

The open, notorious, and public character of most of these facts and circumstances, and their long-continued existence, would seem to establish, prima facie, at least, and justify the inference, that the conduct of plaintiffs' affairs at Pomona by their agents was with the knowledge, consent, and under the authority of plaintiffs. In the very nature of the business of plaintiffs, it would be impracticable for the board of directors to take up matters such as are here involved, in connection with the hundreds of stations on their thousands of miles of road. It is but reasonable to hold that the agents of these companies, in doing what is by this record disclosed, were acting within their ostensible, if not express, authority. And this would seem the more to be a reasonable conclusion, where, as here, the companies made no attempt to show that the acts of their agents were without authority or in violation of instructions given to such agents, or were to the damage or injury of the companies.

Appellants cite Pacific Bridge Co. v. Kirkham, 54 Cal. 558, and California Nav. & Imp. Co. v. Union Trans. Co., 126 Cal. 433. 58 Pac. 936, 46 L. R. A. 825, in support of their contention. The question decided in the Pacific Bridge Company Case related particularly to the insufficiency of the findings. It was, however, said that the president and members of the water front company, individual-



ly, but not in their corporate capacity, could not dedicate land of the corporation by giving permission to use it. Where dedication is claimed to result from such consent alone, a question arises different from that here, in view of all the facts. In the other case cited, one question was as to the authority of a person who had charge of reclaiming and farming a portion of what is known as "Robert's Island," in San Joaquin river. For the use of the owners (a corporation) a wharf had been constructed, which was also part of the reclamation levee, from which the products of the soil had been shipped to market; the steamboats and other craft being permitted to use it for that purpose. Plaintiff leased the wharf from the owners, and, to prevent defendant from committing a trespass upon the property, brought injunction. The question, among others, arose as to whether this wharf had been dedicated to the use of the public by the owners, which defendant sought to establish by the acts of the person above referred to, who testified that he was engaged in carrying out the reclamation work and the management of the land. No officer or director of the company had ever visited the property, and no action was ever taken by the corporation towards establishing a wharf there. It was held that the agent had no authority to dedicate the land to public use. The facts, it seems to us, were wholly unlike the facts here.

The full extent of the authority of the S. P. Co. as lessee and agent of the S. P. R. R. Co., we do not know, for the lease is not in evidence. The court found that it "leased the railroad, its sidings, switches, subways, tracks, turntables, and all the appliances and appurtenances thereof." The land in question was deeded for railroad purposes, and was clearly within the control and management of the S. P. Co., and, for the purposes of the lease, could be dealt with by this company as the necessity or interest of the business required. "An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." Civ. Code, § 2300. Whoever seeks to charge the principal with the act of an ostensible agent must himself believe that the agent had authority as such from the alleged principal. *Harris v. San Diego Flume Company*, 87 Cal. 526, 25 Pac. 758. The evidence is that the city authorities, as well as the general public, believed that the S. P. Co. had full authority to dedicate Gordon street; and there is evidence, from which a reasonable inference may be drawn that the S. P. R. R. Co. engendered this belief intentionally, as well as by want of ordinary care. Whether Mr. Muir was acting in this particular instance as division superintendent of the S. P. Co., or was acting for the S. P. R. R. Co., or both, does not appear; but that he was with good reason believed by defendants to be acting under

competent authority, and held himself out as so acting, does appear. No other conclusion is consistent with the conduct of the parties interested. The dedicatory acts to which we have alluded were such as would apparently be within the power of the S. P. Co. to perform in the conduct of the business contemplated by the lease. The S. P. R. R. Co. permitted the S. P. Co. to appear to possess authority, as it had itself, to dedicate Gordon street, and is bound by its agent's acts, as within its ostensible authority. *Reinhard on Agency*, § 192.

Having in view all the facts in the case, we do not think the plaintiffs should be heard to deny the dedication of the streets involved, and it is therefore advised that the judgment and order be affirmed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

144 Cal. 209

**LAGUNA DRAINAGE DIST. v. CHARLES MARTIN CO. (S. F. 3,688.)**

(Supreme Court of California. July 23, 1904.)

**DRAINAGE DISTRICTS—EMINENT DOMAIN—CONSTITUTIONALITY OF LAW—PUBLIC USE.**

1. Defendant in proceedings by a drainage district to condemn land for a ditch may not raise the question of any unconstitutionality in the drainage act (St. 1885, p. 204, c. 158), under which the district was formed, and which authorizes the condemnation, in that it does not provide for notice of a hearing on a petition for formation of a district, or of notice to the parties interested of assessments on the land in the district for the purpose of its organization; defendant's lands being outside the district, and not affected by its organization or the assessment.

2. The drainage act (St. 1885, p. 204, c. 158) providing for formation of drainage districts, each consisting of land susceptible of one mode of drainage, does not, in authorizing condemnation by a district of land for a drainage ditch, contravene Const. art. 1, § 14, providing that private property may be condemned only for a public use; the increase of cultivable land and the promotion of public health by drainage being public uses.

3. It cannot be said, as matter of law, that the condemnation of land for a drain, for a drainage district, is not for a public use, merely because the area of overflowed land in the drainage district is only 160 acres.

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Condemnation proceedings by the Laguna drainage district against the Charles Martin Company. Judgment for defendant. Plaintiff appeals. Reversed.

Thos. J. Geary, for appellant. Lippitt & Lippitt, for respondent.

LORIGAN, J. This is a proceeding brought by the plaintiff, a drainage district corpora-

¶ 2. See *Eminent Domain*, vol. 13, Cent. Dig. § 77.

tion organized under the drainage act of this state, to condemn a strip of land belonging to the defendant for the purpose of constructing a drainage ditch. A general demurrer to the amended complaint was sustained, and, from a judgment entered thereon in behalf of the defendant, plaintiff appeals.

A dual attack was made upon the complaint under the demurrer in the lower court; it being insisted, first, that the act of 1885 (St. 1885, p. 204, c. 158) under which the plaintiff district was organized was unconstitutional; and, secondly, that, if constitutional, still the complaint failed to show that the condemnation of the defendant's land was for any public use, but, on the contrary, it appeared therefrom that such condemnation was sought solely for private advantage and benefit; and it is urged here that the judgment should be sustained on either or both grounds.

As to the constitutionality of the act, the point made is that it does not provide for notice to be given of a hearing on the petition presented to the board of supervisors for the formation of a drainage district, nor does it provide for a notice to the parties interested concerning assessments to be imposed upon the lands in the district, to be collected for the purpose of its organization. If it were necessary to a disposition of this case to examine into the constitutionality of this act for failure to provide for a notice of a hearing, as claimed by appellant, we would approach the determination of that question with a great deal of hesitancy; realizing that the provisions for the formation of drainage districts, under the act of 1885, as far as the petition, notice of the application, publication, and the hearing by the board of supervisors are concerned, are identical with the provisions of the act of 1868 (St. 1868, pp. 514, 515, c. 415, §§ 30, 31), relative to the formation of reclamation districts, as subsequently carried into, and existing now under, sections 3446 and 3447 of the Political Code. A vast number of reclamation districts have been organized under the provisions of the act of 1868, and the Code provisions and the constitutionality in general of the act of 1868 was early, but unsuccessfully, questioned in *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222, and has subsequently since been under review; but in no instance has any question ever been raised of its validity, as far as the provisions for notice or hearing of petitions for the formation of districts under it are concerned. Possibly it was deemed useless to raise that point, because, as all these districts are agencies created in behalf of the state, the rule laid down in the *Madera Irrigation District Case*, 92 Cal. 323, 28 Pac. 278, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, would doubtless apply, where it is said: "The constitutionality of the act in question is further assailed upon the ground that it makes no provision

for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state. \* \* \* In the absence of constitutional restriction, it would be competent for the Legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property."

But without discussing this matter further, it is sufficient to say that, assuming that there was anything in this point, we do not think defendant is entitled to raise it. The only object of the proceeding under the petition was to establish a public corporation. Its establishment did not affect the property of any person, even within the district, or deprive any one therein of his property. It simply authorized the corporation to discharge the public purposes for which, as a state agency, it was created. Respondent's land was not embraced within the district. Neither he nor it was affected by the organization, and he has no ground to complain that the statute failed to provide for a notice of hearing to which he was not for any reason entitled. Neither is it of concern to him that the statute fails to provide for notice of any assessment that may be levied. Such assessments can only be levied upon the land within the district. He has no land therein, and whether an assessment is ever levied, or levied with or without notice, cannot be of a particle of interest to him, as affecting any of his legal rights.

It is further insisted, however, against the constitutionality of the act, that it nowhere appears therefrom that, in providing for the organization of drainage districts, and authorizing them to exercise the right of eminent domain, any public use is to be subserved for which private property may be taken under section 14, art. 1, of the Constitution, which provides that it may be only so taken for a "public use." But testing again the provisions of this act of 1885 by the provisions of the act of 1868, which, as we have above stated, were upheld, we find no substantial difference in their respective provisions as to the purposes for which the respective organizations could be created. In fact, the only difference in them is that the act of 1868, in terms, referred to the reclamation of "swamp and overflowed, salt, marsh or tide lands," as such, and authorized the formation of a reclamation district upon petition of the owners of one-half of any such body of land "susceptible of one mode of reclamation." The act

of 1885 in question is not, however, limited to the creation of districts for the drainage of any particular kind of land, but provides that on the petition of "the owners of two-thirds of any body of land susceptible of one mode of drainage," and compliance with further provisions, they may be created. It was doubtless on account of the provision as to the character of land which might be reclaimed under the act of 1868, and a possibility of the act being inapplicable to the reclamation of lands other than those, that the act of 1885 was passed. In other respects their provisions are practically identical; the act of 1885 having apparently been modeled after the act of 1868, because the latter contained appropriate legislation for the same general purpose which was intended to be accomplished by the former, and such legislation had already received judicial sanction. Both acts, too, provide for the reclamation (because the term "drainage of land" has practically the same application as "reclamation;" the one is the means employed, the other the result) of bodies of land susceptible of one mode of reclamation. Now, in discussing the validity of the act of 1868, it was said in *Hagar v. Supervisors of Yolo County*, supra: "But we think the power of the Legislature to compel local improvements which, in its judgment, will promote the health of the people and advance the public good, is unquestionable. In the exercise of this power, it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement. \* \* \* The reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community. If left wholly to individual enterprise, it would probably never be accomplished; and, in inaugurating so great a work, the Legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited."

Now, while the decision above quoted from speaks of the public benefit to be derived from the reclamation of vast bodies of swamp and overflowed lands, the terms of the act did not particularly provide for the organization of districts only where such vast tracts were sought to be embraced within their limits. There was nothing said in the act as to quantity. In fact, while the general scheme doubtless contemplated that ultimately vast tracts would be reclaimed, it was equally contemplated that this result would be accomplished gradually, through the medium of various special, sep-

arate, and independent districts formed under the act. This, of course, would promote the public good. But the public good is equally to be attained under the act of 1885, and because it is provided by section 1238 of the Code of Civil Procedure "that the right of eminent domain may be exercised in behalf of the following public uses: (4) \* \* \* draining and reclaiming land." This is a legislative declaration that, in general, "draining and reclaiming lands" in this state is a matter of public utility and benefit, and the act of 1885 is in harmony with this declaration.

On account of the climatic conditions and the topography of this state, the Legislature recognized that there were other areas of land, not consisting of "swamp, salt, marsh, or tide lands," which it was equally for the material advancement of the public interests and for the benefit of the public health should be drained, and this object was to be attained under the provisions of the act of 1885. It is to the interest of every state, and hence conducive to the public good, that all its land should be utilized and made productive, and this end attained in any particular locality or localities is a benefit to the entire state. A moment's thought will suggest that whatever tends to increase the area of cultivable land materially adds to the productive capacity of the state, increases her resources, induces settlement, promotes her industrial energies, and enlarges her revenue. And whether legislation operates to facilitate the draining of land so as to adapt it to cultivation, or to irrigate it so as to promote its productiveness, the same principle applies, and the end to be attained is the same—public prosperity and welfare. As said in the *Madera Case*, 92 Cal. 313, 28 Pac. 275, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106: "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the Legislature to authorize such legislation must be upheld upon the same principle, namely, the welfare of the public, and particularly that portion of the public within the district affected by the means adapted for such reclamation." And not only is drainage legislation supported as being, from a material point of view, conducive to the public good, but it is equally sustained as being within the exercise of the police power of the state—in the interest of public health. Ponds, marshes, and low, swampy places are generally recognized as a menace to the public health of the neighborhood in which they exist, as generating malaria, and hence it is matter of public interest that they should be abated and removed. These are the main grounds upon which such legislation is sustained. In *Lewis on Eminent Domain*, vol. 1 (2d Ed.) § 188, speaking on this general subject, it is said: "The promotion of the

public health is undoubtedly a public use, within the meaning of the Constitution, and private property may be taken for the construction of drains, levees, or other works in order to accomplish this object. \* \* \*

As wet lands are undoubtedly unhealthy, it is evident that the public health may be made the real or ostensible ground of nearly all the drainage laws which have ever been passed. It is never an objection to the exercise of the power of eminent domain that it is instigated by private persons whose private interests will thereby be promoted. So a drain which will in fact promote the public health is none the less a public use because it is sought by particular individuals whose estates will be thereby improved. Most drainage laws, however, are not conditioned upon the public health. Some of these laws permit any one or more persons to construct a drain across the land of others without any consideration of the public health or public welfare. Such statutes clearly permit the taking of private property for private use, and are void. On the other hand, a drain through a large tract of wet or swamp land belonging to numerous proprietors, into which all can drain whose lands incline towards it, will seem to be a public use, although the only object accomplished is the drainage and improvement of private property. As has been already observed, a public use does not necessarily mean for the use of the entire community, but for the use of all within a given locality. Thus a drain for the use of all within a certain district is as much a public use as a schoolhouse for the use of a particular school district. \* \* \*

The drain is for those who have land needing drainage within the drainage district. \* \* \*

The improvement of the land in a particular locality is of benefit to the whole state. \* \* \*

Therefore it seems to us that a law which provides for the drainage of a given district by means of drains which are for the common use of all the lands within the district is valid, as effectuating a public use, within the meaning of the Constitution. But a law which enables one or more proprietors to construct a drain across the lands of others for the benefit of their particular estates is void, as authorizing a taking for a private purpose. A law such as we have indicated would be valid might be special, designating the particular district to be drained, or general, providing for the organization of drainage districts of a quasi public character." The legislation referred to in the latter part of this quotation from Lewis is of the kind embraced in the act of 1885, and which is designed to effect the drainage of a district by means of a common drainage system for the use of all the lands therein, to be accomplished by drainage districts of a public character organized under the act for that purpose. Nor is it necessary that the

act should declare in terms that it is enacted for the public good or welfare, or that the right of eminent domain conferred under it should be expressly declared to be for a public use. It is sufficient if, from all the provisions of the act, it reasonably appears that it is for that purpose; and, for the reasons which we have heretofore given, and under the authority cited, we are satisfied that it sufficiently so appears.

Counsel for respondent contends that the act of 1885 is no more valid from a constitutional point of view than the drainage act of 1881 (St. 1881, p. 15, c. 21), declared unconstitutional in *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150, 58 Pac. 459. The essential difference between the two acts, however, is that the act of 1881 conferred the right of eminent domain upon individual owners for the benefit of their private estates, and was therefore void, as taking the lands of a private owner for individual benefit. Under the act of 1885, the right to take the land of a private owner is to be exercised by a public corporation, acting as an agency of the state for a public use, and hence is valid.

The other point urged by respondent, that the order sustaining the demurrer was proper because the complaint does not show that the condemnation of the land of defendant is for any public use, but, on the contrary, it appears therefrom that it is solely for the private benefit of a few individuals, we do not think calls for any particular consideration; and we gather from the briefs that this was not at all made the basis for sustaining the demurrer by the lower court. In the opening brief of appellant it is stated that the demurrer was sustained on the ground that the act of 1885 was unconstitutional. This statement is not specifically denied by counsel for respondent in their reply brief, and, as it appears that the demurrer was sustained without leave to amend, and that both sides on this appeal have devoted their attention principally to a discussion of the constitutionality of the act, this would appear to be the fact. The order sustaining the demurrer is, however, general, and counsel for respondent presents the point. While it is true that the mere declaration of the Legislature that the purpose for which property may be taken is a public use is not conclusive, and does not conclude a person whose land is being condemned from showing upon the trial that, as a fact, the use sought to be subserved is a private one (*County of San Mateo v. Coburn*, 130 Cal. 634, 63 Pac. 78), or from assailing the complaint on the ground that it so appears therefrom, still we think that the complaint at bar is not open to this attack.

Most of the objections in this regard are disposed of in our discussion of the constitutionality of the act. The claim that the drainage of this land will, from the facts of the complaint, inure mainly to the benefit of those within the district, presents no valid reason why the right of eminent domain for

that purpose is not being properly exercised in behalf of a "public use," where all the lands within the district are susceptible of one mode of drainage, and such a system for the common benefit is sought to be provided. *Lewis on Eminent Domain*, supra. Nor is it any objection that the public benefit which is to be subserved is practically limited to those in the district whose lands are to be drained, and which will thereby be made valuable. In order that it shall constitute a public use, it is not necessary that the advantages derived from the contemplated public improvement shall extend as effectually to the community outside the district as to those in it. It need not extend to the whole public, or to any large portion of it. It is sufficient that all within the district will be in common benefited by it. *Lewis on Eminent Domain*, supra; *Mutual Irrigation District*, supra.

Neither can it be said, because the area of overflowed land embraced in the district amounts to a fraction less than 160 acres, that the object of the district in this proceeding is not effectuating a public use, within the meaning of the Constitution. The area of a drainage district is not a matter from which, of itself, it can be determined whether the district corporation is exercising the right of eminent domain for the private advantage of the owners within its territory, rather than as a public agency exercising it for a public use. It is apparent from the act that it contemplates by its provisions a subdivision of the state into districts, so that the lands which, by reason of natural conditions, are capable of one common system of drainage, shall be embraced in one district; but, of course, in the nature of things, these districts could not be expected to be all of the same area. In organizing these districts there would have to be taken into consideration the area of overflowed land as it existed, be it great or small, which was capable of drainage under one practical, common system; and, under the terms of the act, it is made the duty of the board of supervisors, in providing for the organization of the district, with a view to having all the land capable of one mode of drainage included therein, to see that no land is excepted from such district which should properly be included therein, and to exclude all land improperly included, so that the mere area of the land overflowed could not affect the question of public use in providing for its drainage. The Legislature had authority to provide for the organization of these districts, and as there is no constitutional prohibition as to the mode of organization, or as to the amount of overflowed land necessary to constitute a district, legislation on these matters was entirely within its discretion. In harmony with that discretion, it provided for drainage without relation to the extent of the flooded area, requiring only in that regard that the district should consist of land susceptible of one mode of drainage, and that all lands properly

capable of drainage by such common system should be included in the district; and it cannot be said, as matter of law, from the simple fact that a given overflowed area may be comparatively limited in extent, that a drainage district embracing it alone could not be created, and vested with the power of eminent domain, to promote a public use, under the act.

We are of the opinion that the court erred in sustaining the demurrer to the complaint, and the judgment is reversed, with directions to the lower court to overrule the demurrer.

We concur: SHAW, J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

144 Cal. 329

MERCHANTS' NAT. BANK OF SAN DIEGO v. ESCONDIDO IRR. DIST. (L. A. 1,235.)

(Supreme Court of California. Aug. 3, 1904.)

IRRIGATION DISTRICTS—STATUTES—CONSTRUCTION—MORTGAGE OF PROPERTY—MUNICIPAL CORPORATIONS—DELEGATION OF POWERS—PRIVATE PROPERTY—DUE PROCESS—IMPAIRING OBLIGATION OF CONTRACTS.

1. Act March 11, 1893 (St. 1893, p. 175, c. 148), amending Act March 7, 1887, § 17 (St. 1887, p. 37, c. 34), by adding to its provision that the bonds of an irrigation district, and interest thereon, shall be paid from annual assessments on the real property of the district, and all the real property in the district shall be liable to be assessed for such payments, the provision that, as additional security for the payment of said bonds and interest, the board of directors of the district may pledge, by mortgage or otherwise, all property of the district, including its rights and privileges, does not authorize a mere conveyance of the legal title, or of this and the statutory powers of the board of directors of the district to the possession and management of the water system and other property of the district, but authorizes a mortgage foreclosable in the ordinary way, so as to convey to the purchaser the legal and equitable title to property.

2. An irrigation district is a municipal corporation, as regards its public functions, so that Act March 11, 1893 (St. 1893, p. 175, c. 148), if considered to authorize the conveyance of the statutory powers of its board of directors to the possession and management of its water system and other property, would contravene Const. art. 11, § 13, prohibiting the delegation by the Legislature to private individuals of any power to control, supervise, or interfere with any municipal improvement or property.

3. Under the act for organization and government of irrigation districts (Act March 7, 1887, p. 34, c. 34, § 11), providing that all waters distributed for irrigation purposes shall be apportioned to the owners of the land of the district in a certain proportion, and section 13, declaring that the legal title to all property acquired under the act shall be vested in the district, and shall be held by it in trust for, and is dedicated and set apart to, the uses and purposes provided in the act, the district is not a municipal corporation to the extent that the state may dispose of its property as it pleases, but the rights in the property are private rights, within Const. art. 1, § 13, declaring that no person shall be deprived of property without due process of law.

4. The act for the organization and govern-

ment of irrigation districts (Act March 7, 1887; St. 1887, p. 29, c. 84), authorizing the organization of a district on the vote of a majority of its electors, creates a contract by which the property owners in the district consent to the burden imposed on their property by section 17, providing that the bonds of the district, and interest thereon, shall be paid from annual assessments on the real property of the district, and that all the property in the district shall "be and remain liable" for such assessments, so that Act March 11, 1893 (St. 1893, p. 175, c. 148), in amending this by authorizing the board of directors of the district, without the consent of the landowners, to pledge the property acquired by their contributions as security for the bonds, and thus subjecting them to the liability of losing it, contravenes Const. U. S. art. 1, § 10, inhibiting any state law impairing the obligation of contracts.

**Commissioners' Decision.** Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the Merchants' National Bank of San Diego, as trustee, against the Escondido Irrigation District. Judgment for defendant. Plaintiff appeals. Affirmed.

Stearns & Sweet, for appellant. A. Haines and Withington & Carter, for respondent.

**SMITH, O.** The plaintiff is trustee in two deeds of trust made to it by the defendant June 12, 1894, and April 15, 1895, as additional security for the payment of two series of bonds, of date January 1, 1894, and April 15, 1895, for the aggregate sums of \$250,000 and \$100,000. The deeds purport to convey to the trustee the whole water system of the district, including its reservoirs, water ditches, and water rights, and, generally, all its property, real and personal, then owned or afterwards to be acquired. The trustee is now in possession of the property conveyed, having taken possession of it before the commencement of the suit, for default in the payment of interest, as it was authorized to do by the deeds. The suit was brought for the foreclosure of the lien and sale of the property. The pleadings consist of the complaint, to which a demurrer was interposed; the cross-complaint of the defendant, praying for the restitution of the property; and the demurrer and answer of the plaintiff thereto. The demurrer to the complaint was sustained, the demurrer to the cross-complaint overruled, and, upon the motion of the defendant, judgment was entered in its favor on the cross-complaint and answer, as prayed for, which is the judgment appealed from. The deeds of trust were made under the supposed authority of section 17 of the Wright act (St. 1887, p. 37, c. 84), as amended March 11, 1893 (St. 1893, p. 175, c. 148), which (indicating by italics the new provisions added to the original section) reads as follows: "Sec. 17: Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as

hereinafter provided. And as additional security for the payment of all said bonds, and interest thereon, the board of directors shall have power to pledge, by mortgage, trust deed, or otherwise, all property of the district situate within or without the district, whether real, personal, or mixed, of whatsoever kind, including all its rights and privileges held or possessed at the time of the issue of said bonds, or which may hereafter be acquired under the provisions of this act." St. 1893, p. 175, c. 148. It was held by the lower court, in effect, that this provision was unconstitutional; and whether this position be correct, or otherwise, is the principal question to be determined. The contrary is maintained by the appellant's counsel, on two grounds, based, respectively, on several different and inconsistent constructions of the statute—the one, that the act merely "authorizes a change in the custodian of the public use," leaving the use itself and the rights of the landowners of the district to the use of the water unaffected; the other, that the Legislature has the constitutional power to dispose absolutely of the property of all public or municipal corporations.

But the former construction is manifestly untenable. The pledge or hypothecation of the property of the district, in the absence of qualifying expressions, necessarily implies the right of foreclosure and sale in the ordinary way; that is to say, in such manner as to convey to the purchaser the whole property in the land hypothecated—legal and equitable. Civ. Code, §§ 2931, 3000. And this construction is confirmed by the consideration that the conveyance of the mere legal title would not serve as additional security, as intended by the act, and that to convey, in addition to the legal title, the statutory powers of the board to the possession and management of the water system and other property of the district, would be in contravention of section 18 of article 11 of the Constitution, which forbids the delegation of such powers, which provision, it can hardly be doubted, must with section 12 of the same article, be construed as applying equally to public or municipal corporations of this character, as to ordinary municipalities or cities. For not only is this construction required by the reason, and consequently by the presumed intention of the constitutional provision, but the term "municipal," as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special: and, indeed, this must be taken as the definition of a public or municipal corporation. Civ. Code, § 284; Board of Education v. Board of Trustees, etc., 129 Cal. 604, 62 Pac. 178; Hughes v. Ewing, 93 Cal. 417, 28 Pac. 1067; Irrigation District v. Lappe, 79 Cal. 854, 21 Pac. 825; Madera Irr. Dist., 92 Cal. 308, 316, 319, et seq., 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. Hence, accepting the ordinary division of corporations into public and private (1 Dillon, Mun.

Corp. § 52); corporations of the kind under consideration do not fall wholly within the one or the other class, but, with regard to their public functions, are to be classed with the former, and, with regard to the private rights of the individual landowners, with the latter.

The other position of the appellant is equally untenable. The state, indeed, has a large, though not an unlimited, power of disposition over the property of ordinary municipalities, which is commonly held in trust for the public generally, or for the limited public of the municipality. Cooley's Const. Lim. 342, et seq.; 1 Dillon on Mun. Corp. §§ 27, 66, 67. But here the corporation in question is distinguished from ordinary municipal corporations by the fact that "the legal title" only of the property of the corporation is vested in the district, "in trust for and is \* \* \* dedicated and set apart to the uses and purposes set forth in [the] act," and that the beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ. Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St. 1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that "no person shall be \* \* \* deprived of \* \* \* property without due process of law," and of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States.

The act is also, we think, in conflict with the provision of section 10 of article 1 of the federal Constitution, prohibiting the enactment by the state of any "law impairing the obligation of contracts." The act providing for the organization of the district, and the organization of the district under the provisions of the act by the vote of its electors, cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected. The contract, indeed, lacks one of the ordinary elements of contracts, namely, the actual consent of all the parties to it, but, by the provisions of the statute, the majority of the electors were empowered to act and consent for the individual proprietor; and, unless this were a legitimate exercise of the powers of the state, the statute itself would be invalid. Hence the consent of all the parties to the contract was in fact given, either personally or by their authorized agents; and there was thus created a com-

plete contract between the parties, by the terms of which the property owners in the district consented to the burden imposed upon their property by the provisions of section 17 of the original act, and to no other. The burden thus imposed was that the bonds issued under the act should "be paid by revenue derived from an annual assessment upon the real property of the district," and that their lands should "be and remain liable" for such assessment; and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent or even the knowledge of the landowners, to pledge or hypothecate the property acquired by their contributions—that is to say, acquired with their money—and thus to subject them to the liability of losing entirely the property thus acquired, which is not only their property, but, by the express provision of the statute (section 13), has been "dedicated and set apart to the uses and purposes set forth in the original act"; thus leaving them only the liability for continued assessments until the balance of the bonds shall be paid. We have no doubt, therefore, that in this respect, also, the Legislature went beyond its constitutional powers.

We advise that the judgment appealed from be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

143 Cal. 333

JONES v. GOLDTREE BROS. CO. et al.  
(L. A. 1,186.)

(Supreme Court of California. March 3, 1904.)

INDEBTEDNESS OF BANK—STOCKHOLDERS' LIABILITY—ACTION TO ENFORCE—LIMITATIONS—PLEADING—INSTRUCTIONS.

1. The individual liability of a stockholder for his proportionate share of a corporate indebtedness is a liability created by statute, within Code Civ. Proc. § 338, requiring action on such a liability to be brought within three years after the cause of action accrues.

2. In an action against stockholders of a bank, to recover for the latter's indebtedness, it appeared that a part of the amount sued for was money which the bank had collected for plaintiff and placed to his credit on his open account, and which he afterwards caused to be transferred to his savings account; the transfer being made by plaintiff drawing a check in its favor against his open account, and the bank charging it to the open account, and crediting it on the savings account. *Held*, that the transfer did not interrupt the running of the statute of limitations as to such sum, the cause of action for which accrued when it was first collected and placed to his credit on the open account.

3. An instruction based on material facts, of which there is no evidence, is erroneous.

4. A plea of the statute of limitations was not waived by failure to ask the withdrawal of the question from the jury, or an instruction in relation thereto.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Albert Jones against the Gold-tree Bros. Company and others. From an order granting a new trial on a verdict for plaintiff, he appeals. Affirmed.

See 69 Pac. 1124.

William Shipsey and Albert Nelson, for appellant; Max Blum and W. H. Spencer, for respondents.

COOPER, C. This action was brought to recover of defendants, as stockholders of the County Bank of San Luis Obispo, the proportion of certain indebtedness due plaintiff, in such amounts as may be found to be severally a liability against each defendant. As to the greater portion of the claim there is no controversy. But as to one item, of \$2,312.20, there is a question—and the principal question here—as to whether or not it is barred by the statute of limitations as to each and all the defendants. As to this item, the complaint, which was filed July 18, 1900, alleges that the plaintiff deposited with the County Bank of San Luis Obispo "on July 27, 1897, \$2,312.20." Defendants each pleaded that the cause of action "is barred by subdivision 1 of section 338 and section 359 of the Code of Civil Procedure." The case was tried with a jury, and a verdict returned for plaintiff in the amount claimed, which included the proportionate share of each defendant of the \$2,312.20. In other words, the jury, under the evidence and instructions of the court, found against defendants on their plea of the statute of limitations. Upon the verdict so found, judgment was entered. Defendants made a motion for a new trial, upon a statement of the case, and the court granted the motion. Plaintiff brings this appeal from the order.

The court, in granting the order, held that the item was barred by the statute, and we think the ruling correct. The individual liability of a stockholder of a corporation for his proportionate share of the indebtedness is created and exists by Const. art. 12, § 3, and Civ. Code, § 322. *Redington v. Cornwell*, 90 Cal. 63, 27 Pac. 40. An action upon a liability created by statute, other than a penalty or forfeiture, must be brought within three years after the cause of action accrues. Code Civ. Proc. § 338. When did the cause of action accrue against these defendants? It appears, without conflict, that, with authority from plaintiff, the bank on the 14th day of July, 1897, collected for plaintiff, and placed to his credit on his open account, \$2,588.85, which included the \$2,312.20 in controversy. No part of this sum has ever been repaid to plaintiff. On July 27, 1897, plaintiff caused the bank to transfer the \$2,312.20 from his open account to a savings account, and the sum was entered upon plaintiff's savings account passbook on said date. The

transfer was made by plaintiff drawing a check in favor of the bank against his open account, and the bank charged the check to the open account, and credited it on the savings account. The check was evidently drawn for the convenience of the bank, and as a voucher against, or explanation of, the item charged on the open account. The amount so placed to plaintiff's credit on his savings account was to draw interest if left for the time provided in the by-laws and rules of the bank. It is clear that the plaintiff on July 14, 1897, by reason of the deposit, loaned the amount to the bank, and afterwards, on July 27th, the loan was to be continued, but to draw interest according to the terms of the passbook. The money was, by the terms of the savings passbook, to be paid on demand, but not to draw interest, except left six months on deposit. There was no time after the 14th day of July, 1897, that the plaintiff could not, after demand, have begun and maintained an action against the bank for the said sum. The bank did not pay plaintiff the amount on July 27, 1897, nor at any other time. The change by the transfer of the account was only a change in the character of the loan, so that by the contract of the parties it was to draw interest. When the debt was contracted, the liability arose. The corporation had no power, without the consent of the defendants, to extend the limitation of the time for commencing the action. *Redington v. Cornwell*, 90 Cal. 63, 27 Pac. 40; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Goodall v. Jack*, 127 Cal. 258, 59 Pac. 575. In the latter case it is said: "From the foregoing facts it is apparent that the court was warranted in finding that the transactions above mentioned constituted merely a renewal of the old debt, by taking up the old notes and giving new ones in lieu thereof. But the running of the statute of limitations in favor of the stockholders could not in this way be interrupted. The suit was not brought until seven years after the time when the original liability was created." If on the 14th day of July, 1897, the bank had given plaintiff its promissory note, without interest, for \$2,588.85, and if on the 27th of July, 1897, the bank had given plaintiff its interest-bearing note for \$2,312.20, and the same had been credited on the noninterest-bearing note, the authorities cited would be directly in point. There can be no difference in principle. The bank was given credit on plaintiff's open account. It became his debtor on the savings account. It was always his debtor after the money was first deposited.

The court, at plaintiff's request, instructed the jury as follows: "If you find from the evidence that one Dutra deposited with the County Bank of San Luis Obispo on July 14, 1897, \$2,588.85, for Albert Jones, with the instruction to said bank that it should not pay said Jones said money until he (said Jones) should deliver up to him (said Dutra), or his



agent, the note which he (said Jones) held against Alpha Price and Mike Price, and also satisfy the mortgage of record which he (said Jones) held against said Alpha and Mike Price, then I instruct you that said County Bank was the agent for said Dutra for the purpose of paying said note and having said mortgage satisfied of record, and said Jones was not the owner of said money until he (said Jones) delivered up said note to said Dutra, or his agent, and also canceled and satisfied said mortgage of record, and it was in the power of said Dutra, by notifying said Jones, to withdraw said money at any time before said Jones had complied with his (said Dutra's) instructions." The giving of the above instruction is error, for the reason that there is no evidence upon which to predicate it. There is no evidence in the record of any instruction by Dutra or on the part of Dutra to the bank with reference to the payment of the money to plaintiff upon satisfaction of the mortgage. In fact, the evidence of Osgood, the assistant cashier of the bank, is directly and positively to the effect that Dutra came into the bank on July 14, 1897, and paid in the money for plaintiff, and that the note was surrendered to him, and the amount placed to the credit of plaintiff, on the same day. Plaintiff testified that, before the money due him on the Price note was placed to his credit, he had not authorized the bank to receive it for him; but in a letter to the bank, dated July 9, 1897, which plaintiff admitted having written, he said: "Enclosed please find note given by Price and wife. Mr. Dutra will call and pay it in a few days. When paid please place to my credit and oblige, yours truly, A. Jones." It was clearly error to instruct the jury to the effect that they might find certain material facts, when there was no evidence upon which said facts could be found or inferred. *Whitman v. Steiger*, 46 Cal. 257; *Perkins v. Eckert*, 55 Cal. 401; *People v. Thompson*, 115 Cal. 160, 46 Pac. 912.

Appellant contends that the specifications as to the insufficiency of the evidence to support the verdict are insufficient, for the reason that they are pointed to the probative fact that the evidence fails to show that the \$2,312.20 was loaned to or deposited with the bank on the 27th day of July, or at any time subsequent to July 14, 1897. It is said that the finding of the jury was of the ultimate fact that the item was not barred by the statute of limitations, and that the probative fact specified may be true, and yet other facts may have existed, such as the absence of defendants from the state, the infancy or insanity of the plaintiff, or that the plaintiff did not discover that the defendants were stockholders until within three years of the time of commencing the action. In answer to this contention, we find that chapter 4, pt. 2, Code Civ. Proc. § 350 et seq., provides the exceptions in cases, which would otherwise be controlled by the preceding general statute of limitations. The chapter provides as to

absence of defendant from the state, infancy or insanity of plaintiff, imprisonment on a criminal charge, being a married woman, death of a party before the statute expires, being an alien subject of a country at war with the United States, etc. Then follows section 359, which says: "This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created." It therefore appears clear that under the above section the only thing that would prevent the statute from having run in this case would be the fact that the plaintiff did not discover the facts upon which the liability was created until within three years of the time of commencing the action. The complaint contains no such averment. On the contrary, it states that the bank was incorporated on the 8th day of October, 1892, and "at all times herein mentioned each of the defendants [naming them] owned capital stock and shares of the capital stock of said bank as follows. [Here follows the number of shares owned by each defendant.]" If plaintiff desired to rely upon a discovery of the facts within three years, it was incumbent upon him to allege such discovery. *Sublette v. Tinney*, 9 Cal. 425; *Story's Eq. Pl.* §§ 484, 751. In *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, it was held that, where the fact that defendants were stockholders was shown by the books of the corporation, a person who advanced money to the corporation must be held to have had knowledge of the facts upon which the stockholders' liability was created. In the case at bar the complaint alleges that the defendants were, at all times named in the complaint, owners of the several shares of the capital stock of the bank; the number of shares belonging to each being set forth. Therefore the complaint not only fails to allege a discovery of the facts within three years, but it alleges facts from which the law presumes notice of all the facts.

We conclude, therefore, that the specifications were sufficient, and pointed to the only implied finding upon which the verdict as to the statute of limitations could rest.

The notice of intention to move for a new trial specified the insufficiency of the evidence to justify the verdict. The court seems to have passed upon the motions with the settled statement before it. No objection appears to have been made that the specifications were insufficient. The testimony appears to be substantially all in the statement. In view of the liberal rule now adopted and followed by this court, the specifications were sufficient. *American Type Founders' Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Bell v. Staacke* (filed Nov. 30, 1903) 74 Pac. 774. Nor did defendants waive their plea of the stat-

ute of limitations by failing to ask the withdrawal of the question from the jury, or an instruction in relation thereto. They had the right to rely upon the presumption that the verdict would be in accord with the law and the facts. As it was erroneous in the respects pointed out, the court below granted the new trial. It would have been better practice for defendants to have asked an instruction as to the bar of the statute from their standpoint. But it would open a wide field if we were to lay down a rule that any defense relied upon in a pleading is waived if a party does not ask an instruction as to the law applicable to the particular facts.

We advise that the order be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed. SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

On Rehearing.

In Bank.

(April 2, 1904.)

PER CURIAM. A rehearing is denied. The portion of the opinion heretofore filed, commencing with the words, "In answer to this contention, we find that chapter 4, part 2," and ending with the following paragraph, viz.: "We conclude, therefore, that the specifications were sufficient, and pointed to the only implied finding upon which the verdict as to the statute of limitations could rest"—is stricken out, the same not being necessary to the conclusion.

144 Cal. 314

In re REITH'S ESTATE. (Sac. 1,150.)  
(Supreme Court of California. Aug. 2, 1904.)

WILLS—CONSTRUCTION—CREATION OF TRUST—  
DECREE OF DISTRIBUTION—DEATH OF BENEFICIARY DURING TRUST PERIOD—RIGHT OF INHERITANCE.

1. A will giving to testatrix's children certain property, and to her husband one-tenth of her other property; naming him, with two others, trustees for testatrix's whole estate, to be so protected by them that her children shall receive at the age of 25 one half of all that is due, and at 30 the remaining half; providing that they shall receive a commission for their services; assigning to them the duty of keeping the children in such circumstances as will permit them to have every comfort of dress, etc., and all needed education; and providing that in case of her husband's death a certain other person shall act as trustee with the survivors—creates a trust as to the property of the children, all testatrix's property except that given her husband; the purpose being sufficiently plain, and a devise, in terms, to the trustees not being necessary.

2. A trust for children is not void because not specifying how much the trustees shall expend for the support and education of the children.

3. Where a will vests the title in fee in testatrix's children, subject to a trust, and to the possession of the trustees for the trust period,

the decree of distribution in the matter of the estate should distribute such title in fee, subject to said trust, to the children.

4. Where a will gives the property to testatrix's children, and then provides a trust as to the property till the children are of a certain age, the share of one of them dying after testatrix, but before arriving at such age, vests in his heirs, not in those of testatrix.

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Alice Lindley Reith. From part of the decree of distribution, an appeal is taken. Modified.

R. C. Van Fleet, for appellants. S. C. Denison, W. F. George, and Wm. M. Sims, for respondent.

McFARLAND, J. This is an appeal from that part of the decree of distribution which distributes the estate of the minors to trustees. The decree follows the will under which it was made, and the question is thus presented as to whether or not the will created a trust as to the property of the minor children. The portion of the will material here is as follows: "Of my real estate and business interests I bequeath to my children all equally share and share alike the property bounded by 7th., J—the alley, etc.,—my interest in the home property on H, 13th. and 14th., and the part of the business and property now carried on on K. Street, between 3rd. and 4th., my interest in the Buffalo Brewery and lands in Arizona and the Omaha. To my husband, John Reith Jr., I name one-tenth of all such of my estate not mentioned as personal property, together with small personal bank interests, and together with Douglas A. Lindley, Wallace A. Briggs, I name him trustees for my whole estate, to be so protected by them that my children shall receive at the age of twenty-five one-half of all that is due and at thirty, the remaining half, and that these trustees shall receive a small commission each in consideration of their services. I also assign to said trustees the added duty of keeping my children in such circumstances as will permit them to have every comfort of dress etc., and all the needed education which shall fit them for a career in any position of life. In the event of my husband's death, I name by brother-in-law Jesse L. Reith, to act as trustee with the surviving ones, knowing him to be honorable, competent and justly fitted for such responsibility as are herein expected. Furthermore, I wish to state that if the trustees see fit to make over to my children because of good character and industrious propensities the whole rather than one-half of my estate as they reach the age of twenty-five, it shall be in their power to do so. Alice Lindley Reith."

"The will is in the handwriting of deceased, and was evidently written without legal assistance. But no matter how poorly expressed, nor how ungrammatical may be the sentences, it is the duty of the court to inter-

pret it, and carry out the intention of the testatrix, if that intention can be ascertained, provided no law is violated in so doing. The court must examine the will in all its parts with the honest and earnest purpose of arriving at the thing that the deceased intended should be done with her property. She had property, and desired to dispose of it. She had four children of tender age, and she desired to provide for their care and education. She had the right to dispose of her property as she saw fit, provided she violated no law in so doing. It is plain that the deceased intended her husband to have one-tenth of the property, after excluding the specific bequests made in the first part of the will, and the personal property which had been given to her children. It is equally plain that the children were to have the remaining nine-tenths. She named her husband and Lindley and Briggs as trustees of her whole estate, but by 'whole estate' she evidently meant the whole of the estate left to the children, for the statement immediately follows: 'to be so protected by them that my children shall receive at the age of twenty-five one-half of all that is due and at thirty, the remaining half, and that these trustees shall receive a small commission each in consideration of their services.' She did not mean that the trustees should have charge of her husband's portion, because she states that the trustees are to keep it until the children shall receive it under certain conditions. In the next paragraph she makes it the duty of the trustees to keep her children, to give them a proper education, and to provide suitable clothing for them. She had named the children, she had given them an estate, she had named trustees, and she designated the duty of the trustees. She did not intend that the executors, as such, should keep the estate for the children, and clothe and educate them, because that is no part of the duties of executors. She expressly states that the trustees shall receive a commission. And in the latter clause she states that, in the event of her husband's death, she names her brother-in-law, Jesse L. Reith, 'to act as trustee with the surviving ones, knowing him to be honorable, competent and justly fitted for such responsibility.' The intention was that the children's portion should be held, and managed by trustees of her own selection, until the time when they should have full possession.

"A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another. The trustee stands upon the same footing as a confidential agent or adviser, and, in cases of minor children, much like a guardian. The confidence reposed is the essence of the relation, and the trust is always for the benefit of some third party or parties, or for some particular object. A trust may be created for any purpose allowed by the Code. The subject-matter of the trust,

the purpose thereof, and the persons beneficially interested, must be reasonably ascertained. A voluntary trust is created as to the trustor and beneficiary 'by any words or acts of the trustor indicating, with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose and beneficiary of the trust.' Civ. Code, § 2221. In the case of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, which was an appeal from the Circuit Court of the United States for the District of California, the words of the will were: 'I give and bequeath to my said wife E. M. C. all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such provision for them as in her judgment will be best.' It was held that a trust was imposed upon the surviving wife to make suitable provision for the mother and sister. The court said: 'No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words "upon trust" or "trustee" if the creation of a trust is otherwise sufficiently evident. If it appears to be the intention of the parties, from the whole instrument creating it, that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust, but the intention is to be gathered in each case from the general purpose and scope of the instrument.' In *Tobias v. Ketchum*, 32 N. Y. 319, the testator did not use the words 'trustee' or 'trustees,' but gave the executors power to rent, lease, repair, and insure his real estate, until sold or divided, and out of the rents and profits to pay the provision made for the widow, and to at a certain time divide the property among the children or other heirs. It was held that the will created a trust in the executors. The court said (quoting from *Hill on Trustees*): 'It is by no means necessary that the donee should be expressly directed to hold the property to certain uses or in trust, or as trustee. \* \* \* It is one of the fixed rules of equitable construction that there is no magic in particular words, and any expressions that show unequivocally the intention of the parties to create a trust will have that effect. It was said by Lord Eldon that the word "trust" not being made use of is a circumstance to be alluded to, but nothing more, and, if the whole frame of the will creates a trust, the law is the same, though the word "trust" is not used.' See, further, *Fay, Trustee, v. Taft*, 12 Cush. 448; *Brewster v. Striker*, 2 N. Y. 19; *Morse et al. v. Morse*, 85 N. Y. 53;

Pomeroy's Eq. Jur. (2d Ed.) §§ 1010, 1011, 1012; Hill on Trustees (American Notes) p. 101 et seq.; Lucas v. Lockhard, 10 Smedes & M. 466, 48 Am. Dec. 766; Johnson's Adm'r v. Billups, 23 W. Va. 685.

"It is also claimed that the trust is void for the reason that it leaves it to the discretion of the trustees as to how much income shall be used to support and educate the children, and the Estate of Sanford, 136 Cal. 93, 68 Pac. 494, is claimed to support such contention. In that case the trustees were to receive the rents and profits of the land, and apply the net proceeds of the same to the use and benefit of the beneficiaries to such extent and at such time or times as, in their judgment, shall be proper. What was said in regard to the discretionary clause was not the point on which the case was decided. It was expressly held that the provision of the will creating an express trust to convey was void on the authority of the Fair Case, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. In the case at bar, however, the clause is entirely different from that in the Sanford Case. Here it is made the duty of the trustees to keep, clothe, and educate the children. It was not necessary to say that all the income should be used for such purpose. The income may for many reasons vary from time to time. It may be more than necessary for the purposes contemplated in the will. In such case it could not have been the wish of deceased that the excess should be squandered or used in a reckless manner. It may under certain circumstances cease, or be diminished to such extent as to be wholly insufficient. In such case it could not have been the wish of deceased that her children should suffer for the necessities of life. The terms of the trust in this case are imperative. The children must be kept, clothed, and educated. The manner in which they shall be kept, the nature of their education, the kind of clothing they shall wear, must depend to a certain extent upon the amount and income of their estate. The trustees will be presumed, acting as the persons in charge of the children, to reasonably and properly care for them. They are under the supervision of the court, and at all times will be held answerable for a failure to perform the duties of their trust in a proper manner, and for any abuse of their powers. The deceased reposed confidence in them, and, having such confidence, she selected them. We will presume that they will perform the duties of their trust faithfully. This disposes of the questions argued in the brief of appellants and upon which they rely. Their appeal is only from that part of the decree distributing the estate in trust for the four minor children of deceased."

The foregoing was prepared by Mr. Commissioner COOPER when this case was pending in department, and it is adopted as part of this opinion.

In response to appellants' contention that there is in the will here in question no direct devise of an estate to the trustees, it is sufficient to say that when, from the nature of the duties to be performed, the taking of such estate is necessary, "an estate in the trustees will vest by implication." See Fay, Trustees, v. Taft, 12 Cush. 448, and cases there cited, where the subject is fully discussed.

However, the decree of distribution in the case at bar must be modified in some respects. A trustee takes only such estate as is necessary for the performance of the trust, and in this case the decree properly distributes the trust property to the trustees "for the period, and for the uses, trusts, and purposes hereinafter in this decree specified." This properly gives to the trustees only an estate for years. But a decree of distribution should dispose of the property, and the whole title thereto, and all the estates therein, which is not done in this instance. By the will in question the title in fee is vested in the four children, subject to the trust, and to the possession of the property by the trustees during the trust period; and such title in fee, subject to said trust, should be distributed to the children. Moreover, the decree, after stating that, upon the death of any of the children under the age mentioned in the will, the trust as to such beneficiary shall cease, proceeds as follows: "And the share of said trust property and the accumulations thereof which, but for his or her death, said beneficiary would have received on obtaining the age hereinbefore mentioned, shall go to and vest in the heirs at law of said Alice Lindley Reith, deceased, according to the laws of succession of the state of California." This last-quoted clause of the decree should be stricken out. Perhaps it is not necessary for the decree to make any provision on this subject, but the clause as it stands is erroneous. It goes upon the theory that the whole title in fee to the trust property vested in the trustees, that the children have no estate or title at all in the property during the trust period, and that at the end of such period they would get title only through a conveyance from the trustees. This is an erroneous view, and, if it were correct, the attempted trust would be void, as a forbidden trust to convey. As before said, the title in fee vested in the children at the death of the testatrix, by virtue of a direct testamentary gift to them, subject only to the trust. The estate mentioned in section 863, Civ. Code, "means the whole of such an estate as is necessary to the performance of the trust." In re Walkerly, 108 Cal. 648, 41 Pac. 772, 49 Am. St. Rep. 97. The whole title to the property passed from the testatrix by the will, and it was erroneous to decree that the property would go to her heirs upon the death of one of the children before arriving at the age mentioned in the will. In the event of the death of one

of said children, his or her share in the property would vest in fee in his or her heirs.

There was submitted, also, a motion to dismiss the appeal herein; but, in our opinion, the grounds upon which said motion are based are not tenable, and the motion to dismiss is denied.

The cause is remanded, with directions to the court below to modify the decree appealed from as above indicated; that is, by striking out the clause above quoted, commencing with the words "and the share," and ending with the words "state of California," and inserting as a general clause in said decree the following: "All right, title, interest, and estate to all of the property, given in trust, except only the estate therein hereinbefore distributed to said trustees, and subject thereto, is hereby distributed to said children, Lindley Morton Reith, Flora Reith, John Reith, and Alice Reith;" and, as thus modified, the decree will stand affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 289

COLLINS et al. v. MAUDE. (L. A. 1,206.)

(Supreme Court of California. Aug. 1, 1904.)

RESIDENCE—EVIDENCE—FOREIGN JUDGMENT—GIFTS—EVIDENCE—PAYMENT.

1. Evidence in an action by the distributees of decedent's estate under administration proceedings in a court of record of another state held, in view of the presumption in favor of the judgment of the court of the other state, to sustain the finding that deceased was a resident of that state when she died.

2. An instrument reciting: "I am leaving for S., and before I start I write this is to certify that it is my wish that M. shall not be asked for the money she borrowed from me or the interest on it. She and I have a perfect understanding about my business"—does not, on its face, import a gift, or an intention to forgive the debt.

3. Evidence in an action to foreclose held sufficient to sustain the finding that the mortgagee did not make a gift to the mortgagor of the sum evidenced by the note and mortgage.

4. It cannot, on appeal, be said that the trial court erred in holding that the presumption of nonpayment from possession by the payee at her death of a note free of indorsements was not overcome by the unsupported testimony of the maker of a note that she made two payments on account of interest, but did not know whether she paid more than one year's interest; that she paid \$60 about two months before a certain event, and that it was her impression that it paid the interest up to about that time, but that she could not remember the time or amount of the first payment.

Commissioners' Decision. Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Patrick Collins and another against Bella K. Maude. Judgment for plaintiffs. Defendant appeals. Affirmed.

Collier & Carnahan, for appellant. C. L. McFarland, for respondents.

CHIPMAN, C. Plaintiffs bring the action to foreclose a mortgage on property in Riverside county, given by defendant to secure her promissory note for \$2,000, May 27, 1892, due five years after date, with 10 per cent. annual interest. The note and mortgage were given to Julia Mann, but the money was furnished by Bridget Collins, to whom Julia executed an assignment. Bridget came from Ireland about 1865, and took service as a cook with defendant at St. Louis, Mo., and worked for her 16 or 17 years, and it was there she accumulated this money. Her two brothers, plaintiffs in the action, have for many years resided in St. Louis. As near as we can determine from the evidence, Bridget came to California in 1891. She worked for others several months, and came to defendant, and remained about a year. Later Bridget worked for another family, and in the latter part of 1893 her health failed her, and she was taken to defendant's home and cared for. Defendant testified, "She was a good deal over sixty," and could neither read nor write. In December, 1893, Bridget determined to return to St. Louis for the advice of a doctor who had been successful formerly in treating her. Defendant and Bridget had some conversation concerning the note and mortgage, and on the day Bridget left for St. Louis she executed the following document:

"I am leaving for St. Louis, and before I start I write this is to certify that it is my wish that Mrs. Maude [defendant] shall not be asked for the money she borrowed from me or the interest on it. She and I have a perfect understanding about my business. I affix my name in the presence of these witnesses, this twenty-first day of December, eighteen hundred and ninety-three.

"Bridget (X her mark) Collins.

"H. Meyer, Helen Ward."

On her arrival at Kansas City, Mo., Bridget became ill, and on December 27, 1893, was attended by a physician, who testified that he diagnosed her case as chronic progressive dementia; and that she died at Kansas City, December 29, 1893. On January 24, 1894, plaintiff Patrick Collins petitioned the probate court of St. Louis, Mo., for letters of administration on Bridget's estate, setting forth that he and plaintiff John Collins were brothers of the deceased, and her only heirs at law, and that she died intestate, leaving an estate consisting of a note and mortgage for \$2,000 and cash in bank \$200. On the same day the court issued letters reciting: "Whereas Bridget Collins, late of the city of St. Louis, died intestate, as it is said, having at the time of her death, property in this state, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same, to the end, therefore, that the said property may be collected, preserved, and disposed of according to law, we do hereby

appoint Patrick Collins administrator of all and singular the goods and chattels, rights and credits, which were of the said Bridget Collins at the time of her death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased," etc. On March 5, 1894, the court made an order approving the appointment of Patrick Collins as administrator, "taken and granted by the judge and clerk of this court in vacation since the last term thereof." Inventory was duly returned and filed May 26, 1894, and described the note and mortgage in question. Also cash on deposit in Riverside Savings & Loan Association, Riverside, Cal., \$198.90; on her person \$45, and wearing apparel valued at \$27.05; also an account against Miss Mangan \$200—making in all \$2,470.95. Notice was given of final settlement of the estate to be held at the ensuing September term of the court, at which final settlement and distribution were decreed October 28, 1896. Among other things, the court ordered the administrator to assign and transfer to himself and his brother, John, as sole heirs of the deceased, each an undivided one-half of the note and mortgage in question and the other property, and on March 28, 1897, the administrator was discharged. Defendant claimed in defense (1) that she had paid the note in part; (2) that on December 21, 1893, Bridget "gave to defendant the sum evidenced by the note and mortgage, and forgave the indebtedness;" and (3) that the St. Louis court had no jurisdiction of the probate proceedings in said estate. The court found against defendant on these issues, and gave judgment for plaintiffs for the full amount of principal and interest of the note, and rendered a decree of foreclosure. Defendant appeals from the order denying her motion for a new trial.

1. The question of jurisdiction demands first attention. The jurisdiction of the Missouri court is challenged upon the ground that at the time of her death Bridget Collins was not a resident of St. Louis. The superior court, however, has found upon the evidence before it that the court of the city of St. Louis, state of Missouri, had jurisdiction of her estate and of its settlement, and authority to issue letters of administration therein. This finding necessarily implies that she was a resident of St. Louis, if that fact was essential to give such jurisdiction to that court. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699. And, as there was a conflict of evidence as to whether she was a bona fide resident of the city of St. Louis when she died, this finding cannot be disturbed. In *re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. There is no direct evidence showing that Bridget ever intended becoming a permanent resident of California. She had resided many years in St. Louis, where her only relatives in this country resided, before coming to this state. She was unmarried,

and had reached an advanced age, and there was testimony that she was not physically capable of performing the duties of servant as theretofore. Defendant testified that Bridget said she thought she would "be back." Mr. Abbott, cashier of the bank, when given the custody of the note and mortgage, testified that she came to the bank on December 21st, the day she signed the paper held by defendant, and drew out some money. He testified: "My impression is then was the time she told me she was going east, and might not return, and wanted to leave the papers for safe-keeping." She was so seriously ill when she departed that she died before reaching St. Louis. The St. Louis court, in its appointment of the administrator, mentions her as "late of the city of St. Louis," and so also did the petition for letters filed by plaintiff Patrick Collins. The burden of showing want of jurisdiction in the St. Louis court was on the defendant, and, in view of the presumptions which are indulged in support of judgments of courts of record, this burden requires clear and convincing proof of such want of jurisdiction. The fact that Bridget came to California about the year 1891, and remained nearly three years, does not compel the inference that she had thus abandoned her residence at St. Louis. Upon the question of Bridget's residence at the time of her death, there is sufficient evidence to create a substantial conflict. As the court found that Bridget resided in St. Louis at her death, the distribution of her personal estate was governed by the law of that state. *Estate of Apple*, 66 Cal. 432, 6 Pac. 7. The property was in fact delivered to the administrator at St. Louis, and thenceforward was within the jurisdiction of the St. Louis court. No administration was had in this state; no claim was made on the property by any one in this state, and hence no question arises as to any conflict of jurisdiction. The fact that the note and mortgage were in this state when letters issued in St. Louis is immaterial.

2. The writing signed by Bridget does not, on its face, import a gift to defendant of the sum evidenced by the note and mortgage, or an intention to forgive the debt. "A gift is a transfer of personal property, made voluntarily and without consideration." Civ. Code, § 1146. To constitute a transfer, the writing should contain words apt to effect a transfer, or show an intention to transfer. In the paper before us Bridget did no more than to say that, as she was about to go to St. Louis, she did not wish, in her absence, that Mrs. Maude should be asked for the money she had borrowed, or the interest. Before it could be held that this language effected a transfer, something more must be shown than the paper writing itself. Defendant undertook to do this by evidence which was admitted without objection by plaintiffs. Mrs. Ward, a witness to the signature of Bridget, and sister of defendant, testified

that defendant wrote the body of the paper, and, when asked to state what directions Bridget gave defendant before writing it, replied, "She told her to write she was not to be asked for the principal or interest." There was evidence that Bridget had said on several occasions that she intended that defendant should have her money, and that she did not intend to do anything more for her brothers. Defendant, as did other witnesses, testified that Bridget was very strongly attached to her. Speaking of the loan, witness explained that Bridget wanted her to take her money, which was then in a St. Louis bank. It was sent for, and loaned to defendant on the date of the note and mortgage. Witness testified that Bridget often spoke of this money as belonging to witness, as she had paid it to Bridget originally. The witness was asked particularly as to what occurred when the paper was signed by Bridget. After relating the circumstances which brought the matter up, witness testified: "I said, 'I am not worried about that, but what troubles me is I don't want to be worried and bothered about that interest if it should fall due before you come back.' She said, 'You must not be bothered.' I said, 'It is in the bank to be collected,' and she said, 'Go down to the bank and get it out.' This conversation took place that afternoon after we had gone home. It was raining very hard. It was time the bank was closed. I supposed it was closed by that time. 'Well,' she said, 'I will give you a paper about it.' She said, 'You sit right down to the desk, and you write this yourself; you are not to be bothered about it.' She said, 'I got it from you, and it is yours.' She told me to write that. I sat down. She said, 'You are not to be bothered about any of it; not to ask you for the interest or anything else.' So I sat down, and wrote a paper I thought covered it. I am not very good at business writing, I must say. It never entered my head that she would die, but I just wrote what I thought she meant. I wrote it under her instructions, and then took her to the depot." Witness Abbott, cashier of the Riverside Savings & Loan Association, testified that Bridget opened an account in his bank June 6, 1893, and made several deposits; that she came to the bank on December 21, 1893 (the day she left for St. Louis), and got some money, and his impression was that she left the assignment of the note and mortgage with him at that time; and she told him she was going away, and he advised her to have the assignment recorded; that she had not recorded it because some one had a claim against her for \$20, which she said she did not owe, and that Mrs. Maude had advised her not to record the assignment. Witness afterwards, on December 29, 1893, had it recorded, and later, upon an order of the probate court of St. Louis, turned over the note and mortgage and assignment and Bridget's

balance on account. We cannot see that this evidence leads necessarily to the conclusion claimed for it by defendant. Defendant wrote the paper signed by Bridget, and we think the court was warranted in holding that its purpose was not enlarged beyond its terms by any attendant or preceding circumstances. It must be presumed that defendant used as strong and expressive language as she was authorized to use, for she drew the paper herself in her own interest. Indeed, she testified that she wrote a paper which she thought covered Bridget's wish. Something more definite could have been said than was said if there was a mutual understanding that Bridget was surrendering control and ownership of these evidences of indebtedness. Mr. Abbott, speaking of the day Bridget left for St. Louis, testified that she came to the bank. He testified: "I am sure it was at that time that I had a talk with her about recording the assignment. I saw it at that time. It is possible that I had those papers there for safe-keeping for some time, but I don't think it probable. My impression is that it was the day she came in. Mrs. Maude was not with her at the time she came in to get the money. In fact, if my memory serves me right, she told me Mrs. Maude hadn't any knowledge that she was bringing it in; she didn't want her to bring it in." If Bridget had wished to give these evidences of indebtedness to Mrs. Maude on that day, or to forgive her the debt, she would most likely have taken those papers to her, and not left them in the bank. Whatever disposition Bridget intended ultimately to make of her claim upon Mrs. Maude, we cannot say that the evidence without conflict shows that she intended, or that Mrs. Maude then thought she intended, to sign a paper the effect of which was to transfer the note and mortgage, or to operate as a forgiveness of the debt evidenced by them.

Referring to sections 1146 and 1147, Civ. Code, relating to gifts, it was said in *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267: "There can be no gift without an intention to give and a delivery, either actual or constructive, of the thing given. There must be both a purpose to give and the execution of this purpose. The purpose must be expressed either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift." In *Pullen v. Placer County Bank*, 188 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, it was said: "A gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or (except in the case of a gift causa mortis) is subject to his

revocation, his gift is not complete. There is no difference, however, in this particular between a gift *inter vivos*, and a gift *causa mortis*. In either case it is not complete unless there is either an actual or symbolic delivery to the donee of the thing to be given." In the case last cited a father intended to give his son money that was in bank, and gave the son a check for the amount. The father died before the check was presented, and it was held that the check was not a symbolic delivery, but was revocable by the father, and that his death worked a revocation. Said the court: "By the failure of the son to present the check there was no delivery of the money during the lifetime of the father, and the gift was, therefore, not complete." If we could look to the paper signed by Bridget as evidence of an intended transfer, Mrs. Maude failed to demand possession of the note and mortgage until after Bridget died. Indeed, she never has demanded or obtained their possession, so far as appears. She relies apparently on the paper as having effected a present transfer, which, we think, cannot be maintained. Bridget's declarations on previous occasions to Mrs. Maude, "The money is yours;" and again, "Take the money and go (to Europe); it is yours;" her statement to witness Ward "that she had made up her mind that Mrs. Maude and Leesy," as she called him, "should have her money"—at best were expressions of Bridget's then mental attitude towards Mrs. Maude, but no step was taken to carry out her apparent willingness to give Mrs. Maude her money. Prior to her death Bridget never for a moment surrendered control of her property, and but a few hours before she left for St. Louis she gave instructions concerning her property to the bank having custody of it. Upon no principle of law can we see how the trial court could have reached a conclusion favorable to defendant's contention.

3. The court found that the note was wholly unpaid. It is claimed that the evidence shows without conflict that one year's interest was fully paid, and that defendant paid \$60 at one time as interest. Defendant testified that she made two payments on account of interest, but did not know whether she paid more than one year's interest; that she paid \$60 the last time, about two months before Bridget gave her the paper. It was her "impression" that it "paid the interest up to about that time." She had no receipts, and the payments were not indorsed on the note. She did not remember when she made the first payment on the interest, or the amount. There was no corroborative evidence of these alleged payments. The possession of the note without indorsement raised the presumption that no payment had been made on it. We cannot say that the court erred in holding the unsupported testimony of defendant coming from an interested witness to be too

weak and unreliable to overcome this presumption. *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497.

It is advised that the order be affirmed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 228

PEOPLE v. ALLEN. (Cr. 1,139.)

(Supreme Court of California. Aug. 1, 1904.)

CRIMINAL LAW—APPEAL—PRESUMPTIONS—  
TIME OF OFFENSE—INSTRUCTIONS.

1. In support of an instruction assuming a fact, it will, in the absence of the evidence, be presumed the fact stood as undisputed or admitted.

2. Where the state on a prosecution, after giving evidence of several acts occurring at different times, selects one of them, described by reference not to time, but to other things happening at the same time, as the crime for which defendant is being prosecuted, it is proper to instruct that the prosecution had made out its case if it established the crime so described as having been perpetrated on any day within three years prior to the filing of the information.

3. It cannot be assumed, because the court instructed the jury to disregard certain evidence, that it committed error in admitting it.

4. In justification of a refusal to instruct, and in the absence of the evidence, it will be presumed prosecutrix was under the age of consent.

Department 2. Appeal from Superior Court, Ventura County; Noyes, Judge.

Francis T. Allen appeals from a conviction. Affirmed.

W. E. Shepherd and Blanchard & Bowker, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

HENSHAW, J. Defendant was convicted of rape perpetrated upon a female under the age of consent. He moved for a new trial, and his motion was denied. He appeals from the judgment and from the order of the court refusing his motion for a new trial.

Upon this appeal he presents no statement of the case nor bill of exceptions, but brings up the judgment roll alone. None of the evidence is before us. His attack is upon the instructions given by the court. Since the defendant has failed to present to us the evidence bearing upon the instructions, it must be presumed, in considering them, that they were pertinent to the evidence in the case. Indeed, more; all reasonable presumptions in this regard must be indulged to support them. "All intendments of the law are in favor of the regularity of the judgment and proceedings of the court below, and it is incumbent upon appellants to show error affirmatively." *People v. Winters*, 29 Cal. 658; *People v. Gib-*



son, 106 Cal. 458, 39 Pac. 864; *People v. Ebanks*, 117 Cal. 665, 49 Pac. 1049, 40 L. R. A. 269.

We come to the consideration of the instructions which are attacked, bearing in mind the foregoing indisputable rule.

1. Several acts of sexual intercourse having been testified to by the prosecutrix, the district attorney, on motion of defendant, elected one such act alleged to have occurred at what was known as the "Blue House" at the time when it was alleged the drawers or "panties" of the prosecutrix were thrown out of a window. The court, in this regard, instructed the jury as follows: "The crime alleged against the defendant, and the one the people have selected as the one they intend to prove, is that the defendant, in the house designated as the 'Blue House,' in the city of Santa Paula, county of Ventura, state of California, at the time the drawers or 'panties' of the witness, Drusilla Larsen, were alleged to have been thrown through the window, did willfully, unlawfully, and feloniously have sexual intercourse with said Drusilla Larsen, a female, the said Drusilla Larsen being then and there under the age of sixteen years, and the said Drusilla Larsen not being then and there the wife of the defendant. Now, the exact date of this occurrence is not necessary, so long as the occurrence happened within three years prior to the filing of the information in this case. By this I mean that the people are not obliged to prove that the crime was committed exactly on the 10th day of September, 1903, but that they can prove the crime to have been committed at any time within three years prior to the filing of the information, so long as they prove the crime to be the crime that is alleged to have been committed by the defendant at the house designated as the 'Blue House,' in the city of Santa Paula, county of Ventura, state of California, and at the time when the drawers or 'panties' of Drusilla Larsen were alleged to have been thrown through the window. This is the crime the people have selected as the one alleged in the information, and this is the crime you are to find the defendant either guilty or not guilty of, in case you should agree upon a verdict." Objections are urged against this instruction, first, that it assumes the fact that the drawers of the prosecutrix were thrown through the window, and, second, that it was error to charge the jury that it was not necessary for the prosecution to show that the crime, if committed, was committed upon the 10th day of September. As to the first of these propositions, it will be assumed, in the absence of evidence, and to support the instruction, that it stood as an undisputed or admitted fact that the girl's drawers were thrown from a window of the "Blue House." "An instruction which assumes a fact as proved will not warrant a reversal if the fact is admitted, or there is no

shadow of conflict of evidence with respect to it." *People v. Messersmith*, 61 Cal. 249; *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *People v. Putnam*, 129 Cal. 263, 61 Pac. 961. As to the second contention, it is sufficient to say that, the particular act having been selected by reference to circumstances rather than to date, it was proper for the court to instruct the jury, as it did, that the prosecution had made out its case if it established the crime according to the circumstances as having been perpetrated upon any day within three years prior to the filing of the information. *People v. Sheldon*, 68 Cal. 437, 9 Pac. 457.

2. The court refused to give an instruction to the effect that the jury might convict of the crime charged, or of the lesser crime of assault with intent to commit rape, and justified its refusal by stating that the case was not a case of force or assault. In support of the ruling it will be assumed, in the absence of the evidence, that the proposed instruction was properly rejected, and that this case stood like that of *People v. Castro*, 133 Cal. 13, 65 Pac. 13, where this court said that upon the evidence a verdict of guilty or not guilty was the only verdict which could properly be rendered in the case.

3. Complaint is made of a modification of an instruction made by the court in striking out a declaration to the effect that the proof must establish that the crime was committed on the 10th day of September, 1903, but, for the reasons given under paragraph 1 foregoing, it was proper for the court so to have modified the instruction.

4. The court refused to give an instruction upon the subject of corroborative evidence which "admonished the jury of the danger of a conviction on such uncorroborated evidence," etc. The refusal was justified in the first place, because the instruction was argumentative and in the nature of a special plea, and, in the second place, justified (in the absence of the evidence) upon the ruling of the court that it was not applicable to the facts.

5. The court instructed the jury as follows: "You are not, under any circumstances, to take into consideration the testimony concerning the fact of sexual intercourse defendant is alleged to have had with other little girls, or any one. This, remember, gentlemen, you are not to consider, and you are therefore to wholly disregard it." It is said that this was an attempt "to cure a gross error made in admitting, under objection of defendant, testimony as to the alleged fact that defendant had intercourse with other little girls." But, again, we repeat, as the evidence is not before us, this statement from appellant's brief cannot be accepted. To the contrary, the rule applicable to this instruction, under these circumstances, is that expressed in *People v. Olson*, 80 Cal. 123, 22 Pac. 125, where it is said: "Counsel for ap-

pellants contend that certain evidence was improperly admitted, and claim that we can consider the action of the court in overruling their objection thereto, in the absence of the evidence, because it appears from the instructions of the court that the jury were instructed not to consider the same. But the fact that the court, in effect, acknowledged its error in admitting the testimony by thus instructing the jury, cannot justify a reversal of the case. So far as we know, the court below may have been right in its first ruling, and wrong in directing the jury not to consider the evidence."

6. It is urged that the court erred in refusing to give an instruction to the effect that the jury should consider the fact that the prosecuting witness made no outcry at the time of the alleged rape, and concealed the fact for a considerable length of time thereafter. The trial judge refused to give the instruction, as inapplicable to the facts. It will be presumed, in justification of the court's refusal, that the rape was not committed by force or violence, but was committed upon a female actually consenting, but, by reason of her tender years, incapable of legal assent.

This disposes of all the points raised by appellant upon his appeal, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.

(144 Cal. 284)

PEOPLE v. JAN JOHN. (Cr. 1,087.)

(Supreme Court of California. July 29, 1904.)

PERJURY—EVIDENCE—CONFESSIONS.

1. In a prosecution for perjury in having filed with a justice a complaint charging A. with larceny, evidence that B., who was arrested and brought before the justice, was the same person as A., and was the person whom defendant intended to charge, was admissible.

2. The rule that statements of guilt are inadmissible without preliminary evidence that they were voluntary applies only to confessions, and does not forbid proof of other admissions of defendant, though they may tend to prove him guilty.

3. In a prosecution for perjury in charging another with larceny in a complaint filed with a justice, the stenographer at the examination of the person charged testified to the statement of defendant as to the identity of the person examined with the party charged, and that afterwards an interpreter was called in, and the examination continued through him. Held, that the court properly refused to permit defendant to examine the witness as to what was said through the interpreter.

Commissioners' Decision, Department 1. Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Jan John was convicted of perjury, and appeals. Affirmed.

Louis P. Boardman, George F. Carroll, and G. A. Whitehurst, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Jas. H. Campbell, Dist. Atty., for the People.

SMITH, C. The defendant was charged with the crime of perjury, and convicted. The appeal is from the judgment and from orders denying motions for new trial and in arrest of judgment. The crime is alleged to have been committed by the defendant in making and verifying an affidavit or complaint before a justice of the peace charging one Lai Ha with larceny alleged to have been committed on or about December 10, 1900, at the county of Santa Clara. It appears from the evidence of several witnesses that under the warrant issued on this complaint a woman, named Yet Gum, or Gam, living in Stockton, was arrested, and on being brought for examination before the justice of the peace was identified by the defendant as the party charged; and there was evidence not only that she did not commit the larceny charged, but that she was, at the date alleged, at her residence in Stockton, where she was confined by illness. There was evidence on the part of defendant that there was a woman of the name Lai Ha, and that she was in San Jose on January 10, 1900, but there was no proof connecting her with the charge, or that the defendant knew of her. The points urged by the appellant are: (1) That the evidence as to the identity of Yet Gum with the person charged in the complaint was inadmissible; (2) that evidence of the defendant's statement at her preliminary examination as to her identity was erroneously admitted; (3) that the court erred in sustaining the objections of the prosecution to the offer of the defendant to prove by the stenographer employed at the examination of Yet Gum the testimony given by the defendant through an interpreter; also (4) in admitting the testimony of the witness Roenthal as to a conversation with defendant; also (5) in admitting the testimony of the witness Walker as to another conversation with him; and (6) that the evidence was insufficient to sustain the verdict.

The first and last points may be considered together. The evidence of the identity of Yet Gum as the person charged in the complaint was ample, if admissible, to prove that she was the person the defendant intended to charge, and in fact did charge, with the crime alleged; and as to the question of admissibility, that, we think, must be answered in the affirmative. The effect of the complaint is to be determined by the intention of the party making it, as disclosed by its language and competent explanatory circumstances; and, the intention being clear, the misnomer of the party, referred to, or other misuse of words, is immaterial. This evidence, coupled with the proofs that Yet Gum

§ 2. See Criminal Law, vol. 14, Cent. Dig. § 894.

was not and could not have been guilty of the crime charged, was sufficient, with other evidence in the case, to sustain the verdict. And as there were several witnesses to the facts establishing the falsity of the charge, the requirements of section 1968 of the Code of Civil Procedure were complied with.

The second point, more specifically stated, is that the statements of the defendant made in his testimony at the preliminary examination of Yet Gum, were inadmissible without preliminary evidence that they were voluntary. But this rule applies only to confessions of guilt, and does not forbid proof of other admissions of the defendant, though these, taken in connection with other proofs, may tend to prove him guilty. *People v. Ammerman*, 118 Cal. 32, 50 Pac. 15, and cases cited.

With regard to the third point, it appears that the stenographer at the examination of Yet Gum testified to the statement of the defendant as to the identity of Yet Gum with the party charged, and that afterwards an interpreter was called in, and the examination continued through him. It is claimed that thereupon the defendant proposed to examine the witness as to what was said by the defendant through the interpreter, but was not permitted to do so; which is the error complained of. Assuming this to be as claimed, the ruling was proper, for it was held on the former appeal in this case that such evidence was inadmissible. *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063.

As to the remaining points, the testimony of the witnesses Rosenthal and Walker was, we think, admissible.

We advise that the judgment and orders appealed from be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

(144 Cal. 231)

THOMPSON v. BOARD OF TRUSTEES OF CITY OF ALAMEDA et al. (S. F. 3,768.)

(Supreme Court of California. July 29, 1904.)

CITIES — ORDINANCES — TEMPORARY DIVESTING TRUSTEES OF POWER — RULE OF PROCEDURE.

1. The board of trustees of a city may not, by ordinance or otherwise, divest itself for any length of time of legislative and discretionary powers vested in it by the general law.

2. An ordinance providing that on petition of 10 per cent. of the voters of the city the board of trustees "shall" submit to the voters such proposition of local public interest as may be specified in the petition, is a mere rule of procedure for the guidance of the board, to be observed or disregarded by it, in its discretion.

¶ 1. See *Municipal Corporations*, vol. 34, Cent. Dig. §§ 153, 154.

Commissioners' Decision. Department 1. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Suit by H. A. Thompson against the board of trustees of the city of Alameda and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Thomas K. Kase, for appellant. M. W. Simpson, for respondents.

SMITH, C. This is a suit for mandamus against the board of trustees of the city of Alameda and as trustees individually. The case involves the effect of an ordinance of the defendant board, and the refusal of the board to comply with its terms.

The ordinance, so far as material, is as follows: Section 1: "Whenever ten per cent of the legal voters of the city of Alameda shall petition in writing therefor, the board of trustees shall submit to said voters such proposition of local public interest as may be specified in said petition, said submission to be made for the purpose of enabling the said voters to express their approval or disapproval of the question so to be voted upon, and to be made in the form and manner in this ordinance hereinafter provided." Sections 3 and 4 provide for the submission of the question to be voted on to the voters at "any general or municipal election," and the duties of the city clerk thereto. Section 5: "The result \* \* \* shall be regarded by the trustees \* \* \* as advisory of the line of action of said board." Under this ordinance a petition was filed with the board, signed by 600, or more than 10 per cent, of the legal voters of the city, praying the board to submit to the voters at "a special election" certain propositions therein specified "of local public interest" relating to proposed railway franchises over certain streets. But "the defendants, it is alleged, have neglected and refused, and still neglect and refuse, to comply with said petition"; and it is further alleged, in effect, that the board intends to ignore the petition and the ordinance, and to give the franchise to one of certain railroad companies named in the petition. The prayer of the petition is for a mandate to the board to desist and refrain from granting the franchise in question to any corporation, and to comply with the ordinance. The position of the appellant is that the ordinance is mandatory, and that compliance with its provisions by the board of trustees is "a condition precedent to their acting legislatively in awarding or refusing franchises to railroad corporations." But, if this be the case, the effect of the ordinance would be, in this and other cases where petitions may be filed, to suspend the legislative and discretionary powers of the board. The period of suspension, it is contended by respondents with apparent justice, would in all cases be until the next general or municipal election; that is to say,

for a period that might be two years, and in the present case in fact is over a year. This, indeed, is contested by the appellant's counsel, who claims that the ordinance provides for special elections when deemed by the board desirable. But we deem it immaterial whether the longer or the shorter period be taken. In either case it is obvious that it was beyond the powers of the board by ordinance or otherwise to divest itself and succeeding boards, for a longer or a shorter period, of powers vested in it by the general law for the benefit of its constituents; for this would be to repeal pro tanto the general law. Nor, if this objection could be obviated, would it have been competent for the board thus to bind its successors. *Broom's Leg. Max. "Leges posteriores,"* etc.; *Kellogg v. Oshkosh*, 14 Wis. 623, 628; *Brightman v. Kirner*, 22 Wis. 54, 58. But we do not think it necessary to give to the ordinance such a construction. The words, "the board of trustees shall submit to said voters," etc., are not necessarily to be construed as mandatory (*Bouvier's Law Dic., "Shall"*; *Railroad Co. v. Hecht*, 95 U. S. 170, 24 L. Ed. 423) and in the present case there is no reason to suppose that they were so intended. It is more reasonable to suppose that the ordinance was intended as a mere rule of procedure for the guidance of the board, and as such to be observed or disregarded by the board in its discretion, as circumstances might require. Whether, as thus construed, it was within the power of the board to enact it, or in other words, whether it is in the power of the board to provide for the submission of questions of this kind to the voters of the city a question largely discussed in the briefs, it is unnecessary in this case to determine.

We advise that the judgment appealed from be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

144 Cal. 303

PEOPLE v. MAJOINE. (Cr. 1,140.)  
(Supreme Court of California. Aug. 1, 1904.)  
CRIMINAL LAW—REDIRECT EXAMINATION—DIS-  
CRETION OF COURT—QUESTIONS OF DIS-  
TRICT ATTORNEY—HARMLESS ERROR.

1. Allowing a witness, who on his direct examination has testified to one conversation with defendant, to testify on redirect to another con-

versation with him, is in the discretion of the court.

2. Any impropriety in the district attorney's asking defendant whether he had been convicted of a felony is harmless, the answer being in the negative.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Gustave Majoine was convicted of burglary, and appeals. Affirmed.

M. Walter Dinkelspiel, J. M. Mannon, Jr., and Benj. I. Block, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

SMITH, C. The appellant, with one Gerard, was convicted of burglary, and appeals from the judgment, and from an order denying his motion for a new trial. The only points made by his counsel are (1) misconduct of the district attorney on the trial, prejudicial to the accused; (2) that the district attorney was permitted on the trial to read from the testimony of a witness given at the preliminary examination for the purpose of refreshing his memory; and (3) that a witness who had testified as to a conversation with the defendant Gerard was permitted on redirect examination to testify as to another conversation.

These objections, with perhaps one exception, are of a trivial character. As to the last point, the matter was within the discretion of the court. *People v. Benc*, 130 Cal. 165, 62 Pac. 404. As to the second, if there was error, there was nothing in the passages read to the witness from his previous testimony that could have prejudiced the accused. As to the remaining point, under which there are several specifications, we see nothing reprehensible in the conduct of the district attorney, unless it was in asking the defendant, when testifying as a witness on his own behalf, whether he had not been convicted of a felony. And as to this, it is unnecessary to express an opinion, as it is clear that the question, which was answered in the negative, could have done the defendant no harm.

We advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 3130.

144 Cal. 386

## BOYD v. LIEFER. (L. A. 1,290.)

(Supreme Court of California. Aug. 4, 1904.)

CONTRACTS—QUESTIONING MEANING—UNNECESSARY FINDINGS—REJECTION OF EVIDENCE—HARMLESS ERROR.

1. Plaintiff, having written the contract, may not question the plain and obvious meaning of its terms.

2. A finding of a fact stipulated in open court is unnecessary.

3. A finding as to defendant having assured plaintiff that he was prepared and ready to carry out the agreement is unnecessary where it is found that defendant did fully carry out his agreement.

4. The court having found that defendant fully performed his contract, so that plaintiff's action to rescind it would not lie, rejection of evidence to show that plaintiff was not dilatory in commencing his action to rescind was immaterial.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. S. Boyd, 8d, against Henry Liefer. Judgment for defendant. Plaintiff appeals. Affirmed.

P. W. Dooner, for appellant. Geo. W. Carey and A. G. Hinckley, for respondent.

HENSHAW, J. This action was for rescission. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The facts found by the court are that upon the land of one Mrs. H. A. Unruh a well had been dug. Defendant Liefer agreed by written contract with H. A. Unruh, husband of Mrs. Unruh, to install a pumping plant and other machinery for the development of water in the well, and when the same was installed Unruh agreed to convey to Liefer an undivided one-half interest in the 800 square feet of land in which the plant and well shaft were located, "and thereafter the parties hereto shall be equal owners in said plant and ground, and any and all water obtained shall be equally divided, each having the use of said plant and water, one-half of every month, and each bearing the expense of operating during such time." Plaintiff having actual knowledge of this contract and of the existing condition of affairs, then entered into an agreement with Liefer in the words and figures following:

"To Whom it May Concern: Be it known that for the sum of Six Hundred Dollars (\$600.00) to me in hand paid, receipt whereof is hereby acknowledged, I hereby sell to W. S. Boyd 3rd, his heirs or assigns, a one undivided one-quarter interest in and to a certain well of water on land owned by Mrs. H. A. Unruh, being on Lot One (1) Block Ninety-five (95) of the Santa Anita Tract. I also hereby agree for myself, my heirs and as-

signs, to install a good and sufficient pumping plant with all necessary pipe connections, engines, etc., sufficient to raise the water to a point of height sufficient to irrigate the land of said Boyd. I also hereby give said Boyd an order on Mrs. Unruh to deed to him direct said undivided quarter interest in and to the aforementioned well & plant.

"In witness hereto I hereby sign my name this 8rd day of September, 1900.

"Henry Liefer."

This agreement, signed by Liefer, was actually drawn in the handwriting of the plaintiff. After the execution of this agreement and the payment of the \$600, plaintiff discovered that the Unruh property, including the well, was covered by an unsatisfied mortgage. He contended for a deed of his quarter interest free from the mortgage incumbrance, and, failing to secure it, brought his action to rescind. The trial court found that the defendant had fully performed his part of the contract, and refused plaintiff relief.

The first proposition raised is that the evidence is insufficient to support the first finding to the effect that plaintiff and defendant entered into a written contract whereby, amongst other things, defendant agreed "to give plaintiff an order on said Mrs. H. A. Unruh for a deed to an undivided one-quarter interest in and to the well and plant." But, as this finding is in words an almost literal transcript from the above-quoted agreement of Liefer, the validity of which agreement is in no wise questioned, it is impossible to perceive how it can be said that the finding is not supported by the evidence. Plaintiff wrote not only this agreement, but the order for a deed upon Mrs. Unruh, which accompanied it, and under these circumstances he can scarcely be heard to question the plain and obvious meaning of the language which he thus advisedly employed.

It is next contended that the court failed to find upon certain material issues, one of these being the payment or nonpayment of the \$600 to defendant, but, as appears by the record, it was stipulated in open court that the defendant did receive the \$600 from the plaintiff at the time of the execution of the contract, and a finding, therefore, was unnecessary. It is next urged that the court failed to find upon the allegation in the complaint that the respondent, at the time he contracted with the appellant, assured the appellant that he was prepared and ready to carry out his agreement, but a failure to find upon the "assurances" of the defendant becomes immaterial in view of the finding of the court actually made that the defendant did fully carry out his agreement. So of the other allegations of the failure of the court to find upon issues joined, they are one and all immaterial in view of the finding of performance by the defendant which the court made.

It is finally insisted that the court erred in

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 204.

sustaining an objection to a question proposed to appellant as a witness in his own behalf to this effect: "What representations, if any, did Mr. Liefer make to you with regard to his ability to give you a deed during all that interim? What did he say?" The purpose of this question was to show that plaintiff had not been dilatory in beginning his action for a rescission; but we repeat, as the court found upon sufficient evidence that the defendant had fully performed his contract, and that, therefore, an action for rescission could not lie, it became immaterial to enter into a consideration of the reasons leading to any delay upon plaintiff's part in commencing it.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.

7 Cal. Unrep. 188

PEOPLE v. CHIN YUEN et al. (Cr. 1,126.)  
(Supreme Court of California. July 26, 1904.)

CRIMINAL LAW—INSTRUCTIONS—PERPETRATORS.

1. Though Pen. Code, § 31, makes accomplices principals, they are not "perpetrators," so that, on a prosecution for robbery of two of the five persons present when the crime was committed, a requested instruction that the jury must be satisfied of the identity of defendants as the perpetrators is properly refused, as misleading, in ignoring the fact that they may have been accomplices.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco, Carroll Cook, Judge.

Chin Yuen and Yee Hung were convicted of robbery, and appeal. Affirmed.

A. S. Newburgh, for appellants. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

SMITH, C. The defendants were convicted of the crime of robbery, and appeal from the judgment, and from an order of the court denying their motion for new trial.

The crime was committed upon the person and in the room of Lai Sin, a Chinese woman. The defendants were two of five Chinamen present when the crime was committed. The only point made by the appellants' counsel is that the court erred in refusing to give the following instruction: "I instruct that in order to justify a conviction of these defendants, or either of them, you must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the crime of robbery, and of identity of the defendants, or either of them, as the perpetrators or perpetrator. The evidence in a criminal case must satisfy the jury to a moral certainty and beyond a reasonable doubt—that is, must entirely satisfy the jury of

the guilt of the defendants—before they can convict. If the jury are not entirely satisfied, they should acquit." This instruction was refused by the court on the ground, in effect, that, in the passage italicized, it ignored the fact that the defendants may have been guilty as accomplices, and was misleading. Otherwise the instruction was covered by the charge of the court. The argument of appellants' counsel is that by the statute "all persons concerned in the commission of a crime \* \* \* whether they directly commit the act constituting the offense, or aid and abet in its commission," etc., " \* \* \* are principals." Pen. Code, § 31. And hence, it is argued, "as a logical conclusion, an accomplice is likewise a perpetrator." But this is contrary to the plain meaning of the term—not to the crime, but to the act constituting it, which is to be understood as referring to the act constituting the principal crime. Nor has the meaning of the term been in any way affected by the statutory provision. There was no error in the ruling of the court.

We advise that the judgment and order appealed from be affirmed.

We concur: HARRISON, C.; GRAY, C.

VAN DYKE, J. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

ANGELLOTTI, J. I concur in the judgment. In my opinion, the requested instruction discussed in the opinion was substantially covered by the charge of the court.

SHAW, J. I concur with ANGELLOTTI, J., and I also consider the instruction liable to mislead the jury, though not technically incorrect.

144 Cal. 385

MULLER v. PALMER et al. (L. A. 1,292.)  
(Supreme Court of California. Aug. 2, 1904.)

SALE OF REAL ESTATE—DEFECTIVE TITLE—MISREPRESENTATIONS—RIGHT TO RESCIND  
—WAIVER.

1. Defendants having sold land to plaintiff on the false representation that they had a good marketable title, and he having, as soon as he discovered its defective condition, rescinded, and offered to reconvey, and they not having cured or offered to cure the defect till long after action was brought by him, he is entitled to recover the part of the purchase money paid, though he might have cured the defect by making proofs and complying with rules laid down by the Secretary of the Interior, pursuant to the act of Congress forfeiting to the United States this and other land, but providing that on a showing pursuant to such rules of a bona fide purchase patent should issue to such purchaser or his assigns.

2. A purchaser of land does not waive a defect in the title, and so lose his right to rescind, because of a false representation that the title was good, because the title insurance

company to which he applied for a policy, and to which he sent the deed on its requesting a correct description of the land, put it on record, he having obtained it from a mutual friend to whom defendants sent it, with instructions to let him examine it, and he having, on sending it to the company, told it to proceed with the examination, and to draw on him for the balance of the purchase price as soon as the title should be found clear and marketable.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Fr. Otto Muller against Truman C. Palmer and another. Judgment for defendants. Plaintiff appeals. Reversed.

Henry C. Dillon and George A. Corbin, for appellant. D. P. Hatch and W. O. Fetchner, for respondents.

COOPER, C. Action to recover \$300, with interest, paid to defendants on a contract for the sale of certain real estate, described in the complaint. Defendants had judgment, from which plaintiff has appealed.

The case was submitted upon an agreed statement of facts, which shows that in July, 1896, after a personal inspection of the property, the plaintiff entered into a written contract with the defendants, by which plaintiff agreed to purchase, and the defendants to sell to him, the lands described in the complaint for the sum of \$2,025, of which sum \$300 was paid down, and the balance to be paid January 1, 1897. Defendants represented to plaintiff that they were the owners of an absolute and indefeasible estate in fee simple in the lands, and that they had a good, perfect, and marketable title, and agreed to execute to plaintiff a bargain and sale deed with a certificate guarantying the title. After making the \$300 payment, the plaintiff wrote to the Title Insurance & Trust Company of Los Angeles, asking what the charges would be for a policy insuring the title to the said lands. The insurance company replied, stating that its charge would be \$20, and asking plaintiff for a correct description of the lands. Plaintiff answered, sending the company a deed, which had been forwarded by defendants to a mutual friend in Philadelphia (that being the place of residence of plaintiff) with instructions to permit the plaintiff and his attorney to examine it, and the deed had been by said mutual friend delivered to plaintiff for the purpose of allowing the plaintiff to examine it. In the letter sending the deed plaintiff said to the company, "Enclosed please find deed, and proceed with the examination at once." This deed was, without authority, placed of record by the company in the county where the land is situated. On November 12th plaintiff wrote to defendants offering to pay the balance of \$1,725, if given a discount of 7 per cent. for the time anticipated, and in said letter informed defendants that he had for-

warded the deed to the said company, and had instructed it to draw upon him for the said balance as soon as the examination of the title should be completed. This offer was accepted by defendants. Plaintiff thereupon notified said company, and sent his check for \$1,725, asking the company to settle with defendants as soon as the title had been examined and found good. The company afterwards made and forwarded to plaintiff a policy of title insurance covering the property, and in the policy the following language was used: "The title to said property is vested in the said Fr. Otto Muller, provided the action of the United States of America v. Southern Pacific R. R. Co. et al., now pending on appeal to the Supreme Court of the United States, is decided in favor of said railroad."

\* \* \* This company does not insure \* \* \* against any of the following: \* \* \* The right of the United States of America, by reason of a decision of the United States Circuit Court at Los Angeles, in case No. 184 of said court, which was a suit brought by the United States of America v. The Southern Pacific R. R. Co. et al., on May 17th, 1890, under the act of forfeiture of July 6th, 1886, to cancel the United States patent issued to said railroad company March 29th, 1876, for this and other lands lying within and forming part of the overlapping grants of the Atlantic and Pacific Railroad Co., and the Southern Pacific R. R. Company. Said decision as rendered July 19th, 1894, was adverse to said railroad company, and canceled said patent and others. An appeal was taken to the United States Court of Appeal for the Ninth District where the judgment of the lower court was duly affirmed. [100 Fed. 912, 48 C. C. A. 712]. Said case is now pending on appeal to the United States Supreme Court." The quoted clause in the policy was the first notice that plaintiff had concerning the title being defective and in litigation, and he immediately telegraphed to the company not to settle with defendants, but to return his check. He then notified defendants that he would not accept said deed, offered in writing to reconvey the land to defendants, tendered them a deed to it, and demanded a return of the \$300. This tender and demand were refused by defendants. After receiving the policy, the plaintiff paid the said company \$22.15 for the policy and charges thereon, which, upon demand of plaintiff, was repaid to him by defendants. Shortly after the above occurrences, acting upon the advice of plaintiff's attorney and others, at a conference participated in by both plaintiff and defendants, the defendants had the company write another policy covering the property and insuring the title against said suit No. 184, mentioned in the first policy. One Brown, who was the personal friend and advisor of plaintiff and general manager of a real estate title insurance and trust company of Philadelphia, wrote to the company in

Los Angeles, and suggested on behalf of plaintiff the phraseology in the second policy, which was accordingly inserted therein, and which is as follows: "The rights of the United States of America if the decision in case 184 United States District Court rendered against the Southern Pacific Railroad Company et al. is affirmed by the Supreme Court of the United States. Loss by reason of such adverse decision is hereby insured against." Plaintiff does not appear to have agreed to waive any defect in the title, or to accept the second policy. The second policy was issued February 27, 1897, and was immediately forwarded to plaintiff at Philadelphia, who thereupon refused to accept it.

The following is stipulated as to the federal statutes, rules, and decisions affecting the title to the land in controversy:

"March 29, 1876, the United States issued a patent to said lands to the Southern Pacific Railroad Company. Said patent was recorded at the instance of the patentee in the office of the Recorder of Los Angeles county, California, on the 13th day of December, 1880, at page 563 of Book 2 of Patents. The defendants deraigned their title from Ismert and Mack, who bought of said railroad company, June 21, 1886, without notice of any claim of the United States, the purchase price therefor having been wholly paid to said railroad company, and defendants were holding and in possession of said lands at the time of their contract with the plaintiff.

"By act of Congress of July 6, 1886, said lands were declared forfeited, and restored to the public domain. Suit was begun by the United States against the Southern Pacific Railroad Company to quiet title, and on July 19, 1894, it was decreed by the United States Circuit Court that said lands had been erroneously patented to said railroad company, and the legal title thereto was vested in the United States. An appeal was taken to the Circuit Court of Appeals, and afterwards to the United States Supreme Court, which affirmed the decree of the lower court October 18, 1897. However, by the fourth section of the act of Congress of March 3rd, 1887, c. 376, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1596], it was provided: 'That as to all lands \* \* \* which had been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and the patents of the United States shall issue therefor, and shall relate back to the date of the original certifi-

cation or patenting: provided further that where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the government price of similar lands, they shall be required, after delivery of patent for their lands, to pay to the government a sum equal to the difference between the portion of the purchase price so paid and the government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser.'

"In conformity with said act the Secretary of the Interior, on February 13, 1889, made the following rule for the guidance of registers and receivers, viz.: 'An applicant for land under this section (said No. 4) will be required to publish notice of intention to make proof as in pre-emption and homestead cases, and the proof must show: (1) That he has declared his intention to become a citizen of the United States. (2) That he is a bona fide purchaser from the company or of some person claiming title under it, and the character of the instrument conveying the land to him. (3) The amount of purchase money paid to the company. (4) What part, if any, of the purchase money paid to the company has been refunded to him or any person acting as his agent. (5) Whether he has instituted proceedings against the company for the recovery of any portion of the purchase money; if so, for what portion. (6) The value and character of the improvements, if any, made or acquired by him upon the land. (7) Whether there is any person of the first class under the third section entitled to the right of entry under the pre-emption of homestead laws.'

"Upon the submission of satisfactory proof as prescribed above, the register will issue certificate in duplicate, numbered in the regular cash series, with annotations thereon showing that the entry is allowed without payment under the fourth section of the act of March 3, 1887, c. 376, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1596].

"On the 19th day of January, 1900, the defendant Truman C. Palmer, upon application and presentation of proofs as required by law, received from the receiver of the Land Office of the United States, at Los Angeles, California, a certificate covering said lands, and entitling said Palmer to a patent therefor under the provisions of said act of Congress of March 3, 1887; and the said defendant Palmer has since received from the United States government a patent for said property."

The above is a statement of all the facts in the stipulation material to this controversy, and upon which the case must be decided.

The action was commenced in October, 1899, and judgment entered in March, 1902. We are of opinion that the plaintiff was entitled to judgment upon the stipulation. Defendants represented to plaintiff at the time



of the agreement to purchase that they had a good, marketable title. They were supposed to know the condition of their own title. The plaintiff relied, and had a right to rely, upon the statement made to him by defendants. He was making a contract for the present purchase of the lands, and not for the purchase of lands the title of which could not be cleared till years should elapse. As soon as plaintiff found the true condition of the title, he offered to reconvey, and demanded the return of the \$300. He rescinded promptly, and offered to reconvey to the defendants. Defendants did not cure the defect in the title, nor offer to cure the same, until long after the action was commenced. It was not contemplated by plaintiff, when he made the contract in the early part of 1896, that he would bind himself to take a title that was not perfected until January, 1900. It was not to be expected that plaintiff would take any other than a good marketable title, which defendants had agreed to give him, nor was he required to take steps himself and incur expense for the purpose of correcting the title. Any other rule would work a great injustice to a party making a contract to purchase real estate. The party agreeing to sell, knowing he had no title, could keep the part of the purchase money paid, buy up outstanding titles, or take other steps to get good title, in case he found it to his advantage to do so; while the party agreeing to purchase is all the time bound by the contract, and, when the title is perfected, the property may have greatly depreciated in value, or the purposes for which he desired it may have been wholly abandoned. The risk of loss in such case would be entirely thrown upon the purchaser. The only risk of the seller would be refunding the money in case he could not cure the title or found it to be to his advantage not to do so. The rule that in cases free from fraud, where the seller is innocent, it will be sufficient if the title is cured and a good title tendered within a reasonable time, or when the deed is to be made by the terms of the contract, has no application to the facts in this case. Defendants represented to plaintiff that they had a clear, perfect, and marketable title before the contract was made and the \$300 paid. They are supposed to have known the condition of their own title. Plaintiff did not know it, and had a right to rely upon the representation made to him by defendants. They procured his money by the representations. The representations were not true, and they must refund it. They will not be allowed to get the money of plaintiff by a false statement, and to keep it because long afterwards they made the statement true. Plaintiff has not been guilty of laches, but, on the contrary, as soon as he found the condition of the title, he offered to reconvey, and demanded his \$300. He would thus have left the defendants in the same condi-

tion they were before the contract, and would have received back his money, which was obtained by misrepresentation.

Actual fraud is committed where one, with intent to induce another to enter into a contract, makes a positive assertion, in a manner not warranted by the information of such person, of that which is not true, even though he believes it to be true. Civ. Code, § 1572. One who gains a thing by fraud is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of a person who would otherwise have had it. Civ. Code, § 2224. It was held in *Alvarez v. Brannan*, 7 Cal. 504, 68 Am. Dec. 274, that where a vendor, supposing himself to be the owner of a lot, represented that he was such owner, and sold the lot to the vendee for \$6,000, the vendee, upon discovering that the lot had been previously sold to another party, might rescind, and recover the money paid. It is said in the opinion: "But it is equally true that whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial. If a party asserts that as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion." And the same rule is laid down by all the authorities. 1 Story, Eq. Jur. §§ 193, 193a, and note; 2 Pomeroy's Eq. Jur. § 887. It is said by Pomeroy in the section cited: "It is settled in equity by an overwhelming array of authority that where a person makes a statement of fact which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue." The respondent contends that the grantors of the defendants were innocent purchasers, and that the title was not taken from them nor divested by reason of the act of Congress and the decision of the Supreme Court of the United States. We do not think that the plaintiff was compelled to rely upon making proof as to the kind of purchasers some of the grantors of plaintiff were in order to clear his title or to establish it. The courts had declared that the lands had been erroneously patented, and that the

legal title was still in the United States. It was declared that purchasers in good faith might, by complying with certain rules and regulations and making proof in compliance with such rules as the Secretary of the Interior might prescribe, secure their title and get patents. The Secretary of the Interior prescribed rules by which bona fide purchasers must publish notices of intention to make proof as in pre-emption and homestead cases, and make proof showing the seven things contained in the stipulation. If it be conceded that plaintiff could have made the proper proof and complied with the rules as laid down by the Secretary of the Interior, yet he was not bound to do so. It would have involved time and expense, and plaintiff did not agree to assume any such burdens. It might, with as much reason, be claimed in any case where the title is defective, that, if it is possible for him to do so, the vendee must cure it. But the vendee is entitled to a marketable title, and one free from reasonable doubt or pending litigation. *Turner v. McDonald*, 76 Cal. 179, 18 Pac. 262, 9 Am. St. Rep. 189; *Sheehy v. Miles*, 93 Cal. 292, 28 Pac. 1046; *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928; *Reynolds v. Borel*, 86 Cal. 538, 25 Pac. 67; *Bartlett v. McGee*, 45 Pac. 1029.

It appears from the opinion in the lower court, printed by respondent as part of his brief, that the trial judge, although conceding the title to be defective, was of the opinion that the plaintiff waived the defect by the recording of the deed. The learned judge in his opinion says that sending the deed to the insurance company and asking for a policy was equivalent to a direction to the company to place the deed of record. We do not think so. The plaintiff only sent the deed in answer to a request for a correct description of the land. He told the insurance company in the letter inclosing the deed to proceed with the examination of the title. If he had accepted the deed, he would not have then needed to have the title examined. In a subsequent letter to the insurance company he authorized them to draw upon him for the balance "as soon as the title should be examined and found to be clear and marketable." There is nothing in the acts or conduct of plaintiff that shows that he ever intended to take any other than a good and clear title.

We advise that the judgment be reversed, and the court below directed to enter judgment for plaintiff as prayed for in his complaint.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below directed to enter judgment for plaintiff as prayed for in his complaint: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

## DEVINE v. BILLINGSLEY.

(Supreme Court of Oregon. Aug. 15, 1904.)

### TRUSTS—TITLE TO LAND—EVIDENCE.

1. Evidence in a suit to establish a trust in land, title to which stood in defendant's name, held to show that it belonged to the estate of plaintiff's deceased husband.

Appeal from Circuit Court, Harney County; Morton D. Clifford, Judge.

Suit by Jennie Devine against J. D. Billingsley. Decree for plaintiff. Defendant appeals. Affirmed.

This is a suit to establish a trust in land. The defendant having commenced an action against the Pacific Live Stock Company, a corporation, to recover possession of section 2, and the southeast quarter of section 3, in township 34 south, of range 34 east, in Harney county, the latter pleaded that it was in possession thereof as a tenant of the plaintiff herein, who, on application therefor, was substituted as a party defendant, and, having filed an answer therein, alleging that she had no defense at law, but was entitled to relief arising out of facts material to her defense, and requiring the interposition of a court of equity, thereupon, as plaintiff, filed a complaint in the nature of a cross-bill, averring, in substance, that in 1891, and prior thereto, John S. Devine, her husband, purchased and paid the full consideration for certain real property, including the premises hereinbefore described, causing the deeds therefor to be executed to the defendant, to secure the payment of a debt due him; that her husband died intestate September 13, 1901, leaving her his sole heir, and, his estate having been duly administered, the real property involved herein was distributed to her; and that the debt due from her husband to the defendant has been fully paid, but he refuses to reconvey the premises to her. The answer denied the material allegations of the complaint, and averred that defendant, complying with the provisions of the statutes of the United States, secured the legal title to 960 acres of land, which he conveyed to one Henry Miller, at the request of and upon agreement with Devine that he should receive in exchange therefor lands of equal value; that, in pursuance of such contract, and in payment for services rendered by the defendant for Devine, it was stipulated, on a settlement of their business, that the 800 acres sought to be recovered in the action of ejectment should belong to him, and also agreed that in consideration of the improvement of the premises, and of the payment of the taxes thereon by Devine, he was to have possession thereof, which he held at the time of his death. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree enjoining further prosecution of the law action,

declaring that defendant held the legal title to the land in controversy in trust for the plaintiff, and requiring him to execute to her a deed thereof, and he appeals.

Thornton Williams and Lionel R. Webster, for appellant. John L. Rand, for respondent.

MOORE, C. J. (after stating the facts). The transcript shows that in 1891, and prior thereto, J. S. Devine purchased nearly 15,000 acres of land in Harney county, Or., causing the deeds therefor to be executed to the defendant, to whom he was indebted in the sum of \$3,549, evidenced by a promissory note given May 1, 1890. Devine on January 7, 1893, borrowed from one E. P. McCornack a large sum of money, giving as security therefor a deed executed by the defendant for all the lands so conveyed to him, except section 2 and the southeast quarter of section 3 in township 34 south, of range 34 east of the Willamette meridian. The promissory note mentioned was fully paid, but just prior to Devine's death he again became indebted to the defendant in the sum of \$836, which was thereafter discharged by plaintiff. McCornack, as plaintiff's witness, testified that soon after Devine's death he went to Harney county and met the defendant, who, referring to the property which was supposed to belong to the decedent's estate, informed him that he held a section of land and certain cattle; saying that he helped to buy the latter, which had been assessed to him, and that the title thereto stood in his name. The witness, having informed him that he furnished Devine more than \$10,000 with which to buy cattle, inquired by what right he held the title to the land so claimed, to which he replied: "Well, you know that Devine has used my name very freely, and I have done a great deal for him, and I think I ought to have this land. I admit there was no financial consideration, but I have done enough to earn that land, and John [meaning Devine] intended I should have it. He always referred to it as my ranch, and, when I was there he would say: 'Jeff, there is your ranch. How does it look?' And in conversation he always spoke to me as though it was my ranch, and I feel that I am entitled to it, and I am going to keep it." The witness further said that defendant told him Devine had used his name to such an extent that at one time he became so frightened that he conveyed all his own property to his wife. The transcript also shows that the defendant, under various acts of Congress, secured from the United States patents for the south half of the southwest quarter of section 12, the northwest quarter, the south half of the northeast quarter, and the south half of section 13 in township 33 south, of range 34 east, the northwest quarter of section 11 in township 31 south, of range 35 east, and the northwest quarter of section

29 in township 30 south, of range 36 east of the Willamette meridian, containing 960 acres. Devine on December 19, 1890, entered into a contract with one Henry Miller whereby he agreed to convey, *inter alia*, the premises so patented to the defendant, who, on February 26, 1891, executed a deed therefor to Miller, receiving March 3d of that year from the latter and from other persons a deed for the 800 acres in question and for other lands. The defendant, as a witness in his own behalf, denies that he told McCornack that he claimed the cattle which belong to Devine's estate, though they were assessed to him; that he did not say there was no "financial consideration" for the land which he claimed—testifying on that branch of the subject as follows: "That 'financial,' that is a word— I seldom ever use a word like that; that 'consideration'— I might have said 'there was no money consideration'; there wasn't any money taken." The defendant, in answer to the following question asked by his counsel: "Do you remember the conversation that you had with McCornack at that time in relation to the 800 acres of land?"—replied: "Well, I— We had some conversation about it. I told him that I owned the land—owned 800 acres of land. I don't know whether I said 'eight hundred acres' or not. I might have said 'section' or 'about a section,' or might have referred to it in them words; but I didn't, when talking to Mr. McCornack— I don't think there was ever anything come up like this. I don't remember everything that was said at all. I wasn't keeping everything down, or trying to. I was just talking in a general way, like two men interested in the same thing would in a conversation." The defendant further says that the note for \$3,549 was given for money loaned to Devine in pursuance of an agreement entered into in 1886 that it was to be used in buying land, the title to which was to be taken in his name, whereby he was to secure an undivided interest in the premises purchased therewith, and that he never sold Devine any part of the 960 acres for which he secured patents, or received any payment therefor, except the right to retain the 800 acres set apart to him, but that he conveyed his homestead, pre-emption, and desert claims to Miller at Devine's request, and to aid the latter in securing a valuable stock ranch. The defendant, answering the inquiry of his counsel in relation to the circumstances under which his deed to McCornack was executed, said: "Well, Mr. Devine wanted to get some money from Mr. McCornack— He wanted to get some money to stock his ranch up, and he said that he would mortgage the whole works; mortgage all of it. And I told Mr. Devine that, if I had any interest in the land, I would like to have it set aside, and that he could take his and do what he pleased with it. So he took his part, and I

deeded it to Mr. McCornack. I thought it was a straight-up sale at the time. And what was left—this 800 acres—was left to me to pay me for my homestead, pre-emption, and desert claims." The defendant's wife, as his witness, testified that, after joining in executing a deed at Devine's request, he remarked to her husband: "Well, Jeff, what of this land is left is yours. This land is left is yours. Now all of it belongs to you." The plaintiff, as a witness in her own behalf, testified that in 1892, while returning from Ontario, Or., the defendant, calling her attention to the premises pre-empted by him, said: "There is a piece of land that I sold to John" (meaning Devine), and, in speaking of the transaction, further remarked, "All the rest of the boys got a horse, but I didn't get any," and that she said to him, "I will speak to Mr. Devine about that," and I did, and he got the horse." C. E. Kenyon, formerly county clerk of Harney county, and, at the time of the trial herein, engaged as a merchant at Burns, testified, as plaintiff's witness, that the day her husband died the defendant, referring to the deceased, said: "Mr. Devine was the best friend I ever had. He gave me the best part of the Alvord Ranch"—meaning the 800 acres in question.

The testimony given by the witnesses for the respective parties is contradicted in nearly every particular that is at all material, but, considering the attendant circumstances, we think the preponderance is with the plaintiff. It will be remembered that the land in controversy was conveyed to the defendant by Miller in March, 1891; that McCornack's deed was given in January, 1893; and that Devine died in September, 1901. McCornack testified that, when his deed was executed, Devine told him that the 800 acres in question, and also the northeast quarter of section 3 in township 34 south, of range 34 east, constituting his homestead, must not be included, as the security given was ample, and that, referring to the land so exempted, he further said: "That is my heart's blood. That little ranch is my heart's blood, and I am going to keep it." The testimony discloses that in 1891 the land now claimed by the defendant was valued at about \$5

an acre, but in the 10 years following Devine improved the premises to such an extent that the 800 acres is reasonably worth \$20,000; that he had the willows and sagebrush grubbed up, and an expensive canal constructed to conduct water from a creek to the premises which he cultivated, growing alfalfa thereon; that, though a fence surrounded the 800 acres when purchased, he subdivided the tract by partition fences, made about 60 acres into an elk park, built several houses and a large barn, and paid all the taxes imposed thereon; and that the defendant during Devine's life was never known to assert any claim to the land. The defendant's testimony to the effect that Devine was to have the use of the land in consideration of the improvements which he might make thereon is, in our opinion, overthrown, when their kind and extent are considered. We also believe Mrs. Devine's testimony that the defendant informed her that he had sold to her husband the land which he had pre-empted. She seems to be corroborated in this particular by McCornack, who said the defendant at first admitted that no "financial consideration" existed for the land which he now claims, and by Kenyon, who said that the defendant told him that Devine gave him the best part of Alvord Ranch.

We believe a careful examination of the testimony and a consideration of the surrounding circumstances warrant the conclusion that the defendant holds the legal title to the 800 acres in trust for Devine's heirs; that he sold all the lands patented to him to Devine, though he did not execute a deed therefor until he conveyed the premises to Miller; that he received from Devine a horse as extra compensation for his pre-emption claim, but retained the title to the 960 acres of land, probably on the assumption that, if he could be trusted to hold other lands, he would execute a deed for those patented to him when requested to do so; and that, the notes secured by the real property conveyed to him having been fully paid, no error was committed in requiring him to convey the 800 acres in question to Mrs. Devine, as the sole heir of her husband; and hence the decree is affirmed.

## STATE v. IDE.

(Supreme Court of Washington. Aug. 24, 1904.)

## CONSTITUTIONAL LAW — TAXATION — NONUNIFORMITY—RULES OF DECISION.

1. An act of the Legislature will not be declared unconstitutional unless its invalidity is so apparent as to leave no reasonable doubt on the subject.

2. Const. art. 7, § 9, provides that all corporate taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same. Const. art. 11, § 12, declares that the Legislature shall have no power to impose taxes on cities, or on the inhabitants or property thereof, for state purposes, but may, by general law, vest in the corporate authorities thereof the power to assess and collect taxes for such purpose. *Held*, that Ballinger's Ann. Codes & St. § 938, subd. 7, empowering the city of Port Townsend to impose on and collect from every male inhabitant between the ages of 21 and 50 years an annual street poll tax not exceeding \$2, but exempting from liability for such tax members of volunteer fire companies, and an ordinance of such city limiting such taxes to the persons contained in such class, were unconstitutional for nonuniformity.

Fullerton, C. J., dissenting.

Appeal from Superior Court, Jefferson County; Geo. C. Hatch, Judge.

C. W. Ide was convicted of failing and refusing to pay a street poll tax, and he appeals. Reversed.

Brinker, Coleman & Ballinger, for appellant. A. W. Buddress, for the State.

ANDERS, J. On June 22, 1903, William Furlong filed a verified complaint in the police court of the city of Port Townsend, alleging, in substance, that he was at said time the city marshal and city street poll tax collector of the city of Port Townsend, a city of the third class, in the county of Jefferson, and state of Washington, and that on said day one C. W. Ide, then and there being a male inhabitant of said city between the ages of 21 and 50 years, and not a member of any volunteer fire company of said city nor a member of the militia of the state of Washington, did then and there commit the misdemeanor of failing and refusing to pay to said city street poll tax collector, on demand, his (the said defendant's) city annual street poll tax for the year 1903, committed as follows: That the said city street poll tax collector did then and there personally demand of and from said defendant, C. W. Ide, the sum of two dollars for the payment by defendant to said city and to its said street poll tax collector, the said city annual street poll tax for the year 1903, but said defendant did then and there willfully and unlawfully fail and refuse to pay to said city street poll tax collector said sum of \$2 from his city annual street poll tax of said city for the year 1903, contrary to Ordinance No. 675 of said city, entitled "An ordinance imposing and levying an annual

city street poll tax for the year 1903, and providing for the collection thereof," approved June 3, 1903, and contrary to Ordinance No. 639 of said city, entitled "An ordinance to provide for the collection of a city street poll tax, and making the refusal to pay the same a misdemeanor, and to provide for the appointment of a tax collector and deputy," approved on May 3, 1899. A warrant was issued on this complaint, and the defendant, having been arrested thereon and brought into court, filed a demurrer to the complaint on the following grounds: First, that it appears upon the face of the complaint that defendant has not violated any law; second, that said complaint fails to state facts sufficient to constitute a crime or misdemeanor of any kind; third, that said complaint does not charge any offense against the laws of the state of Washington; fourth, that said complaint does not charge defendant with the commission of any crime or misdemeanor under the ordinances of the city of Port Townsend. The demurrer was overruled, and on the hearing in the police court the defendant was convicted and fined, and from the judgment he appealed to the superior court. The demurrer was again argued and considered in the superior court, and was by that court overruled. Upon the trial in the superior court the defendant was convicted, and fined \$2 and costs, and it was thereupon adjudged that he be imprisoned in the county jail until such fine and costs be paid, unless otherwise discharged by law. From this judgment and sentence the defendant has appealed to this court.

Section 1 of ordinance No. 675, which is mentioned and referred to by its title and date of approval, provides "that there be and hereby is imposed and levied an annual city street poll tax upon each male inhabitant between the ages of twenty-one and fifty years, residing in said city, excepting any member of any volunteer fire company in said city, the sum of two dollars, payable on demand between the first day of June, 1903, and the first day of September, 1903." And section 2 provides "that the poll tax hereby imposed and levied shall be collected as provided by Ordinance No. 639 of said city entitled 'An ordinance to provide for the collection of a city street poll tax, and making the refusal to pay the same a misdemeanor, and to provide for the appointment of a tax collector and deputy,' passed by the city council of said city on the 2d day of May, 1899, and approved on the 3d day of May, 1899." Ordinance No. 639, above mentioned and described, contains, besides others, which it is not necessary to mention, the following provisions:

"Section 1. That it shall be the duty of the city marshal between the first day of May and the first day of September, of each year, to collect all city street poll taxes levied or assessed by the city council, as

¶ 1. See Statutes, vol. 44, Cent. Dig. §§ 56, 386.

herein provided, and shall give to each person paying such city street poll tax a receipt therefor. \* \* \*

"Sec. 2. That the said city marshal shall receive in full compensation for his services for the collection of the said city street poll tax, under this ordinance, the sum of ten per centum upon all moneys so collected.

"Sec. 3. If any person liable for the city street poll tax herein provided for, shall fail, refuse or neglect to pay the same upon demand by the city marshal, the city marshal shall proceed to collect the same as herein provided."

"Sec. 5. That any person who shall fail, refuse or neglect to pay upon demand to the city marshal, or his deputy, the annual street poll tax, which shall have been levied or assessed by the city council of said city, or which may be hereafter levied or assessed by the city council of said city, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars, or be imprisoned not exceeding thirty days, or both such fine and imprisonment in the discretion of the court.

"Sec. 6. That it shall be the duty of the city marshal to collect all the city street poll tax from every person liable therefor, and on the neglect or refusal of such person to pay the same, he shall collect the same by seizure and sale of any personal property owned by such person. The sale to be made after three days written notice of time and place of such sale to be posted in three of the most public places of said city before the day of sale."

"Sec. 13. The city marshal shall enforce the payment of the city street poll tax by any and all the modes herein provided in the name and at the cost of the city."

The Constitution of the state (article 11, § 10) provides that the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, and it is conceded that Port Townsend is a city of the third class, duly organized and existing under and by virtue of a general law passed by the Legislature in accordance with the mandate of the Constitution. By that law (section 938 of Ballinger's Ann. Codes & St.) the city council of such city is empowered: "(7) To impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: provided, that any member of a volunteer fire company in such city shall be exempt from such tax."

"(16) To impose fines, penalties and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars nor the

term of such imprisonment exceed the term of three months." If the provisions of section 938 of the Code, which we have quoted, are not in conflict with the Constitution of the state or of the United States, it can hardly be disputed that the ordinances founded thereon, and numbered 675 and 639, are valid enactments of the city of Port Townsend. And, if the ordinances in question are valid, we think the averments of the complaint are sufficient to constitute an offense, and that the demurrer thereto was properly overruled.

But it is earnestly insisted by the learned counsel for the appellant that the ordinances and statute providing for the imposition and collection of this city street poll tax are, each and all, violative of the Constitution of the state and of the fourteenth amendment to the Constitution of the United States. Before proceeding to the consideration of the objections interposed by appellant to this poll tax law and these city ordinances, we deem it proper to observe that it is settled by the highest authority that a legislative enactment is presumed to be constitutional and valid until the contrary clearly appears. In other words, the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity. And when the constitutionality of an act of the Legislature is drawn in question the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject. Cooley on Constitutional Limitations (7th Ed.) pp. 252-254, and cases cited; *Id.* p. 255. See also, *Francis v. Railroad Co.*, 19 Kan. 303-306. We have mentioned these well-established rules because we believe that they should always be kept in mind when the court is called upon to declare invalid an act of the lawmaking body, a co-ordinate and independent department of the government.

The first and chief contention of appellant is that subdivision 7 of section 938 of the Code, above quoted, and the ordinances founded thereon, are unconstitutional and void, for the reason that the tax attempted to be levied and collected under the ordinance is levied and imposed upon males between the ages of 21 and 50 years alone, and not upon females, nor upon males over the age of 50 years, nor upon males under the age of 21 years, nor upon the members of volunteer fire companies. Although the sum involved in this case is small, the question presented for our determination is one of great importance to the various municipalities of the third class throughout the state. This is the first time this precise question has been before this court for determination, and we find, upon investigation, that the decisions of other courts of last resort bearing directly upon the question are far from numerous. It is true, we have several times

had occasion to pass upon the validity of statutes and ordinances providing for the payment of license taxes or fees by persons engaged in certain occupations or callings, and have held that such exactions, although imposed by the taxing power, are not taxes within the meaning of the Constitution or of the ordinary revenue laws. See *Fleetwood v. Read*, 21 Wash. 548, 58 Pac. 665, 47 L. R. A. 205; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796. And in *State v. Clark*, 30 Wash. 439, 71 Pac. 20, we held that the inheritance tax law, which exempts from its provisions sums below \$10,000 when the estate passes to direct heirs and kindred, but grants no such exemption to collateral heirs or strangers to the blood who are devisees, and which does not require all classes of persons mentioned therein to pay taxes on the property received by them at a uniform rate, is not in conflict with the constitutional provisions requiring uniformity in the rate of assessment and taxation of property, for the reason that the so-called inheritance tax is only a charge upon the passing of the estate by succession and the privilege of the heirs or devisees to take it, and not a tax on property. The tax in question is not a tax on property, but it is nevertheless a tax, under any proper definition of that term. It is a poll or capitation tax, and is so denominated both in the statute and the ordinances. It is levied for a public purpose, and is clearly a revenue measure. But its assessment is not governed by the general revenue law, or, strictly speaking, by section 2 of article 7 of the state Constitution, which declares that the Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state according to its value in money. It is settled law that the power of taxation is a legislative power, and an incident of sovereignty, and when the people adopt a Constitution, and thereby create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of such general power. And, unless its power of taxation is limited by constitutional provisions, the state, by virtue of its sovereignty, has the power to tax all persons and property within its jurisdiction. *Cooley on Taxation* (2d Ed.) pp. 4, 5; *Id.* (3d Ed.) pp. 7-9, and cases cited. See, also, *Judson on Taxation*, § 431. Several of the state Constitutions provide for the imposition of poll taxes, but such taxes are, it seems, prohibited by the Constitutions of Ohio and Maryland. See 1 *Desty on Taxation*, page 296. Our Constitution does not expressly mention such taxation, and, as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument, it follows that this tax must be declared valid, unless the Legislature was indirectly and by necessary implication pro-

hibited from authorizing it to be levied by some provision of the Constitution. While it is conceded by counsel for appellant that the Legislature may, in the absence of constitutional restrictions, "confer upon a city almost supreme power over local taxation," yet they contend that the tax in question, by reason of its lack of uniformity, is repugnant to section 9 of article 7 of our Constitution, and therefore void. That section of article 7 reads as follows: "The Legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Section 12 of article 11 of the Constitution provides that "the Legislature shall have no power to impose taxes upon \* \* \* cities \* \* \* or upon the inhabitants or property thereof, for \* \* \* city \* \* \* purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." These two provisions are the only ones relating to the vesting of the power of taxation in municipal corporations. And they clearly indicate—especially the latter—that the Legislature may authorize the taxation, by cities, of persons, as well as property, within their limits. Conceding, as we must, that the Legislature had the right to delegate to cities of the third class the power to levy poll taxes on the inhabitants thereof, the question naturally arises whether, in this instance, they exercised the power in conformity with the Constitution. As we have seen, section 9 of article 7 of the Constitution, empowers the Legislature to vest all municipal corporations with authority, for corporate purposes, to assess and collect taxes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body levying the same. It is claimed by the learned counsel for the respondent, as we understand his argument, that this constitutional provision applies only to the taxation of property, and that this court has so decided in several cases. But counsel is in error, so far as the decisions of this court are concerned. The cases referred to relate to license taxes and the like, which are not deemed taxes, as that term is ordinarily understood, and they are, therefore, not applicable to the case in hand. The Constitution says, in effect, that all municipal corporations may tax persons, as well as property, if authorized so to do by the Legislature; and we are not at liberty to construe that provision so as to eliminate, or give no effect to, the words "as to persons," therein contained, which we would be obliged to do in order to hold that it was the intention of the framers of

that instrument that property alone should be taxed by municipal corporations. All the power possessed by cities and other municipal corporations to tax either property or persons is conferred upon them by the Legislature, whose power, as we have already intimated, is practically, though perhaps not absolutely, unlimited, in the absence of constitutional restrictions. And it will be observed that the only restriction imposed by the Constitution upon the power of the Legislature to vest municipal corporations with the authority to tax persons and property is that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." It is conceded by counsel for appellant that the uniformity rule in taxation usually prescribed by law does not preclude the Legislature from selecting and classifying, in a proper and reasonable manner, the subjects of taxation; and that rule is so firmly established that the citation of cases in support of it is entirely unnecessary.

But it is claimed on behalf of the appellant that the rule of uniformity prescribed by the state Constitution was in this instance wholly disregarded and ignored by the Legislature in exempting from the tax all females, all males not within the designated ages, and members of volunteer fire companies; and that the classification of the persons to be taxed is arbitrary and unreasonable, because it is not based upon any "difference which bears a just and proper relation to the attempted classification." As to the right to classify subjects of taxation, this court, in *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, where the question of classification was under consideration, said: "It is true that the mere fact of classification is insufficient to relieve a statute from the reach of this clause of the Constitution,—that it must appear that the classification is made upon some reasonable and just difference between the persons affected and others to warrant classification at all." And in *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, in which the question of the power of classification is elaborately discussed, the Supreme Court, respecting such power, observed: "That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." The classification made in imposing this tax is based solely upon age and sex. It has no relation to the property of the persons to be taxed, or to their ability to pay. The persons selected to bear the burden are under no greater obligations to pay for keeping the streets in repair than others who are exempted from the payment of the tax. Does such classification, then, rest upon a reasonable difference between the persons taxed and others who are not taxed? It

has been stated by our highest court that there is no precise application of the rule of reasonableness of classification, and that there cannot be an exact exclusion or inclusion of person and things. *Magoun v. Illinois, etc.*, Bank, 170 U. S. 296, 18 Sup. Ct. 594, 42 L. Ed. 1037. Where exemptions from taxation are permissible, the reasonableness of the classification of subjects must, therefore, be determined from the facts and circumstances appearing in each particular case. It is urged on the part of the respondent that the statute under consideration ought to be upheld, because the people have acquiesced in it, and these taxes have been levied and collected under it in cities throughout the state ever since the organization of the state government; and *City of Faribault v. Misener*, 20 Minn. 396 (Gil. 347), is cited in support of that proposition. The Constitution of Minnesota contained the following clause: "All taxes to be raised in this state shall be as nearly equal as may be." Pursuant to the authority given by its charter, the city of Faribault in each of the years 1872 and 1873 levied and assessed a poll tax of \$2 on every qualified voter, except members of fire engine, hook and ladder, and hose companies. The defendant, Misener, refused to pay the poll tax assessed against him for each of those years, and an action was brought against him before a justice of the peace to recover the same. The justice rendered judgment in favor of the defendant, which on appeal was affirmed by the district court, and the plaintiff appealed to the Supreme Court. The principal question before the court in that case was whether the clause in the city charter exempting firemen from the payment of poll tax was repugnant to the provision of the state Constitution above set forth, and the court held that it was not. It seems apparent from expressions in its opinion that the decision of the court was largely influenced by the fact that a long-continued acquiescence of the people in the statute under which the taxes in question had been collected had established a legislative and popular construction of the Constitution, which, in the opinion of the court, was entitled to great consideration. And it is true that in case of doubt in the mind of the court as to the proper construction of any particular provision of the Constitution a contemporaneous interpretation or the subsequent practical construction of such provision is entitled to great weight. But, in the language of Judge Cooley: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution



was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed." Cooley on Constitutional Limitations (7th Ed.) pp. 106, 107. See *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243.

The Minnesota case above cited is confidently relied on by counsel for the respondent as supporting the ruling of the trial court in this case, and it is in fact more nearly in point than any other of the numerous cases cited. But, conceding that decision to be correct under the Constitution and laws of Minnesota, it cannot be said to be entitled to controlling influence here, for the reason that the general constitutional provision there considered is materially different from the provision of our Constitution now before us for interpretation, and which declares, as we have seen, that taxes for corporate purposes "shall be equal and uniform in respect to persons and property within the jurisdiction of the body levying the same." The tax attempted to be collected in this instance is not uniform even as to the persons included in the classification made by the Legislature for some persons in the general class are exempted from the payment of the tax. It would, therefore, seem clear that the section of the statute now under consideration is repugnant to section 9 of article 7 of the Constitution, and consequently void. This conclusion is fully supported by the decision of the Supreme Court of Illinois in *Hunsaker v. Wright*, 30 Ill. 146, wherein the constitutionality of a county tax levied upon property within the limits of the city of Cairo was in question, the provision of the Constitution there interpreted being, in substance, identical with section 9 of article 7 of our Constitution. The lower court in that case enjoined the collection of the tax, and its ruling was affirmed by the Supreme Court. The Constitution of that state declared that "the General Assembly shall provide for levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his or her property," and that "the corporate authorities of counties, \* \* \* cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." And with regard to those provisions the court said: "These provisions were manifestly inserted in the fundamental law for the purpose of insuring equality in the levy and collection

of the taxes to support the government, whether levied for state, county, or municipal purposes. The design was to impose an equal proportion of these burthens upon all persons within the limits of the district or body imposing them. Under these provisions the Legislature has no power to exempt or release a person, or community of persons, from their proportionate share of these burthens. Not having such power themselves, they are unable to delegate such power to these inferior bodies." See, also, to the same effect, *Cooley on Taxation* (2d Ed.) pp. 25, 26.

We have refrained from discussing the numerous cases cited by counsel upholding levies of taxes payable in labor on highways, for the reason that we have deemed such cases inapplicable to the case at bar. Though in the nature of a tax, such levies are, in general, referable to the police power. "Neither in common speech nor in customary revenue legislation would a burden of this nature be understood as embraced in the term 'tax'; and statutory provisions for assessment are not, therefore, applicable to it, unless made so in express terms." *Cooley on Taxation* (2d Ed.) page 15.

Our conclusion is that both the ordinances for the violation of which appellant was tried and convicted and the provision of the statute upon which they are founded are unconstitutional and void, and the judgment and sentence is therefore reversed, and the action dismissed.

HADLEY and MOUNT, JJ., concur. FULLERTON, C. J., dissents.

STATE ex rel. LIVINGSTONE et al. v. WILLIAMS, Mayor, et al.

(Supreme Court of Oregon. Aug. 8, 1904.)

MANDAMUS — TO CAUSE ARREST — WARRANT — GAMBLING — BAIL AND DEPOSIT IN LIEU — ISSUING BENCH WARRANTS — MISJOINDER OF CAUSES OF PROCEEDING — UNNECESSARY STEPS — AMENDED WRIT.

1. Mandamus will not issue to compel any one to arrest, or order the arrest, without a complaint or warrant, of certain named persons alleged to be conducting a gambling house, the offense not being committed in the presence of the court, so as to warrant it, under B. & C. Comp. § 1615, to command arrest of the offenders without a warrant, and gambling being, under section 1944, and Portland City Ordinance No. 3,983, but a misdemeanor, arrest for which without a warrant is authorized by section 1611 only when it is committed in the presence of the officer.

2. A writ of mandamus commanding the chief of police to arrest and vigorously prosecute certain persons will not be construed as a direction to file formal charges against persons before arresting them, necessary to make the arrest for a misdemeanor lawful.

3. A distinction being made by B. & C. Comp. § 1338, between bail and money deposited in lieu thereof, a literal compliance with a writ of mandamus to issue bench warrants for persons whose bail has been forfeited would not

reach persons who had deposited money in lieu of bail.

4. An alternative writ of mandamus to a municipal judge to issue bench warrants, alleging merely that he neglects to issue them "as required by law," does not, as is necessary, aver that it is incumbent on such judge to issue bench warrants, but merely states a legal conclusion.

5. Under Portland City Charter, § 331, providing that the clerk of the municipal court shall keep its seal and affix it to any process emanating therefrom, it is his duty to issue bench warrants; so that mandamus will not lie to compel the judge to do this.

6. A writ of mandamus does not improperly join several causes of special proceeding, though it is directed to several officers commanding each to do but one of the separate and successive acts—that imposed on such officer by law, necessary to secure to relator his legal right.

7. Though it is the duty of the mayor or executive board of a city, on receipt of satisfactory information, to direct the chief of police to enter gambling houses and arrest persons there found offending against the law, yet, it being made the duty of a police officer by B. & C. Comp. § 1950, to inform against and prosecute persons whom he has reasonable cause to believe guilty of violating the provisions of an act prohibiting gambling, mandamus will not lie to the mayor to issue an order for the chief of police to prosecute gamblers, and to him to obey such order, but, he having reasonable cause to believe that such persons are violating such law, it is enough to command him alone to perform his duty; as mandamus will not lie to compel the doing of vain and useless things.

8. Mandamus to the chief of police to prosecute gamblers will not be refused on the principle that an officer cannot be compelled to do what his superior officer has lawfully commanded him not to do, where they have entered into an unlawful conspiracy not to prosecute them.

9. As an alternative writ of mandamus stands for a complaint, it having improperly united several causes of special proceedings, and having been demurred to on that ground, relator can proceed only by filing an amended writ containing the cause he elects to pursue.

**Appeal from Circuit Court, Multnomah County; John B. Cleland, Alfred F. Sears, Jr., Arthur L. Frazer, and M. C. George, Judges.**

Mandamus, on the relation of R. Livingstone and others, against George H. Williams, mayor of the city of Portland, and others. Judgment for relators. Defendants appeal. Reversed.

This is a mandamus proceeding, instituted on the relation of R. Livingstone and others against George H. Williams, as mayor of Portland; Charles H. Hunt, as chief of police; H. W. Hogue, as municipal judge; and Charles F. Beebe and others, as members of the executive board of that city—to compel the arrest and prosecution of certain persons for alleged violations of a clause of the city charter, of the provisions of a municipal ordinance, and of the requirements of a statute of the state prohibiting gambling. Alternative writs were issued, one to the members of the executive board as a body, and one to each of the other defendants, who severally demurred thereto on the grounds: (1) That they did not state facts sufficient to entitle the relators to the relief

demand; (2) that it appeared therefrom that a plain, speedy, and adequate remedy in the ordinary course of law existed for the suppression of the evil alleged; (3) that the court did not have jurisdiction of the persons of the defendants nor of the subject-matter involved; and (4) that several alleged causes of special proceeding were improperly united. These demurrers being overruled, and the defendants declining further to plead, the writs were made peremptory, and they severally appeal.

J. J. Fitzgerald, for appellants. M. L. Pipes, for respondents.

MOORE, C. J. (after stating the facts). It is contended by defendants' counsel that errors were committed in overruling these demurrers. Let us first consider whether or not the alternative writs state facts sufficient to warrant the granting of the relief demanded. They show the right of the relators to institute these proceedings; allege the incorporation of the city of Portland, and the several duties of the respective defendants, so far as involved herein; that since March, 1903, defendants have willfully conspired to obstruct and defeat the enforcement of the provisions of the city charter, of the municipal ordinance, and of a statute of the state prohibiting gambling, and to thwart the conviction and punishment of persons engaged in gaming, or who keep or frequent gambling houses, and refuse to perform the duties imposed upon them in relation to such prohibition; that every day and night since the unlawful agreement was entered into a number of persons have openly and notoriously been engaged in keeping and conducting gaming and gambling houses, rooms, and premises, and playing the games so prohibited, which places have been and now are kept and used as common gaming houses for playing therein for wager of money at games of chance, some of the persons so employed and of the rooms in which they are engaged being as follows: John Thomas, 130 Fifth street, H. Shapiro, 185 Third street, George Fuller, \* \* \*, Fred Fritz, 242 Burnside street, E. Blazier, 248 Burnside street, and A. D. Martini, 81 First street; that at all times and now the defendants had and have information satisfactory to each of them that such houses and rooms were and are constantly used for gambling, but, in pursuance of their unlawful agreement, the chief of police, with the sanction and approval of his codefendants, pretends to subscribe and verify complaints against such persons, feigning to charge them severally, in due form of law, with violating the ordinances relating to gambling. files the same in the municipal court, and, without any order therefrom fixing their bail, induces them to deposit sums of money, pretending that they are in lieu of bail, and the municipal judge, in furtherance of such

unlawful combination, professes to order such money forfeited and paid into the city treasury, the defendants intending that the persons so charged should not appear in court for trial, they consenting thereto, relying upon the defendants' advice that they were not to be tried on such charges if twice each month they would deposit the sums agreed upon as simulated bail; that in pursuance of such conspiracy all persons conducting common gaming houses, including those hereinbefore named, have been charged by the chief of police twice each month with the offense of gambling, and in every instance they have deposited a specified sum of money in lieu of bail, which has invariably been forfeited, the municipal judge refusing to proceed with their trials; that at intervals between the time of such deposits the defendants had, and now have, satisfactory information, and know that the persons so charged are keeping gaming houses, but the defendants willfully neglect and refuse to charge them therewith, or cause them to be arrested therefor, or to be brought to trial, and in doing so the defendants have not exercised any discretion, but act arbitrarily, and with intent to permit public gambling in violation of law; that the municipal judge, well knowing that the persons making such deposits are in the city, at their several gambling houses, engaged in playing prohibited games, willfully neglects to issue bench warrants for their arrest, "as required by law," with intent that they shall continue to violate the city charter, municipal ordinance, and statute of the state, so as to derive from them an illegal and corrupt revenue for the city; that the largest gambling house is known as the "Portland Club," at No. 130 Fifth street, which is, and at all times mentioned herein has been, kept and conducted by Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon; that in March, 1903, and thereafter at regular intervals, the chief of police has pretended to file in the municipal court verified complaints against one of the persons last mentioned under the fictitious name of John Thomas, well knowing the true name of the person intended to be charged, who would thereupon deposit in that court, under the pretense of bail, about \$250, but on November 23, 1903, the sum left for that purpose was \$300, which the judge pretended to forfeit—whereby gambling has continued in violation of law, and the persons engaged therein and pretended to be charged therewith and arrested therefor under the name of John Thomas have, in pursuance of such conspiracy, never appeared in the municipal court for trial; and that the relators have no plain, speedy, or adequate remedy in the ordinary course of law.

The four alternative writs are alike in every particular, except the thirty-seventh paragraph thereof, which relates to the respective commands enjoined upon the sev-

eral defendants; the one addressed to the mayor, omitting the choice of showing cause, being as follows: "Now, therefore, you are commanded that immediately after the receipt of this writ you forthwith direct Charles H. Hunt, as chief of police of said city, to enter, or cause a proper police officer to enter, the common gaming houses described in this writ, and particularly the premises at 130 Fifth street, known as the 'Portland Club,' which is a common gaming and gambling house, and forthwith arrest or cause to be arrested the person or persons who may be found there violating the gambling law and ordinances, and particularly the person who has heretofore been charged by the said chief of police in the municipal court of said city with violating the laws and ordinances of said city under the name of John Thomas, and the persons, to wit, Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon, who are keeping and using said gaming and gambling house, and to seize all instruments of gaming that may be found therein, and bring the same into the municipal court, and to vigorously prosecute said persons therefor, or that you show cause," etc. The command addressed to the executive board is almost identical with that to the mayor, and that directed to the chief of police was to execute the orders of the mayor and of the executive board, as contained in the mandates to them. The municipal judge was required to perform the following service: "Now, therefore, you are commanded that immediately after the receipt of this writ you issue bench warrants for all persons charged with offenses against the ordinances of said city relating to gambling, whose bail has been forfeited by order of your court, and who have not appeared for trial in the several actions against them, and particularly for the persons charged under the name of John Thomas, charged in the months of May, June, July, August, September, October, and particularly about November 30, 1903, and that you cause the said persons to be brought before you and proceed to the trial thereof."

Section 194 of the charter of the city of Portland, which is relied on as imposing upon the mayor and the executive board the duties sought to be enforced against them in this proceeding, is, so far as deemed involved herein, as follows: "Whenever the mayor or the executive board ascertains or receives satisfactory information that any house, room, or premises within such city \* \* \* is being kept or used as a common gaming house or common gambling premises, for playing therein for wager of money at a game of chance, \* \* \* it shall be lawful for the mayor or the executive board to authorize and direct the chief of police, or any officer of the force, to enter such house, room, or premises, and forthwith arrest all persons therein found of-

fending against any law, and to seize all instruments of gaming \* \* \* and bring the said articles into court." Sp. Laws Or. 1903, p. 83. Assuming, without deciding, that the clause "it shall be lawful," in the section quoted, is not merely permissive, but mandatory, imposing upon the mayor and the executive board the duty of directing the chief of police as therein specified, had these officers the power, and could the court compel them, to order the arrest, without a warrant, of any person not found offending against any law? The statute prescribing when an arrest may be made without written authority is as follows: "A peace officer may, without a warrant, arrest a person,— (1) For a crime committed or attempted in his presence; (2) when the person arrested has committed a felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." B. & C. Comp. § 1611. Finance No. 3,983 of the city of Portland, approved October 13, 1883, prohibiting gambling, and in force when the writs herein were issued, imposes for a violation of its provisions a punishment by imprisonment not exceeding 90 days or by a fine not exceeding \$300, or by both such fine and imprisonment. It will thus be seen that by this municipal enactment the crime of gambling is only a misdemeanor, as it is likewise regarded by statute of this state. B. & C. Comp. § 1944. It would have been lawful for the mayor or for the executive board to have directed the chief of police to enter any gambling house in the city of Portland and arrested all persons found therein offending against any law, for the individuals so discovered would be guilty of a crime committed or attempted in the presence of a peace officer. *Id.* § 1611. When, however, the mayor and the executive board were commanded in the alternative writs, without either the filing of a complaint or the issuing of a warrant, to direct the arrest of the persons named, we do not think any authority existed therefor; for, if the persons designated were found offending against any law, the insertion of their names in the alternative writs was unnecessary, but, if not so found, their alleged crimes being only misdemeanors, and not committed in the presence of the court (*Id.* § 1615), it was powerless to command their apprehension. *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1. In that case it was held that a writ of mandamus would not be issued to compel the board of police commissioners of the city of St. Louis to arrest and prosecute certain named persons for a violation of the law of Missouri prohibiting the sale of fermented liquors on Sunday. In rendering the decision Mr. Justice Sherwood, speaking for the court, says: "Again, on the mere admission of the respondents that four citizens have done certain acts, the latter

are to be arrested and prosecuted without affidavit and without warrant. This is further, it seems to me, than the mandatory authority of a court extends. Indeed, I have found no precedent for a mandamus for the arrest of any one. It is the duty of a sheriff, as conservator of the peace, to cause all offenders against the law, in his view, to enter into recognizance with surety to keep the peace, etc. 1 Rev. St. 1879, § 3889. It is also his duty to quell and suppress assaults and batteries, riots, affrays, and insurrections, to apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority. 1 Rev. St. 1879, § 3891. And yet it is believed that no instance can be found where a mandamus has issued commanding a sheriff to quell a riot or to arrest a criminal. The fact that no such precedent can be found argues very strongly against the exercise of such authority. It is very easy to see that, if the process of mandamus could be employed in this ordinary way, that extraordinary writ would soon descend from its high plane and become very commonplace."

To secure freedom from illegal restraint for trivial causes, the wisdom and experience of ages have sanctioned the use of certain forms of procedure which must be observed before an alleged criminal can lawfully be arrested for a misdemeanor not committed in the presence of a magistrate or of a peace officer. A formal charge must be made and filed, showing that the court has jurisdiction of the subject-matter and authority to issue a warrant, in pursuance of which a peace officer may apprehend the person therein named, and be exonerated from all consequences that may possibly result from a wrongful imprisonment, by producing the writ if it appears therefrom that the court issuing it had such jurisdiction, and there is nothing disclosed to notify him of any lack of such authority. *Crocker, Sheriffs*, § 48; *Murfree, Sheriffs*, § 1161; 3 Cyc. 880; 2 Am. & Eng. Enc. Law (2d Ed.) 869, 893; *Savacool v. Boughton*, 21 Am. Dec. 181; *In re Way*, 41 Mich. 299, 304, 1 N. W. 1021. In *Goodell ex rel. v. Woodbury*, 71 N. H. 378, 52 Atl. 855, relied upon by the relators as supporting the judgment rendered herein, a writ of mandamus was issued to compel the chief of police of Manchester, N. H., to enforce the provisions of a statute of that state prohibiting the sale of intoxicating liquors; but the officer was commanded to prosecute, not to arrest, the persons named in the writ. In deciding that case Mr. Chief Justice Blodgett, referring to the duties of the chief of police, says: "The defendant is not merely a peace officer; he is also a prosecuting officer. The ordinances of Manchester (1892) provide that he shall carry into execution within the city the laws of the state and all the ordinances of the city, and be vigilant to detect and bring to punishment all violators thereof. \* \* \*

He shall receive all complaints made to him of any violation of the laws or of any ordinance of the city, and shall, in behalf of the city, cause all offenders against such laws and ordinances to be promptly prosecuted before the police court of the city of Manchester, and shall attend, on behalf of the city, at their trial." In the case at bar the chief of police was required to arrest and vigorously prosecute the persons named in the alternative writ addressed to him, but, as such order was a recital of the language of the city charter (section 195), we do not think the command can be construed, in the extraordinary remedy invoked, as a direction to file formal charges against the persons so named, before arresting them, and that a reasonable interpretation of the language used means that the officer was required (1) to apprehend such persons; (2) to bring them into the municipal court; (3) to prefer charges against them; and (4) to secure the attendance of witnesses whose testimony might lead to their conviction.

The Congress of the United States, fearing an infringement of the citizen's right of locomotion, and believing that the Constitution originally adopted did not sufficiently "secure the blessings of liberty," guaranteed by that instrument, proposed at an early day, and secured the ratification of the fourth amendment to the fundamental law, which, so far as applicable herein, is as follows: "The right of the people to be secure in their persons \* \* \* against unreasonable \* \* \* seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing \* \* \* the persons \* \* \* to be seized." In *re* Way, 41 Mich. 299, 1 N. W. 1021, Mr. Chief Justice Campbell, commenting on the mode of apprehending persons, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of an officer." In *Bright v. Patton*, 60 Am. Rep. 396, it was ruled that an officer had no right to arrest without a warrant, after an offense had been committed, where the punishment is only a fine and imprisonment in jail. The illegal arrest of a person without a warrant entitles him to compensation for the damages sustained by reason of the false imprisonment. *Thorne v. Turck*, 46 Am. Rep. 126. In *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76, the court, in distinguishing between false imprisonment and malicious prosecution, says: "The foundation of the cause of action in the one case is the right which even a guilty man has to be protected against any unlawful restraint of his personal liberty, while in the other it is founded upon the right of an innocent man to be

compensated in damages for any injury he may sustain by bringing against him a groundless charge, even though such charge may be presented and prosecuted in accordance with the strictest forms of law." The statute of this state, emphasizing the love of personal liberty entertained by a free people as expressed in the fourth amendment to the federal Constitution, impliedly prohibits the arrest, without a warrant, of any person for the commission of a misdemeanor, unless the offense was attempted or consummated in the presence of a magistrate or of a peace officer (B. & C. Comp. § 1611); so that, if the chief of police had obeyed the command of the alternative writ directed to him, and, without a warrant, arrested the persons so designated, their alleged crimes being only misdemeanors, he would probably have been liable to them in nominal damages, at least, for a false imprisonment, unless he apprehended them in the act of violating the law, notwithstanding they may theretofore have been guilty of offending against the statute and city ordinances prohibiting gambling. "An officer," says the editor of the *Am. & Eng. Enc. Law* (vol. 19, p. 729 [2d Ed.]), "cannot be compelled to do more than the statute requires of him;" and hence the issuance of the alternative writs addressed to the mayor, to the executive board, and to the chief of police, in so far as they commanded the arrest without a complaint or warrant of the persons so named, was an exercise of power not authorized, and therefore void.

A compliance by the municipal judge with the command directed to him would have necessitated an examination of the journals of the municipal court from the time of its organization until the writ was returned to ascertain the names of the persons whose bail had been ordered forfeited and who had not appeared for trial in the several actions instituted therein against them, that bench warrants might be issued for their arrest, regardless of the fact that many of those intended to be included in the order may possibly have died in the long interim. The statute makes a distinction between bail and money deposited in lieu thereof (B. & C. Comp. § 1338), so that a literal compliance by that officer with the alternative writ directed to him to "issue bench warrants for all persons charged with offenses against ordinances of said city relating to gambling where bail has been forfeited by your court, and who have not appeared for trial in the several actions against them," would not have resulted in punishing the persons alleged to have been guilty of violating the law prohibiting gambling, nor possibly corrected the evil sought to be suppressed by these proceedings, assuming, as the writs allege and the demurrers admit, that in pursuance of the conspiracy entered into by the defendants money, in each instance, was deposited in lieu of bail.

The alternative writs, in referring to the duties imposed on the municipal judge, contain the following averment: "Among the provisions of law not otherwise provided in said charter are that a defendant shall be admitted to bail by an order of the court, and after such order is made he may deposit in lieu thereof with the clerk the sum of money mentioned in the order, and if, without sufficient excuse, the defendant neglect or fail to appear for arraignment or upon any other occasion when his presence in court may be lawfully required, the court must direct the fact to be entered in the journal, and the undertaking of bail or the money deposited in lieu thereof, as the case may be, is thereupon forfeited. When by reason of the defendant's neglect or failure to appear he has incurred a forfeiture of his bail or money deposited in lieu thereof, it is the duty of the court, by an order entered upon its journal, to direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged. It is then the duty of the court to proceed to trial in ordinary course until final determination." The charter provides that the municipal court shall be a court of record having a seal. Section 328. All proceedings before such court or the judge thereof are governed and regulated by the general laws of the state applicable to the justice of the peace or justices' courts in like cases, except as in the charter otherwise provided. Section 332. The executive board is authorized to appoint a clerk of such court, who is to keep the seal thereof and affix it to any process emanating therefrom. Section 331. The demurrers having admitted the duty of the municipal judge to enter in the journal of his court a memorandum of the forfeiture of the money deposited in lieu of bail, and of orders in such cases directing the arrest of the persons whose money had been forfeited, as alleged, it must be presumed, in the absence of any averment to the contrary, that such official duty has been regularly performed (B. & C. Comp. § 788, subd. 15), and, this being so, the issuing of the bench warrants did not devolve upon the judge, as stated in the command addressed to him, but on the clerk of the municipal court, who is required to affix the seal thereof to any process. Charter of Portland, § 331. Though it is alleged in the alternative writs that the municipal judge willfully neglects to issue bench warrants, "as required by law," for the arrest of persons whose money deposited in lieu of bail has been declared forfeited, it is not averred that it is incumbent on him to issue such warrants, unless the duty in this respect can be implied from the qualifying phrase "as required by law." It was necessary to state, as a major premise: (1) The facts constituting the duty which the law enjoins on the defendants; and, as a minor

premise, (2) their failure, neglect, or refusal to comply therewith, from which the court deduces the conclusion sought to be established. Bliss, Code Pl. (3d Ed.) § 137. The writs having stated that the municipal judge neglected to issue bench warrants "as required by law," the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right. It will be remembered that the sufficiency of the alternative writs was challenged by demurrer, and in such case the probative facts alone are admitted, and not the conclusions of law so stated. Longshore Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 404, 46 Am. St. Rep. 640. It not having been alleged that it was incumbent upon the municipal judge to issue bench warrants, and, as we have seen, this duty is imposed by the city charter on the clerk of the municipal court, it follows that the alternative writs do not state facts sufficient to constitute a cause of special proceeding against the former.

Considering the fourth ground of the demurrer interposed to the alternative writs—that several causes of alleged special proceedings have been improperly united—it has been held that one writ of mandamus against all officers concerned in the separate but co-operative steps for levying and collecting a tax is the proper and effective remedy to secure its exaction. Labette County Com'rs v. United States ex rel., 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698. In deciding that case Mr. Justice Matthews, in speaking for the court on the procedure, said: "There is no incongruity in such a writ. It would not be complete or effective without it embraced all the particulars which, in law, are essential to the full duty contemplated by it, the performance of which is necessary to secure its benefits to the party who sues it out. So here the object of this writ, though including many particular steps in obeying it, is nevertheless single, in that it is intended to obtain an end which is the result of the means prescribed. The command of the writ is to perform the general duty, which is obeyed by performing the successive steps which constitute it. Clearly, the writ would not be chargeable with duplicity if addressed to one person, although it commanded the performance of a series of acts, each of which was a condition of the performance of its successor, where the right of the relator consists in the result legally flowing from the combined whole. It can make no difference in principle that in a particular case the law instead of casting the performance of the entire duty upon a single person, has divided it among several, each to perform but one act in the series, and each acting independently, and not as responsible to any of the others, but all required to co-operate in the attainment of the single result, and by a continuous and uninterrupted succession,

so as to preserve the integrity and unity of the performance of an entire duty. The relator is entitled to an effective writ, and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps in the performance of those official duties which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive." To the same effect, see *State ex rel. v. Bailey*, 7 Iowa, 390.

In the case at bar it will be remembered that section 194 of the city charter provides that it shall be lawful for the mayor or the executive board, on the receipt of satisfactory information, etc., to direct the chief of police to enter common gaming houses in the city and arrest all persons therein found offending against any law. The statute of this state makes it the duty of a police officer to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of violating the provisions of an act prohibiting gambling. B. & C. Comp. § 1950. This enactment made the chief of police of the city of Portland a prosecuting officer (*Goodell ex rel. v. Woodbury*, 71 N. H. 378, 52 Atl. 855), and, if he had reasonable cause to believe that any person was violating such law, also imposed on him the duty of enforcing its provisions without any direction to that effect from the mayor or from the executive board. The obligation thus enjoined results from an office (B. & C. Comp. § 605), and for a refusal by the chief of police to comply with the duty which the law prescribes a peremptory writ of mandamus addressed to him would be as effectual to suppress public gambling as though the mayor and the executive board were also commanded to direct him to do the same thing. This result can be secured by commanding the chief of police to perform a plain duty devolving upon him, and, as a writ of mandamus will not lie to compel the execution of vain and useless things (19 Am. & Eng. Enc. Law [2d Ed.] 757), no necessity existed for joining a cause of special proceeding against the mayor or the executive board, the discharge of whose duties, if it be assumed they are imperative, were not an indispensable or successive step in the procedure to suppress the evil of which the relators complain. In discussing this feature of the case we have not overlooked the legal principle that a public officer cannot be compelled to do a particular act which his superior in office has lawfully ordered him not to do. 19 Am. & Eng. Enc. Law (2d Ed.) 731; *Butterworth v. United States ex rel.*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. Assuming, as the demurrers admit, that a conspiracy existed whereby the defendants sought to raise a revenue by a method tantamount to licensing public gam-

bling, the scheme alleged to have been adopted was unlawful, and, the agreement entered into being void, the chief of police was not bound thereby, nor under any obligation to obey the orders of his superiors, the mayor or the executive board; and hence mandamus will lie to compel him diligently to prosecute any and all persons whom he has reasonable cause to believe guilty of a violation of the provisions of the statute prohibiting gambling. B. & C. Comp. § 1950; *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855.

The relators are entitled to an effective writ, and, having prayed for greater relief than they of right can demand, an amendment may be desired. The statute prescribes what shall constitute the pleadings in mandamus proceedings, and provides that these formal allegations of the parties are to have the same effect, and may be amended in the same manner, as pleadings in an action. B. & C. Comp. § 612. In *State ex rel. v. Crites*, 48 Ohio St. 142, 26 N. E. 1052, it was ruled that where, upon a petition in mandamus, an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremptory writ for such distinct acts or parts of connected acts as he may show a right to have performed, where there is no such mutual dependence between the several acts or parts of acts that they cannot be separated or divided. A mandatory writ, properly framed, alleging the required facts, and addressed to all the officers of the city of Portland who are indispensable in taking the necessary successive steps required successfully to prosecute persons for violating the law prohibiting gambling, will, in our opinion, tend to suppress the evil. If the chief of police refuses or willfully neglects to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of a violation of the provisions of the act prohibiting gambling, he shall be deemed guilty of a misdemeanor, and on conviction thereof in a criminal action instituted for that purpose will be punished and the court so trying him will declare his office vacant for the remainder of his term. B. & C. Comp. § 1951.

The command of an alternative writ of mandamus is equivalent to a conclusion of law, deducible from the facts alleged, showing the particular act which the law specifically enjoins as a duty resulting from an office, trust, or station (B. & C. Comp. § 605); the failure, neglect or refusal of the defendant to comply therewith; and the right of the relator to insist upon its specific performance. It is to the mandatory part of the writ, however, that a party defendant must look to discover the specific act which he is commanded to perform. Though it may be possible that the right to a part of the relief sought against the chief of police

may be stated in the writs, the rule in this state is that, when a demurrer to a complaint is sustained on the ground that several causes of action have been improperly united, the complaint is completely overthrown, and the plaintiff can only proceed by filing an amended complaint containing the cause of action which he elects to pursue. *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20.

As an alternative writ of mandamus stands for a complaint in an ordinary action (*McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1), the judgment must be reversed, the peremptory writs set aside, and the cause remanded, with directions to sustain the demurrers in the particulars indicated herein, and for such other proceedings as may be necessary, not inconsistent with this opinion; and it is so ordered.

#### RICHARDSON et al. v. RUDDY et al.

(Supreme Court of Idaho. June 8, 1904.)

#### DISMISSAL OF APPEAL—CONTINUANCE—APPLICATION FOR CONTRACT—PARTITION OF REAL ESTATE.

1. Under the provisions of subdivision 3 of section 4807 of the Revised Statutes of 1887, if an appeal from an interlocutory judgment is not taken within 60 days after such judgment is entered the same will be dismissed on motion.

2. The action of the trial court in denying the motion for a continuance will not be reversed unless it appears that the court in denying such motion has abused its discretion.

3. In a suit for the partition of real estate among several parties, if it appears to the court that it is impracticable or inconvenient to make a complete partition in the first instance among all the parties to the suit, the court may direct a partition among two or more of the parties, and from time to time thereafter may determine as to the others' rights, shares, and interests, and render a further judgment directing a partition in like manner of all the undetermined parts and portions of the property.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by A. C. Richardson and others against Richard Ruddy and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Geo. W. Tannabill, James De Haven, and H. F. Burleigh, for appellants. Clay McNamee and Geo. W. Goode, for respondents.

SULLIVAN, C. J. This is an action brought under the provisions of title 10, c. 5, of the Revised Statutes of Idaho of 1887, for the partition of certain real estate lying in Idaho county, and to have the defendant Richard Ruddy declared trustee for the benefit of plaintiffs and defendants named in the complaint. It is alleged in the amended complaint that the plaintiff Walker Richardson and the defendants Richard Ruddy, E. Conrad, C. E. Newton, and A. A. Kincaid acquired title as joint tenants to the real es-

tate described in the complaint, and that they are now in possession thereof; that said premises were acquired by said plaintiff Walker Richardson and defendants from the United States government for the purpose of and as a town site by filing certain government scrip with the proper United States officials, and by payment of the sum of money required in such cases by the laws of Congress; that by agreement the recorded title to said premises was to be granted by the government to the defendant Ruddy as trustee for said plaintiffs and defendants, and that he now holds the legal title to all of said premises. The specific interests of the plaintiffs and defendants, so far as known, are alleged and set out in the complaint. The prayer is for a partition of said premises, and that the defendant Ruddy be compelled by proper decree to execute and deliver good and sufficient deeds to both the plaintiffs and defendants to their respective interests in said land, and for general relief. The defendants Ruddy, Jacobs, Marasack, and Conrad filed separate answers, denying all allegations of the complaint. Kincaid filed his answer, admitting all of the allegations of the complaint, and joined with the plaintiffs in a prayer for a partition of the premises. The case was tried by the court without a jury, and an interlocutory decree entered by the court directing that upon the coming in of the report of the referees hereinafter referred to final judgment be entered as to Richardson and Kincaid. In said decree the court determined the interest of plaintiff Walker Richardson and defendant A. A. Kincaid, and ordered a partition of said premises as to them, and appointed three disinterested freeholders to make said partition, and a survey of the premises, if necessary, and report the result thereof to the court. The court made no findings or decree as to the interest of the other parties to this suit, but ordered on the coming in of the report of said referees that the action be severed, leaving the action to proceed as to the remaining parties to the suit. From said judgment and order overruling the motion for a new trial this appeal is taken.

Counsel for respondent moved to dismiss the appeal from the judgment on the ground that the judgment entered was not a final, but an interlocutory, judgment, and that the appeal was not taken within 60 days after entry of said judgment. The record shows that the judgment was filed October 15, 1903, and that the appeal was taken on the 3d day of February, 1904. The provisions of subdivision 3 of section 4807, Rev. St. 1887, provide, among other things, that an appeal may be taken from the district court to the Supreme Court within 60 days after the order or interlocutory judgment is made and entered. The appeal from said interlocutory judgment, not having been taken within 60 days from the date of its entry, must be dismissed, and said motion sustained.



That leaves the appeal from the order denying a new trial to be considered. It appears from the record that defendants interposed a motion for a continuance, which was denied by the court. This is assigned as the first error. We have examined the affidavits pro and con used on the application for a continuance, and we are unable to say that the court abused its discretion in overruling said motion.

It is also contended that the court erred in decreeing a partition so far as the plaintiff Walker Richardson and defendant A. A. Kincaid were concerned, leaving intact and undetermined the share, interest, or estate of the other parties to the suit. Mr. Knapp, in his work on Partition, at page 211, says: "In such case the interlocutory judgment must direct a partition as between those whose share has been determined and the other parties to the action, leaving intact the share, interest, or estate of those that are undetermined. And where the shares and interest of two or more parties have been ascertained and determined the interlocutory judgment may also direct the partition among them of part of the property proportionate to their aggregate share, and the court from time to time may determine as to the other rights, shares, and interests, and render another and further interlocutory judgment, directing a partition in like manner of the undetermined parts and portions of the property." The provisions of section 4568 of the Revised Statutes of 1887 provide for partial partition in cases of this kind. The court did not err in making the partial partition of said premises.

The plaintiffs were permitted to amend the complaint in some minor particulars over the objection of counsel for the defendants, and it is contended that said amendments were not served on four of the defendants, which action of the court is assigned as error. The amendments referred to were made in open court during the trial of the case, and the counsel for the defendants were present. After said amendments were allowed, no continuance of the cause was asked for, and it is not intimated that defendants were taken by surprise, and not ready to meet the complaint as amended.

The next error assigned relates to the insufficiency of the complaint. On an examination of its allegations we find that it states a cause of action, and is amply sufficient. Many of the errors assigned relate to the admission of proof of a verbal contract for the conveyance of real estate. But the evidence clearly shows that this case does not come within the statute of frauds, and the admission of such evidence was not error.

A number of letters were introduced in regard to this real estate transaction. It was not error to admit said letters, as they referred to the transaction out of which this suit arose. The evidence is amply sufficient to sustain the findings and judgment of the

court. After a careful examination of the complaint and the evidence introduced in support of it, we conclude that the complaint states a cause of action, and the findings and judgment are supported by the evidence.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondents.

STOCKSLAGER and AILSHIE, JJ., concur.

#### On Petition for Rehearing.

(Aug. 10, 1904.)

STOCKSLAGER, J. I have read the petition for rehearing in this case with much interest and care. Counsel for appellants urge as a reason why a rehearing should be granted that "only one of the respondents, Richard Ruddy, was represented by counsel present in court." This question was passed upon by the district court. The judge of that court was familiar with all the facts and conditions, and, within his discretion, it seems he refused to grant a continuance. It is certainly well settled that this court will not disturb the action of the trial court in matters of this kind. Many other reasons are urged why the judgment of the trial court should be reversed, but a careful study of the petition does not disclose any reason urged therein that was not fully passed upon in the original opinion. A rehearing is therefore denied.

SULLIVAN, C. J., and AILSHIE, J., concur.

#### CLARK v. CITY OF SAN DIEGO. (L. A. 1,246.)\*

(Supreme Court of California. Aug. 11, 1904.)

##### QUIETING TITLE—TAXES.

1. The lien of taxes being extinguished, title will be quieted against them.

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by W. H. Clark against the city of San Diego. Judgment for plaintiff. Defendant appeals. Affirmed.

H. E. Doolittle, City Atty., for appellant. Withington & Carter, for respondent.

HENSHAW, J. This is an action to quiet title. As defenses to the action, defendant pleaded the liens for delinquent taxes for the years 1890 and 1893, and prayed that the taxes be decreed valid and subsisting liens upon the property. Admittedly, upon the authority of *City of San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923, and *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944, the right of action for the collection of the taxes according to

\*Rehearing denied September 10, 1904.

the statute of 1880, p. 136, c. 123, is lost. The court decreed, under section 2911 of the Civil Code, and upon the authority of *Dranga v. Rowe*, that the lien of the taxes was likewise lost, and quieted plaintiff's title accordingly. It is here contended that a distinction is to be drawn between the case of *Dranga v. Rowe* and the case at bar, in that in the former case the defendant sought affirmative relief that no decree should be rendered quieting plaintiff's title, except upon payment of the assessed taxes, whereas in the case at bar it is asked only that the taxes be decreed to constitute subsisting liens. There is, however, no difference in principle between the cases. *Dranga v. Rowe* was decided upon the theory that the lien was extinguished, and the trial court was therefore correct in its ruling and decision in the case at bar.

For which reason the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: **McFARLAND, J.; LORIGAN, J.**

144 Cal. 356

**VAIL et al. v. FREEMAN et al. (L. A. 1,285.)**  
(Supreme Court of California. Aug. 8, 1904.)

**OIL WELLS—CONTRACT FOR DRILLING—PERFORMANCE.**

1. Plaintiffs are entitled to a conveyance which defendants contracted to make in consideration of their drilling an oil well, though water was not kept out of the well; there being no provision in the contract that it should be, but merely that they should provide the well "with proper and necessary casing, perforated at proper places, tubing, pump and all necessary connections thereof put therein to the proper depth to properly pump the said well, and everything completed ready for pumping," and they having complied therewith, and it still being impossible to keep the water out.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Frank Vail and another against George W. Freeman and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. W. Brown, W. H. Savage, and M. C. Hester, for appellants. Jas. Burdett, for respondents.

**COOPER, C.** Action to compel the specific performance of a contract by defendants to deliver 100,000 shares of the capital stock of the Pioneer White Oil Company. The case was tried before the court, and judgment entered for plaintiffs. Defendants appeal from the judgment, and the order denying their motion for a new trial.

The controversy arises out of a contract made by the defendants, as parties of the first part, and plaintiffs, as parties of the second part, on the 1st day of May, 1900. The material portions of said contract are as follows:

"Third. The parties of the second part hereby agree in consideration of receiving from the parties of the first part one hundred thousand shares of the said capital stock fully paid up and nonassessable that they will erect a derrick and drill an oil well on the said lands at a point to be selected by them to a depth of 1,100 feet unless oil in paying quantities as hereinafter in these presents set out, be struck at a less depth, said well to be fully completed and finished by them and provided with proper and necessary casing, perforated at proper places, tubing, pump and all necessary connections thereof put therein to the proper depth to properly pump the said well and everything completed ready for pumping; such sinking of said well, and completion of the same to be at the expense and charges of the said parties of the second part, and to be so completed without any lien, charge, claim or incumbrance upon the said land, or upon the parties of the first part.

"Fourth. That the said parties of the second part, for the purpose of testing the full capacity of the said well, shall at their own expense pump the same for seven successive days, after the said well shall have been completed. \* \* \*

"Seventh. In addition to the said derrick and well so completed with all necessary casing, the said parties of the second part shall pay to the said parties of the first part the sum of \$5,000, as follows: \$1,000 in cash on the execution hereof, the receipt whereof is hereby acknowledged; \$2,000 when the well is so completed; and \$2,000 six months thereafter; but should oil not be found in said paying quantities in the said well, then the said parties of the second part shall not pay to the said parties of the first part the said last two payments of \$2,000 each, but will be released therefrom.

"Eighth. Upon the said completion of the said well, as aforesaid, by the said parties of the second part, under the terms of this agreement, and that whether oil in paying quantities be found therein or not, the parties of the first part agree to deliver to the said parties of the second part the said 100,000 shares and assign the same to and cause certificates therefor to be issued to the said parties of the second part either jointly or in such proportion as the said parties of the second part shall agree upon between themselves, and notify the said parties of the first part of such agreement."

The findings of the court challenged by appellant are: First, "that, pursuant to and in accordance with the terms of said contract, the plaintiffs duly carried out and performed all the conditions and covenants thereof on their part to be performed, and completed the work agreed by them to be performed, and finished the well therein described, on the 20th day of March, 1901, and thereupon put the pump on said well, and pumped the same for a period of seven days thereafter,

as required by the said contract"; and, second, "that oil was not struck or encountered in paying quantities in said well, either to the extent of ten barrels per day, or to any other extent more than a mere trace thereof." The sole contention of appellant is that these two findings are not supported by the evidence. Under the well-settled and oft-repeated rule that the trial court is the final arbiter of all questions of fact upon which there is a conflict in the evidence, we cannot disturb the findings if there is substantial evidence to support them. We have carefully examined the evidence, and find it sufficient.

As to the second of said findings, Frank Vail, one of the plaintiffs, testified as to finding oil in the well: "There was nothing ever showed up except a trace now and then on the water. I did not see any oil on the water at any time." The witness Putnam testified that in boring the well they found no oil—"only some rainbow colors on the water that might have come off the tools or off the sand line." Appellant has not called our attention to any evidence that oil was found in any perceptible quantity in the well. It is therefore useless to further discuss the second finding.

As to the first finding, the appellants do not claim that the well was not drilled to the depth provided for in the contract and completed by plaintiffs within the time provided, without any lien, charge, or incumbrance thereon of any kind. Their contention is that the plaintiffs did not properly shut off and case out the water in the said well, and that the contract was not completed, because the water should have been kept out, and that the result of water flowing into the well is to drive away and hold out the oil that would otherwise run into the well. There is no provision in the contract that the plaintiffs should keep the water out of the well. They agreed to provide the well "with proper and necessary casing, perforated at proper places, tubing, pump and all necessary connections thereof put therein to the proper depth to properly pump the said well, and everything completed ready for pumping." If plaintiffs complied with their contract in every respect, and yet the water could not be kept out, still they complied with their contract. There is evidence tending to show that plaintiffs used proper and necessary casing, and otherwise complied with their contract. Plaintiff Frank Vail testified that they used every means to keep the water out, but could not do so; that the formation in places was porous, shaly rock, with occasional water and gravel; that they put down 1,105 feet of 5% casing, put on a packer, and perforated it. The witness Putnam testified that when they were 700 feet deep they put in 7% casing to the bottom of the hole, and drove it, but still did not shut the water off; that "after that we put in our tubing, and pumped seven days and nights";

that they were attempting to shut the water off all the time, and were engaged in this about 2½ months. The witness Overman, a well driller by occupation, testified that, in his opinion, all was done in the way of shutting off the water that could be done. The witness Farr testified to the same effect, and further said: "Impossible to shut water off in crooked-up and broken shale, such as was in the well in question." There is other evidence in the record of a contradictory nature, but the above supports the findings.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

144 Cal. 351

PEOPLE v. MYRING. (Cr. 1,124.)\*

(Supreme Court of California. Aug. 6, 1904.)

HIGHWAYS—DEDICATION — EVIDENCE — ABANDONMENT—MALICIOUS BURNING OF BRIDGE.

1. Evidence on a prosecution for malicious burning of a bridge on a highway held sufficient to authorize a finding that the road had been dedicated by defendant as a highway.

2. Under Pol. Code, § 2819, providing that all public highways, once established, shall continue to be public till abandoned by order of the county supervisors, or by operation of law, or judgment of a court, ceasing to use a portion of a road does not of itself destroy its character as a public highway.

3. While the filing of a declaration of homestead as to certain land may prevent the dedication of a highway through it by the deed of the husband alone, it will not prevent a dedication, good as against the wife as well as the husband, through adverse user.

4. A party, by not objecting at the time to the answer of a witness on cross-examination, and proceeding to question him in regard to his answer, waives his right to object to it, and may not thereafter have it struck out as not responsive and as not the best evidence.

5. On the prosecution of defendant for maliciously burning a bridge on a highway, a petition to the supervisors, signed by defendant before the construction of the road, for the laying out of the road in the vicinity of its route, and a grant of a right of way therefor signed by him, are relevant and admissible on the issue of dedication of the highway; whether the route described in the deed was substantially the same as that of the road afterwards built, and on which the bridge was located, being for the determination of the jury.

6. Defendant having intended to destroy a bridge which was on a highway, and not having honestly believed it was not on a highway, his destruction of it was malicious.

Commissioners' Decision. Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

John Myring was convicted of maliciously burning a bridge on a highway, and appeals. Affirmed.

\*Rehearing denied September 5, 1904.

† 2. See Highways, vol. 25, Cent. Dig. § 284.

Thomas, Pemberton & Thomas and Mannon & Mannon, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and Robert Duncan, Dist. Atty., for the People.

**HARRISON, C.** An information was filed against the appellant, charging him with the crime of willfully, maliciously, and feloniously injuring and destroying a public bridge upon a public highway, by burning the same—such bridge then being upon, and used upon, a certain public highway leading from the town of Albion to Anderson Valley, by way of Pullen's Mill—all in Mendocino county, and upon the trial thereof was convicted and sentenced to imprisonment in the county jail for the period of three months. It was shown at the trial, without any attempt at contradiction, that on June 12, 1902, the defendant intentionally destroyed the bridge by setting fire to and burning it; but he defended upon the ground that the bridge was not a public highway, and was not upon the public highway, or upon any way laid out by authority of law. There was no evidence that the road upon which the bridge stood had been laid out by authority of law, but it was clearly shown that it, or one in its place, had been built and used more than 20 years prior to the time it was destroyed by the defendant. There was testimony that a road was surveyed out in April, 1876, and that the present road was constructed along the survey then made; that the grading was done and the road built mostly in the winter and spring of 1878. The defendant testified that the road where the bridge was that was burned by him was built directly after the survey, somewhere along in 1875 or 1876. Testimony was also given that the road had been traveled from late in the year 1878, and that the road overseers of the district had maintained it since that time; also that the road had been traveled by the public for more than 20 years. About 4 years before the bridge in question was burned, a forest fire had swept over the region surrounding the road, and destroyed the bridge which then was there, and from that time until a short time before the bridge was burned by the defendant a portion of the road adjacent to the site of the bridge was unused, the travel going by another route near thereto. In the early part of June, 1902, under the direction of the supervisor of that district, the road overseer repaired the road and rebuilt the bridge, and on the next day the defendant set fire to it and destroyed it. The land over which that portion of the road runs on which the bridge is situated belongs to the defendant. He had lived thereon and cultivated and worked it since 1873. A patent from the United States was issued to him in 1881.

The jury were instructed by the court that, in order to convict the defendant of the

crime charged against him, they must be satisfied from the evidence before them that the road upon which was the bridge that he had destroyed had been dedicated as a public highway. We are of the opinion that the evidence before them fully authorized the jury to find such dedication. Section 2618, Pol. Code, declares that "in all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." The dedication of a road as a public highway is the setting it apart by the owner of the land for the use of the public, and the subsequent use thereof by the public operates as an acceptance of the same, and makes it a public highway. Such dedication may be express, as by a grant to the public, or it may be implied from the circumstances under which the road is set apart and used. The adverse user of the road by the public, with the knowledge of the owner, for a period of time corresponding to that fixed for conferring a title by prescription, establishes, as against the owner, a presumption of dedication. "It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of mere license." *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 Pac. 448; *Hartley v. Vermillion*, 141 Cal. 340, 74 Pac. 987. Under this rule, the evidence before the jury, as above shown, was sufficient to justify them in finding that the road had been dedicated by the defendant as a public highway. There was, moreover, evidence of positive acts on his part tending to confirm this presumption. In 1876, prior to the construction of the road, he had signed a petition to the board of supervisors for the laying out of the road in the vicinity of its route, and had also signed the grant of a right of way therefor, and after the road was built he had, at different times, worked upon it for its repair in the vicinity of the bridge and elsewhere. The ceasing to use a portion of the road after it had been once established did not, of itself, destroy its character as a public highway. Pol. Code, § 2619.

The court properly refused to admit in evidence the declaration of homestead offered on behalf of the defendant. The purpose of offering it in evidence, as stated by his counsel, was to show that it was incompetent for him alone, without the consent of his wife, to dedicate the road after the date of this declaration of homestead (1884). If the prosecution had sought to show a dedication by deed from him alone, this objection might have been good, and the instrument admissible in evidence; but the dedication which is presumed from the adverse user by the public operates as an estoppel against the

wife, as well as the husband, and was independent of any question of homestead.

While the witness Lilly was under cross-examination on the part of the defendant, he was asked whether the defendant maintained gates or bars across the road, and replied: "He had a gate along it. The board of supervisors allowed him to have it." Without making any objection to this answer, counsel for defendant continued with his cross-examination upon this subject, and, after putting several other questions and receiving answers thereto, moved the court to strike out of the above answer that portion referring to the board of supervisors, upon the ground that it was not responsive, and also that it was not the best evidence. The court denied the motion, to which exception was taken. There was no error in this ruling. The objection should have been made immediately upon receiving the answer. By proceeding to question the witness in reference to his answer, he waived the right to object to its admissibility. He was not at liberty to seek to overcome the answer by further questioning, and, if he failed therein, then ask to have it struck out of the evidence.

There was no error in admitting in evidence the petition of the defendant to the board of supervisors, and the grant of a right of way signed by him. These instruments were relevant to the issue of dedication. Whether the route therein described was substantially the same as that of the road afterwards built was to be determined by the jury.

Whether the defendant destroyed the bridge maliciously was also a fact to be determined by the jury upon a consideration of all the evidence in the case. That he intended to destroy it was clearly shown, and, if its destruction by him was a wrongful act, it was done maliciously. Pen. Code, § 7. The court also fully instructed the jury that, if the defendant honestly believed that the road was not a public highway, or that the bridge was not on a public highway, and that he had a right to destroy it, he should not be convicted. By their verdict of guilty the jury must have been satisfied that the defendant did not honestly have such a belief, and we cannot say that the evidence was such as to require them to find otherwise.

Whether the defendant was liable to the county in a civil action for the damage done to the bridge was not an issue before the jury, and the court properly refused the instruction asked in reference thereto.

The judgment and order should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

20 Colo.A. 198

# MULLIGAN v. COLORADO FUEL & IRON CO.

(Court of Appeals of Colorado. Sept. 12, 1904.)

INJURY TO EMPLOYÉ—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—NONSUIT.

1. There was evidence that deceased was employed in defendant's foundry, as one of a gang of men, in hoisting hot ingots, weighing 1½ tons each, tongs similar in construction to ice tongs, weighing 100 pounds each, being applied to the ingots by him, and an hydraulic crane being then worked; that, after deceased had properly applied the tongs, and an ingot had been raised, it, after swinging some distance, slipped from the tongs, because of their being dull, and in such condition unsafe to use, and fell on him; that it was the duty of defendant's foreman to inspect the tongs, and, if found dull, to have them repaired; and that it was not the duty of deceased to examine them, and that he had no opportunity to do so. There was no evidence that he knew of their defective condition. *Held*, that a nonsuit was improperly granted, there being evidence that defendant was negligent in furnishing an appliance in a defective condition, which was the cause of the accident, one whose duty it is to inspect appliances being in the discharge of such duties a representative of the master, and it being impossible, in the absence of further evidence, to say, as a matter of law, that the tongs were such a simple appliance that deceased was charged with notice of their condition, or that he had assumed the risk, or was guilty of contributory negligence.

Error to District Court, Pueblo County.

Action by Mary Mulligan against the Colorado Fuel & Iron Company. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

M. J. Galligan, for plaintiff in error. Devine & Dubbs, John M. Waldron, and D. C. Beaman, for defendant in error.

GUNTER, J. Action by widow to recover for fatal injuries sustained by husband through alleged negligence of defendant. Judgment of nonsuit. Therefrom the case is here.

The evidence tended to show the following: Defendant was operating a steel plant. Deceased was employed therein as one of a gang of men in hoisting red-hot steel ingots, each weighing about 3,000 pounds, from the molds, and loading them on a car. Tongs, similar in construction to ordinary ice tongs, but weighing about 100 pounds, suspended by a chain from an hydraulic crane, were applied to the red-hot ingot, and upon signal the ingot was lifted by the crane and deposited on the car. It was the duty of deceased to apply the tongs to the ingot, and, when raised by the crane, to aid in guiding it to the car. In this instance the tongs were properly applied, and upon signal from the foreman of the gang the crane, in charge of a boy, hoisted the ingot, which, after swinging around about seven feet, slipped from the tongs and fell, fatally injuring deceased. The tongs were very dull, and for this reason did not hold the ingot. In this

condition they were unsafe for use in handling the ingot. If defendant's foreman, whose duty it was to inspect the tongs, and, if found dull, to send them to the shop for repair, had discharged his duty, defendant would have known that the tongs were dull and unsafe at the time deceased used them. It was not the duty of deceased to inspect the tongs, nor had he opportunity of doing so. There was no evidence that he had knowledge of their defective condition. To sum up, the evidence tended to show that the appliance—the tongs—furnished by the master, defendant, to the servant, deceased, was out of repair in being blunt, was thereby in an unsafe condition; that defendant was charged with notice of such condition, and was guilty of negligence in its existence; that such negligence was the proximate cause of the accident. As the evidence tended to establish these conclusions, it was for the jury to determine whether it was sufficient to justify them. "Questions of negligence, as well as of contributory negligence, are generally within the province of the jury, which should not be invaded by the courts except in the clearest of cases." *Colo. Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 226, 27 Pac. 701; *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 394, 21 Pac. 148; *Tanner v. Harper (Colo. Sup.)* 75 Pac. 404, 406. These conclusions, if drawn, bring the case within the rule requiring the master to provide the servant with reasonably safe appliances and to use reasonable care to maintain them in proper repair. *Wells v. Coe*, 9 Colo. 159, 160, 11 Pac. 50; *N. Y. & C. M. S. Co. v. Rogers*, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *D. & R. G. R. Co. v. Sipes*, 26 Colo. 17, 23, 55 Pac. 1093; *Colo. Milling & E. Co. v. Mitchell*, 26 Colo. 284, 288, 58 Pac. 28. Those to whom are delegated the duty of inspecting and keeping the appliances in suitable repair are not regarded as fellow servants with those employed in the business in which such appliance is being used; they, in the discharge of such duties, represent the master. *Colo. Milling & E. Co. v. Mitchell*, supra; *D. & R. G. R. Co. v. Sipes*, 26 Colo. 18, 23, 24, 27, 55 Pac. 1093. The tongs were an appliance furnished to the servant for the performance of his work. They were in a defective and unsafe condition. We cannot, upon the evidence now before us, declare as a matter of law that they are such a simple appliance that the deceased was charged with notice of their condition, and precluded from recovering for an injury sustained through their being out of repair. *Neubauer v. N. P. Ry. Co.*, 60 Minn. 180, 61 N. W. 912. Nor can we, upon the evidence now before us, declare as a matter of law that the deceased had assumed the risk, or that he was guilty of such contributory negligence as to defeat a recovery. We think the facts, in the absence of explanation and a fuller understanding of the

situation, justified submitting the case to the jury, and that in declining to do so the lower court erred. We speak to the case as it stood at the close of the evidence for plaintiff, when the motion for a nonsuit was made and sustained. We express no opinion as to what action the court should take when fully advised by the evidence for the defendant as to the defenses of contributory negligence and assumption of the risk.

The petition for a rehearing questions the correctness of the statement in the opinion that the crane lifted the ingot on the signal of the foreman of the gang. While the fact is not material, the statement is correct, as appears from the testimony on cross-examination of the foreman, Moriarty. The correctness of the statement in the opinion that the evidence tended to show that the tongs were properly applied to the ingot is also questioned. This statement we think abundantly justified by the testimony of witness Boughey on cross-examination. As the court made its ruling upon the assumption that the testimony was in, which the plaintiff tendered, as to the duty of the pit foreman to examine the tongs at every heat, we are justified in considering that fact as one of the facts in evidence at the time of the ruling sustaining the motion for a nonsuit. As the evidence herein, in the absence of any proof in behalf of defendant, tended to show that defendant was guilty of negligence, and was of sufficient weight, in absence of any testimony from defendant, to go to the jury, the court erred, we think, in sustaining the motion for a nonsuit.

Judgment reversed. Reversed.

20 Colo.A. 215

PEOPLE ex rel. SCHOOL DIST. NO. 5 IN MINERAL COUNTY v. VANHORN, County Superintendent of Public Schools.

(Court of Appeals of Colorado. Sept. 12, 1904.)

SCHOOL DISTRICTS—DETERMINATION OF BOUNDARIES—COUNTY SUPERINTENDENT—MINISTERIAL DUTIES—MANDAMUS—DECISIONS OF STATE BOARD OF EDUCATION—LOSS OF TERRITORY BY PERMISSIVE USE.

1. Under Mills' Ann. St. §§ 3991, 3992, containing the only provision for forming a new school district, providing for petition by residents of the proposed district to the county superintendent; the direction by him of notice to the electors of such territory of a meeting to determine its organization into a new district if he shall determine that the interests of the districts affected will be best promoted by the change; the balloting of such electors when assembled; the election by them of directors, if two-thirds of those voting vote for such organization; the subsequent transmission of the proceedings to the county superintendent, who, if the proceedings are found to be in accordance with the law, shall establish and number the district, and enter a record of it—after the county superintendent has determined that the proposed change is for the best interest of the districts affected, the sole power to determine whether the district shall be organized, and its boundaries, is in the electors; and neither the directors of the district, the county superin-

tendent, nor the State Board of Education can organize a school district or change its boundaries.

2. The recording by the county superintendent of schools, in a book kept by him for the purpose, of the description of the boundaries of a school district as defined by the electors, and the preparation of a map of the same, as required by Mills' Ann. St. §§ 3988, 3992, are mere ministerial duties, which may be enforced by mandamus.

3. The decisions of the State Board of Education, which Mills' Ann. St. § 3966, conferring on it power to decide questions of law and fact, provides shall be final, are not final in the sense that they are not reviewable by the courts; otherwise the statute would violate Const. art. 6, § 1, vesting the judicial power in the courts there enumerated.

4. On mandamus to a county superintendent of schools to perform a ministerial duty, a decision of the State Board of Education being pleaded as a defense, the jurisdiction of such board to render the decision and the correctness thereof, raised by the reply, may be decided.

5. The character of ministerial duties of the county superintendent cannot be changed by appeal to and decision of the State Board of Education, so as to prevent their enforcement by mandamus.

6. Under Mills' Ann. St. § 4007, providing that a school district which shall continue to exercise, undisputed, the prerogatives of a legally formed district, for a year, shall be deemed legally formed, a school district which allows another school district to exercise, undisputed, the prerogatives, and enjoy the privileges, of a legally formed district, for a year, over part of its territory, loses such territory.

**Appeal from District Court, Mineral County.**

**Mandamus on the relation of School District No. 5, County of Mineral, against Laura Vanhorn, county superintendent of schools. From an adverse judgment, relator appeals. Reversed.**

John R. Smith and Albert L. Moses, for appellant. C. H. Pierce and W. C. Bowen, for appellee.

**MAXWELL, J.** The facts in this case, as gathered from the record, are: In February, 1894, School District No. 5, Mineral county, Colo., was carved out of the territory theretofore embraced in School District No. 3 of the same county. All of the statutory requirements for the organization of a school district having been complied with, the superintendent of schools of Mineral county, S. E. Van Noorden, received and filed in his office the papers in the matter of the organization of School District No. 5, and indorsed thereon:

"Copy of secretary's report of school meeting held Feb'y. 21, 1894, at Bachelor, Colo.

"Received and filed in my office February 27th, 1894. Upon examination of all the papers attached hereto finding that all the proceedings in the formation of a new District the laws of the State of Colorado have been complied with I hereby number the said new District: School District No. 5.

"Dated Feby. 27, 1894.

"S. E. Van Noorden,

"Supt. of Schools."

Included in the papers above referred to was a description by metes and bounds of the territory of School District No. 5, adopted by the electors; which papers have ever since remained in the office of the county superintendent of schools of Mineral county. April 8, 1894, Henry Wilcox, a resident and taxpayer of School District No. 3, appealed from the action of the county superintendent to the State Board of Education; it not appearing from the record, however, which action of the county superintendent was appealed from by Wilcox. September 20, 1894, the boards of directors of School Districts No. 3 and No. 5 and the county superintendent of schools met in joint session, and attempted to change the boundaries of School District No. 5, so far as the same affected certain territory which had theretofore been included within the boundaries of School District No. 3; and it was then agreed between the two boards and the county superintendent that the compromise line thus attempted to be fixed and determined at this time should be the line between these two districts, and that the appeal of Wilcox to the State Board of Education should be dismissed. The boundaries attempted to be agreed upon by the two boards and the county superintendent at this meeting materially differ from the boundaries set forth in the petition for an election approved by the county superintendent, and adopted by the action of the electors of District No. 5. No question seems to have been raised or objection made by any one to the action of the two boards until some time in 1899, when the then president of the board of directors of School District No. 5 requested the county superintendent to furnish him with a description of District No. 5. In response to this request, the description furnished was the one set forth in the petition for the organization of District No. 5, and which had been adopted by the electors of the district. It appears that no such map or record of the boundaries of District No. 5 as is required by Mills' Ann. St. § 3988, was found in the office of the county superintendent of schools at this time. Thereupon the president of the board of directors of School District No. 5 prepared and tendered to the county superintendent a map showing the boundaries of District No. 5 as adopted by the electors, and demanded that the same be filed and recorded in the office of the county superintendent, which demand was refused. January 30, 1900, an action was instituted by the relator herein against the county superintendent in the district court of Mineral county for the purpose of compelling the county superintendent to make, or cause to be made, a map exhibiting the boundary lines of the several school districts in Mineral county, and more particularly the boundaries of School District No. 5 in said county, and to record a description of the boundaries of School District No. 5 in a book to be kept for that purpose. May

23, 1900, judgment on the pleadings was rendered in this action as follows: "That a writ of mandamus be awarded herein compelling Laura Pollock, county superintendent of schools, to make and keep a record of the boundary lines of the school districts herein, if known, and, if not known, to ascertain and determine the same, and then make a record thereof as required by statute, and to prepare and keep a map in her office showing the boundary lines of said districts as required by law; said records and map to be made within a reasonable length of time." Pursuant to this mandate of the district court, the county superintendent "recorded the description as found by her in the book kept in her office for such purpose, and caused a map to be prepared corresponding thereto," which description and map accorded with the boundaries of District No. 5 as attempted to be agreed upon by the action of the boards of directors of School Districts No. 3 and No. 5 and the county superintendent September 20, 1894. The relator district appealed from this action of the county superintendent of schools to the State Board of Education. July 25, 1900, the State Board of Education addressed the secretary of School District No. 5 as follows:

"Denver, Colorado, July 25, 1900.

"Secretary of School District No. 5, Bachelor, Colorado—Dear Sir: At a meeting of the State Board of Education, held July 23, 1900, in the matter of appeal of School District No. 5 from the action of the County Superintendent of Mineral County in regard to fixing the boundary lines of said district in accordance with certain descriptions presented, it appearing to the board that the County Superintendent had declared the boundaries in accordance with the only description on record, and as it would seem to be a matter to be decided by the courts upon direct evidence as to the reliability of the testimony offered concerning the boundaries, the board unanimously decided that it had no jurisdiction in the matter and the case was ordered remanded to the County Superintendent. Yours truly,

"Helen L. Grenfell,

"President State Board of Education."

"David M. Campbell, Atty. Gen.

"Elmer F. Beckwith, Sec'y State."

Relator district applied to the State Board of Education for a rehearing in the matter, which was granted, and thereupon the following decision was rendered January 4, 1901:

"In the matter of the appeal of School District No. 5 in the county of Mineral, taken from the order of the county superintendent of that county, Mrs. Laura D. Pollock, made on the 25th day of May, A. D. 1900, the State Board of Education being in regular session for the purpose of considering the case herein, met on this fourth day of January, A. D. 1901, finds that there is filed a motion before said board asking that it

review its findings made on the 25th day of July, A. D. 1900, and to pass upon further questions that were then presented in the appeal. There appeared before the board, representing District No. 3, James D. Pilcher, attorney, from Creede, and Mr. F. E. Wheeler, chairman of the said school board of said district. Also District No. 5 was represented by A. L. Moses, attorney, from Creede, and there being present Mr. J. K. Terrill, chairman of the board of School District No. 5. The board having carefully considered the motion filed before it, as well as the original papers in the case, hearing arguments from both sides, finds that it did not consider every question involved in the appeal on its former decision, and finds it to be its duty to grant a further hearing in the matter, and such intention was announced by the board to counsel representing the school districts interested. It appeared to the board that the petition was filed with the county superintendent of Mineral county in 1894, asking for a division of School District No. 3; that the county superintendent favorably acted upon the petition, and granted a division of School District No. 3; and after receiving proper notices of the election of officers to and the organization of the new school district, the superintendent then and there numbered it District No. 5. As it appears to the board, there was no question but what School District No. 5 was legally constituted. After electing its officers, it began to transact business as a school district. It further appears to the board that School District No. 3 was not satisfied with the decision of the superintendent in creating District No. 5, and caused an appeal to be taken from the decision of said superintendent creating District No. 5 to the State Board of Education. Before the said Board of Education passed upon the appeal, the directors of School District No. 3 and School District No. 5 met in joint session, together with the superintendent, and agreed upon a change of the boundary lines of the above districts which would be satisfactory to the two boards. The then county superintendent, Van Noorden, caused maps to be made of each school district as per the agreement then made. It appears to the board that the superintendent, Mrs. Laura D. Pollock, in fixing the boundary lines of School District No. 5, recognized the agreement made between the two boards representing Districts No. 3 and No. 5, and recognized the boundaries authorized by county superintendent Van Noorden. It further appears to the board that the description of District No. 5 as it was properly created by the superintendent in 1894, as found among the papers on file in this office, was also among the records on file in the office of the superintendent of Mineral county. That in making her decision she considered the description as specified in the petition for the creation of School



District No. 5 as well as the agreement between the two boards for the change of boundary lines of School Districts No. 3 and No. 5, and that she acted upon the information given her through two depositions taken, as well as the maps of Districts No. 3 and No. 5 filed in her office, hereinbefore referred to. It appears that she took into consideration the acquiescence of both school districts in the boundary lines as fixed by the joint session of both boards, and the recognition that each district has ever given to the boundary lines as then established. The board finds that both school districts may have certain equities and rights in the boundary lines as was fixed by arbitration of the school boards which it cannot pass upon. These rights can only be adjusted by the court upon a careful examination of the entire matter. But it is the judgment of the board that the boards of directors of the two respective districts had no authority in joint session to change the boundary lines of school districts as they existed at the time they were established by the county superintendent, or of District No. 5 as it was established by the county superintendent of that county. It therefore finds that School District No. 5 exists now as it did exist as per the petition forming its boundaries at the time of its creation. It does not attempt to pass upon any of the equities or rights acquired by either school district, in their acquiescence in the boundary lines for School Districts Nos. 3 and 5, as fixed by the compromise of said School Boards.

"[Signed] Helen L. Grenfell,  
"Elmer F. Beckwith,  
"David M. Campbell,  
"State Board of Education."

January 19, 1901, the relator district made a formal demand upon the county superintendent of schools to change the recorded description and map in her office to conform with the last above decision of the state board, which was refused, and this action was instituted by filing in the district court of Mineral county a petition and affidavit for mandamus February 13, 1901, being the second action of like tenor and import instituted by the relator in this behalf. February 15, 1901, School District No. 3 and Henry Wilcox, as petitioners, filed with the State Board of Education a petition for a rehearing or a review of the decision of the state board rendered January 4, 1901, in which petition all matters relating to the formation of District No. 5 were set up, the relator district herein being named as respondent therein. The state board assumed jurisdiction of such petition, and made the following order with reference thereto:

"The board decides that it will fix a time for hearing the Wilcox appeal, as well as all matters relating thereto, by trial de novo, as provided in section 4055, M. A. S., and also the appeal of School District No. 5 in connection therewith.

"Upon agreement of all parties concerned, April 15, 1901, was fixed as the date of such hearing.

"By order of the State Board of Education. Helen L. Grenfell, President.

"Denver, Colo. Mar. 14, 1901."

June 10, 1901 the State Board of Education rendered a decision in the matter, by the terms of which decision the board dismissed the Wilcox appeal and affirmed the decision of the county superintendent of schools of the 23d of May, 1900, which last-referred to decision of the county superintendent of schools was the one wherein, in obedience to the mandate of the district court of Mineral county, she recorded the description and prepared a map showing the boundaries of School District No. 5, according to the compromise agreement of the two boards and the county superintendent of September, 1894. This last decision of the state board is not in the record. Its purport, as given above, is pleaded in the second supplemental answer of respondent.

The petition and affidavit herein, upon which this action is based, state a good cause of action. The answer and second supplemental answer, which was filed August 5, 1901, after the rendition by the State Board of Education of its decision of June 10, 1901, was in the nature of a confession and avoidance. It admits substantially all that is alleged in the petition and affidavit, sets up the action of the two boards of directors of School Districts No. 3 and No. 5, the proceedings before the county superintendent and the State Board of Education resulting in the decision of the state board of June 10, 1901, and alleges acquiescence upon the part of School District No. 5 in the action of the two boards and the county superintendent of September, 1894, and that School District No. 3, relying upon such compromise, had collected taxes, built and maintained schools, and issued a bonded indebtedness upon and covering the territory included within the boundaries as determined by the joint action of the boards and the county superintendent. The reply challenges the jurisdiction of the state board, questions the correctness of the last judgment or decision of the state board, and denies acquiescence upon its part in the action of the two boards of directors and the county superintendent. The cause came to trial before Judge Northcutt, sitting at Creede in Judge Holbrook's stead, resulting in a judgment of dismissal, with costs against the relator, upon motion of respondent, after the relator had rested its case, from which judgment relator prosecutes this appeal.

Under the statutes of this state the county superintendent of schools and the State Board of Education, in the discharge of the duties of their respective offices, perform ministerial and quasi judicial duties. "A ministerial act is one which the person performs upon a given state of facts in a pre-

scribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of doing an act." 20 Am. & Eng. Ency. 793. "Quasi judicial functions," says Mr. Bishop, "are those which lie midway between judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but in general terms \* \* \* when the law in words or by implication commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial." Bishop on Noncontract Law, §§ 785, 786. In the light of the foregoing definitions, an examination of the statutes defining the duties of the county superintendent of schools and the state board will readily determine the duties of those officers which are ministerial and those which are quasi judicial in their character. In the formation of school districts the county superintendent, by the statutes, is required to discharge duties of both characters. As bearing upon this question, the following provisions of the statutes are pertinent:

Mills' Ann. St. § 3991: "For the purpose of organizing a new district out of a portion of one or more old districts, the parents of at least ten children of school age residing within the limits of the proposed new district shall petition the county superintendent in writing, which petition shall describe the boundaries of the proposed district and the names of all children of school age residing in such proposed district at the date of such petition. \* \* \* If, in the judgment of the county superintendent, the school interests of the districts affected by the proposed change will be best promoted by said change, he shall direct some one of the petitioners, who is a legal voter, to notify each elector residing within the district so to be formed, by personal service as far as convenient, and to post a notice in three public places in said new district, that such petition has been made and that a meeting will be held, naming the time, and place of such meeting, to determine the question of the proposed organization."

Section 3992: "The qualified electors of such proposed new district, when assembled in accordance with the notice above required, shall organize by electing a chairman and secretary. \* \* \* The secretary of said meeting shall immediately transmit to the county superintendent a copy of the proceedings of the meeting, upon the receipt of which, if the proceedings are found to have been in accordance with the law, he shall establish and number such district and enter a record of the same, and of the proceedings of the meetings, as provided in section twenty-four (24) of this act."

Section 24, above referred to, is Mills' Ann. St. § 3988: "It shall be the duty of the coun-

ty superintendent to ascertain the boundaries of each school district in his county, and to make and keep a record of the same in a suitable bound book, which record shall show definitely the boundaries of each district. In case the boundaries are found to be conflicting or incorrectly described, he shall harmonize the same and make a report of such action to the board of school directors whose districts are affected thereby. District officers shall have access to such records for the purpose of examination, making copies, or for other legitimate purposes. The county superintendent shall prepare or have prepared a map of the county, showing the correct boundaries of the districts."

The only quasi judicial duty imposed upon a county superintendent by the above statutes is to determine whether the school interests of the districts affected by the proposed change will be best promoted by such change, as the discharge of this duty involves looking into facts and acting upon them as his judgment and discretion may dictate. This provision seems to vest in the county superintendent of schools a veto power. He may refuse, in the exercise of his discretion, to permit an election to be held, which would be an end of the matter. The duty of establishing and numbering a district, entering a record of the same and of the proceedings of the meeting, ascertaining the boundaries of each district, making and keeping a record of the same in a suitable bound book, which record shall show definitely the boundaries of each district, and preparing or having prepared a map of the county showing the correct boundaries of the districts, is purely ministerial, and must be performed in obedience to the mandate of the law, without regard to or the exercise of the officer's judgment upon the propriety of doing the act. Mills' Ann. St. §§ 3991, 3992, supra, provide the only method for the formation of new school districts, and it will be seen that, after the county superintendent has determined that the school interests of the districts affected will be best promoted, the sole power to determine the question as to whether or not the district shall be organized, and the boundaries of the district, has been placed by the Legislature in the electors of the proposed district. Neither the board of directors of the school district, the county superintendent of schools, nor the State Board of Education can organize a school district, or change its proposed or established boundaries, except where the boundaries are found to be conflicting; which is not the case here. The petitioner in this case sought to enforce the performance by the county superintendent of schools of a purely ministerial or clerical act, to wit, to record in a book kept by her for that purpose the description of the boundaries of the relator district as defined by the electors, and to prepare a map of the same,

pursuant to the requirements of Mills' Ann. St. §§ 3988, 3992, *supra*. This being a purely ministerial act, the relator district, being without other remedy, would be entitled to a writ of mandamus upon the proper showing.

This brings us to a consideration of the jurisdiction and authority of the State Board of Education in the premises, and the effect of its decisions, under the facts in this case. Section 1, art. 9, Const. Colo., declares: "The general supervision of public schools of the state shall be vested in a board of education, whose powers and duties shall be prescribed by law; the Superintendent of Public Instruction, the Secretary of State and the Attorney General shall constitute the board, of which the Superintendent of Public Instruction shall be the president." Mills' Ann. St. § 3986: "The State Board of Education shall meet at the State Capitol on the last Saturday in December, in each year, and at such other times and places as may by them be deemed necessary, and shall have power to adopt any rules and regulations not inconsistent with the law, for its own government and for the government of the public schools." Sections 3967 and 3968, as amended by the Session Laws of 1899 (page 338, c. 135), and section 3969, relating to the issuance of state diplomas, are the only provisions of the statutes in which the power of the state board is touched upon, until we come to the provisions relating to appeals, in chapter 109, Mills' Ann. St. Section 4049 provides for appeals from the district boards to the county superintendent. Sections 4050 to 4054 provide the manner and method of procedure in such appeals. Section 4054: "At the time thus fixed for hearing he shall hear testimony for either party, and for that purpose may administer oaths if necessary, and he shall make such decision as may be just and equitable, which shall be final, unless appealed from, as hereinafter provided." Section 4055 provides for appeals from the county superintendent to the State Board of Education: "Any person or district board aggrieved by any decision or order of the county superintendent, in the matter of law or fact, may, within thirty days after the rendition of such decision or making of such order, appeal therefrom to the State Board of Education, in the same manner as provided in this act for taking appeals from the district board to the county superintendent, as nearly as applicable. In case of an appeal, where a trial has been had before the county superintendent and a decision rendered, the state board shall examine a transcript of such proceeding and render a decision therefrom, but no new testimony shall be admitted. In other cases of appeal the board may require of the parties such papers and documents as may be thought necessary, and the board shall have power to administer oaths through its president. The decision of the board or a majority of said board shall be rendered by

the president, and such decision, when made, shall be final." It will be noticed that these statutory provisions confer upon the district board of directors, the county superintendent of schools, and the State Board of Education the power to decide questions of law and fact, and, unless an appeal be taken from the decisions of the county superintendent, the decisions of that officer become final, and, if an appeal shall be taken, then the action of the state board becomes final. To hold that such judgments or decisions are final in the sense that they are not reviewable by the courts, and that no judicial inquiry into their correctness can be had, would be to hold that three officers of the executive department, the Superintendent of Public Instruction, Secretary of State, and the Attorney General, by the statute granting an appeal to them have been vested with powers properly belonging to the judicial department; which would be clearly repugnant to section 1, art. 6, of the Constitution of Colorado, which vests the judicial power in the courts therein enumerated. However, appellee does not contend that the decisions or judgments of the state board are not reviewable by the courts, but insists that such decisions and judgments cannot be reviewed in an application for mandamus, for the reason that to so hold would be to convert a writ of mandamus into an appeal or writ of error for the review of the alleged erroneous decisions of an officer or board vested with discretionary or judicial powers. There are two answers to this argument: First. This action is not against the state board, and the authorities cited in support of the well-settled principle that a writ of mandamus will not issue to control discretion are not in point. Second. The last decision of the state board is pleaded by the respondent as a defense to this action. The jurisdiction and power of the state board to render this decision and the correctness thereof are raised by the reply, and, it being conceded that such decision may be reviewed by the courts, we know of no principle or rule, and we have been cited to none, which precludes the court in this action, when this issue is presented, from deciding the same. The only issue made by the pleadings up to the time when the last decision of the state board was pleaded by the respondent in its second supplemental answer, more than five months after this action was commenced, was whether or not the county superintendent must perform a ministerial or clerical duty in accordance with the plain requirements of the statutes. Thus, by the second supplemental answer and reply thereto, the validity of this decision of the state board was squarely presented to the court below, and by this appeal is here for determination.

The state board, in its decisions heretofore set forth, recognizes the fact that there were questions involved in this matter which

should be left to the final determination of the courts. The court below took the position that in a proper action it would have jurisdiction to determine the boundaries between the two districts involved, but that the statutes had designated another forum, which had power not only to declare what the boundaries were, but power to ascertain and establish them. In this the court erred if meaning thereby that the state board had power to ascertain and establish the boundaries of school districts, as we have seen that the statutes vest this power solely and absolutely in the electors of the proposed district, after the county superintendent has approved the petition for the organization of a new district and ordered an election thereunder. The report of the proceedings of the organization of the new district having been made to the county superintendent, that officer finding the same to have been in accordance with law, the duties imposed by the statute upon the officer are purely ministerial, to be performed in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of doing the act. The character of this duty cannot be changed by an appeal to and the decision of the state board; and should the state board, a branch of the executive department, assume to exercise judicial functions, it would exceed its authority, and any decision it might render would be a nullity. A contrary doctrine would lead to the result that, whereas by the statutes the electors of the proposed district are the sole depository in whom is placed the authority to fix and determine the boundaries thereof, an appeal from the action of the county superintendent to the state board would vest in the state board power not conferred on it by the law; that is, power to establish or change the boundaries of a school district. It is well settled that executive boards, such as state boards of education, must find warrant in the statutes for the exercise of any power which they assume, or must derive such power by necessary implication from some power expressly conferred. Our conclusion is that the state board has no power or authority, by its decision, to change the boundaries of a school district as established by the electors at a meeting called for that purpose, pursuant to section 3991 and section 3992, *Mills' Ann. St., supra*, and that the decision of the state board of May 23, 1901, cannot be sustained, unless it be by virtue of section 4007, *Mills' Ann. St.*: "All school districts now formed or which may hereafter be formed, which shall continue to exercise, undisputed, the prerogatives, and enjoy the privileges, of a legally formed district, for the period of one year next succeeding the election of its officers, shall be deemed to be a legally formed district, and its legality shall not thereafter be questioned." The second

supplemental answer of respondent avers that after the action of the two school boards and the county superintendent of September 28, 1894, the respondent exercised and continued to exercise, undisputed, the prerogatives and enjoy the privileges of a legally formed district, within the boundaries fixed by the agreement of that date, for a period of more than five years, by erecting and maintaining schools, issuing a bonded indebtedness, collecting taxes, and performing all acts necessary to the existence of a school district. The reply denied all of these averments, thus squarely presenting this issue, which should have been tried and determined by the court below. If it should appear that School District No. 5 had permitted School District No. 3 to exercise, undisputed, the prerogatives and enjoy the privileges of a legally formed district for a period of one year next succeeding the election of its officers, over the territory in dispute, then, under the provisions of section 4007, *Mills' Ann. St., supra*, it has lost that portion of its territory as fixed and determined by its electors at the meeting of February, 1894. Sustaining this conclusion are the following authorities: *Collins v. School District*, 52 Me. 522; *School District v. School District*, 81 Mich. 339, 45 N. W. 993; *Atty. General v. School District*, 54 Minn. 213, 55 N. W. 1122; *State v. School District*, 42 Neb. 499, 60 N. W. 912. Our attention has not been called to an authority, under a similar statute, which holds a contrary doctrine. It therefore follows that the judgment must be reversed, and the case remanded, with instructions to the court below to try and determine the issue above indicated pursuant to the views herein expressed.

Reversed.

#### STATE ex rel. DANGBERG v. BOARD OF COM'RS OF DOUGLAS COUNTY.

(Supreme Court of Nevada. Sept. 1, 1904.)

HIGHWAYS — VACATION — STATUTES — CONSTRUCTION — BOARD OF SUPERVISORS — DISCRETION — PETITION.

1. Under Comp. Laws, § 479, as amended by St. 1895, p. 35, c. 37, providing that when majority of the resident taxpayers of a road district, according to the last previous assessment roll, shall petition the county commissioners for the vacation of a public road, the board, at their next meeting after the reception of the petition, shall vacate the road, a petition failing to show that the petitioners for the vacation of a road constituted a majority of the resident taxpayers in the district according to the last assessment roll was insufficient.

2. Comp. Laws, § 479, as amended by St. 1895, p. 35, c. 37, provides that when a majority of the resident taxpayers of a road district shall petition the county commissioners for the vacation of a public road, which petition shall contain certain allegations enumerated, the county clerk shall lay the petition before the county commissioners at their next meeting, and thereupon the commissioners "shall," with-

¶ 1. See Highways, vol. 25, Cent. Dig. § 264.

in 30 days thereafter, vacate the road. *Held*, that the word "shall" should be construed to mean "may," and that on the presentation of a petition signed by two persons, who constituted a majority and the only taxpayers in a road district, for the vacation of the road, the duty of the board was discretionary, and not mandatory.

Petition by the state, on the relation of H. C. Dangberg, for writ of mandate against the board of county commissioners of Douglas county, to compel the vacation of a road. On demurrer to petition. Sustained.

Alfred Chartz, for relator. D. W. Vergin, J. D. Torreyson, and S. Summerfield, for respondents.

TALBOT, J. Among other things, in his petition for writ of mandate, relator alleges: "That he is a resident taxpayer of the East Fork, Genoa, and Cradlebaugh road district, situated in Douglas county, Nevada, and that at all times thereafter mentioned he was such resident taxpayer of said road district, and that the only other resident taxpayer of said road district at all times mentioned was and is the H. F. Dangberg Land & Live Stock Company, a corporation duly organized and existing under and by virtue of the laws of the state of Nevada. That on the 6th day of July, 1903, relator, jointly with other signers, caused to be filed in the office of the clerk of said board their certain petition praying for the vacation of that certain road lying to the east of Carson Valley, extending from the north end of the Twelve-Mile House lane, along the fence to the east of said valley to the intersection of the Cradlebaugh Road, said road being known as and called the 'Old Desert Road,' as will more fully appear by the petition thereto annexed marked 'Exhibit A,' and made part hereof, being a full, true, and correct copy of its original, said petition being made under the provisions of the act of the Legislature of the state of Nevada approved March 15, 1875 (St. 1875, p. 159, c. 101), as amended by the Legislature of the state of Nevada in 1895 (St. 1895, p. 35, c. 37). That on the 4th day of January, 1904, said board of county commissioners duly met at their office at Genoa, Douglas county, Nevada, and said application and petition was then and there duly rejected. That said Old Desert Road is a public highway, and was a public highway for a great many years last past; but that since the building up of the town of Gardenville, lying a short distance west of said road, the same has been very little traveled, growing less and less each recurring year, and that its travel does not save those traveling it in preference to other public highway over three miles. That said Old Desert Road runs only through the lands of your relator and through the lands of the H. F. Dangberg Land & Live Stock Company, and runs through them diagonally, to the great injury of said lands, and that the almost universally traveled road covering

the distance from point to point of said Old Desert Road, by going through the town of Gardenville, follows closely sectional lines, and that the entire distance of said Old Desert Road lies within said road district. That all the signers to said petition except said relator and said H. F. Dangberg Land & Live Stock Company are residents and taxpayers of other road districts in said county, and their signatures unnecessary, and obtained in ignorance of the law and facts. Your relator further shows and avers that said board of county commissioners still refuse to vacate said road, and that it is the duty of said board, which the law specially enjoins upon it, resulting from their office as county commissioners of said county of Douglas, state of Nevada, to vacate said Old Desert Road, and to declare it vacant, officially, by their order duly entered on their minutes, which duty they have refused and still refuse to perform; and that your relator is without any plain, speedy, or adequate remedy in the ordinary course of law." Respondent moves to quash, and demurs to the petition on several grounds; among these, the technical objection that there is no allegation showing that the persons who petitioned the board of county commissioners to vacate the road constituted a majority of the resident taxpayers in the district according to the last assessment roll is well taken, and sufficient to invalidate the petition in its present form. Looking to the questions raised involving the merits of the controversy, it is more important to determine whether the board has any discretion when the majority of the taxpayers, if numbering only one or more, in a road district, petition to have a public highway closed. The opposing interests here are on one side the benefits which two landowners would reap from the closing of the road which runs through, and for a long time has traversed, their fields, and on the other the inconvenience which would result to the traveling public by closing the highway, and, as the petition indicates, requiring at least some people to journey three miles further, thereby depriving them of the hitherto vested right of using the shorter thoroughfare. Can the Legislature or the law leave the adjustment of these conflicting interests to one of the parties concerned, who is seeking a benefit, and deprive the other of having the controversy submitted to the discretion of the board of county commissioners, the tribunal usually authorized to regulate roads in this state?

Section 479 of the Compiled Laws of Nevada, as amended in 1895 (St. 1895, p. 35, c. 37), provides: "At any time when a majority of the resident taxpayers of a road district, according to the last previous assessment roll, shall petition the county commissioners of their counties, for the location, opening for public use, establishment, change or vacation of any public road or highway or road to connect with any highway here-

tofore established, any street or alley in any unincorporated town in such county, setting forth in such petition the beginning, course and termination of such road, or highway, street or alley proposed to be located and opened for public use, established, changed or vacated, together with the names of the owner or owners of the land through which the same will pass, said petition may be presented to the county clerk of said county, and the clerk shall lay said petition before the board of county commissioners, at their next meeting after the reception of said petition, and thereupon said board of commissioners shall, within thirty days thereafter, proceed to locate, open to public use, establish, change or vacate such road, highway, street or alley." Relator contends that the word "shall," used in this statute, is mandatory; that on the presentation of the petition signed by him and by the H. F. Dangberg Land & Live Stock Company, constituting a majority and the only taxpayers in the road district, the board lost all discretion in the matter, and all power to act judicially, and that it became their bounden duty to enter an order closing the road as demanded. We do not believe that such results were intended to be secured by the Legislature in the passage of this act, but, if they were, we are not prepared to hold that it is within the power of the lawmaking branch of our government to confide to one of the parties concerned the adjudication of such conflicting interests, which would be the result if the respondent is required to enter the order as relator desired. The word "shall" is sometimes construed to mean "may," and that is a better construction for it when applied under this statute to a petition seeking to close a public highway long existing. *Kirman v. Powning*, 25 Nev. 393, 60 Pac. 834, 61 Pac. 1090; *Suburban Light & Power Co. v. City of Boston* (Mass.) 26 N. E. 447, 10 L. R. A. 499; *Becker v. Lebanon St. Ry. Co.*, 188 Pa. 496, 41 Atl. 612. To otherwise conclude might lead to hardship and inconvenience to the traveling public in this and other cases. In the topography of this state one or a few landowners may constitute or become the majority of the taxpayers in road districts lying across valleys, and, if they could at will close the highways traversing their premises, they might thereby not only make it necessary for neighbors and adjacent owners, but for people passing from other localities, to travel long distances out of their way, or over steep mountain ranges. It is of higher importance to have roads remain open when essential to the convenience of the public than to have them closed for the benefit of individuals.

There are stronger reasons for compelling the opening of a new road on the petition of the proper majority of the taxpayers, and regardless of the discretion of the board, than exist for so closing an old one. In the former case compensation must be made to

the landowner for the damage caused by the opening of the road, while in closing a highway it may be assumed that he or his grantors have been paid for the right of way, or had acquired their rights subject to it, and that he will be benefited without making any remuneration to the public for the loss of the easement of which they will be deprived. In *Suburban Light & Power Co. v. City of Boston*, supra, under an act providing that the mayor and aldermen shall give electric light companies a writing specifying where the posts may be located and wires run, the word "shall" was construed to mean "may," and the court sustained the action of the board in declining to grant the application of the light company. It was said, that the power given to the aldermen of a city or the selectmen of a town in regard to such matters was one to be exercised in their discretion seems to have been assumed in several cases; citing *Hill v. Worcester County Com'rs*, 4 Gray, 414; *Com. v. Boston*, 97 Mass. 555; *Pierce v. Drew*, 136 Mass. 75. In *Becker v. Lebanon St. Ry. Co.*, supra, the court held that, notwithstanding the use of the imperative "shall," an injunction is not to be granted unless a proper case be made out in accordance with the principles and practice of equity, and that the word "shall," when used by the Legislature to a court, is usually a grant of authority, and means "may." Interpreting the word "shall" to mean "may," as already stated, the board were empowered to act judicially, and if, in their judgment, they believed the closing of the highway would cause undue inconvenience to the traveling public, they were authorized to deny the petition. It is the uniform decision of this and other courts that a subordinate body can be directed to act, but not how to act, in a matter regarding which it can exercise its discretion. This court cannot substitute its judgment in place of that of the board in its denial of the petition. *Hoole v. Kinkead*, 16 Nev. 222; *Hardin v. Guthrie*, 26 Nev. 252, 66 Pac. 744; *State v. Curler*, 26 Nev. 356, 67 Pac. 1075, and cases there cited; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72. It is unnecessary to express an opinion regarding the meaning of the statute in cases when it is sought to open new roads.

The motion to strike out is denied, the demurrer is sustained on the two grounds indicated, and, if relator desires, he may amend within 30 days.

BELKNAP, C. J., concurs.

FITZGERALD, J. (concurring). The controversy on the merits in this proceeding is the proper interpretation of the word "shall" in a statute. The statute provides that, when certain things (naming them) are done concerning a road or highway, then the board of county commissioners shall vacate such road or highway. Petitioner claims that,

since he had done all the things named and required in the statute, the board of county commissioners were compelled by the word "shall" in the statute to close the road or highway in accordance with his petition therefor. If such were the proper meaning of "shall" in the legislative intent, the word "petition" in the statute would not aptly express or describe the document that was to set the power of the board in motion. The word "demand" would be the proper word to express such meaning. After complying with the conditions stated in the statute, the applicant for the relief should demand that the board close the road or highway, and not petition that it do so. But the statute says there must be a petition, and in this case there was a petition, and not a demand. In *Railroad Co. v. Hecht*, 95 U. S. Supreme Court Reports, at page 170, 24 L. Ed. 433, the doctrine applicable to this controversy is stated as follows: "As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." A contrary intention here is not manifest. The word "petition" and the general framing of the statute indicate that the legislative intent was not to force compulsory action on the board of county commissioners, but to give it a reasonable discretion. Therefore I concur in the denial of the writ of mandate.

**TOWN OF SUSANVILLE v. LONG.** (Sac. 1,149)\*

(Supreme Court of California. Aug. 13, 1904.)

**ACTION BY TOWN—INSTITUTION BY MARSHAL—EVIDENCE—WAIVER OF OBJECTION—ORDINANCES—DE FACTO AND DE JURE TRUSTEES—PRESUMPTION ON APPEAL.**

1. Testimony of the marshal, in an action in the name of a town for a license fee, that he consulted with plaintiff's attorney, and gave him a list of the persons refusing to take out a license, for the purpose of having this and other actions instituted, is sufficient to show that the marshal commenced the suit as required by the ordinance.

2. The legal capacity of plaintiff to bring the suit, not being raised by demurrer or answer, is waived.

3. Persons sued under an ordinance may not object that it was not passed by de jure trustees. It is enough that they were de facto trustees.

4. In support of a judgment, it will be presumed on appeal, in the absence of anything in the record, that an ordinance was introduced the prescribed time before it was passed.

Commissioners' Decision. Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by the town of Susanville against Thomas H. Long. Judgment for plaintiff. Defendant appeals. Affirmed.

\*Rehearing denied September 12, 1904.

† 3. See *Municipal Corporations*, vol. 36, Cent. Dig. § 256.

N. J. Barry, for appellant. H. D. Burroughs (J. E. Pardee, of counsel), for respondent.

**COOPER, C.** Action to recover \$50 claimed to be due the plaintiff from defendant as a license for carrying on the business of selling intoxicating liquors within the corporate limits of plaintiff, under Ordinance No. 7, in force at the time of carrying on such business. Findings were filed, and judgment ordered and entered in favor of plaintiff as prayed. Defendant prosecutes this appeal from the judgment on the judgment roll, accompanied by a bill of exceptions.

It is contended that the suit should have been commenced by the marshal of the town, and not by the trustees. The ordinance provides that the marshal shall commence suit in the name of the town of Susanville. The marshal testified that he consulted with the attorney for the plaintiff, and gave him a list of those persons refusing to take out a license, for the purpose of having this and other actions instituted. This was sufficient to show the institution of the suit by the marshal. But were it otherwise, the defendant did not raise the question as to the legal capacity of plaintiff to bring the suit, either by demurrer or answer, and is therefore deemed to have waived it. Code Civ. Proc. §§ 430, 433, 434.

It is next argued that the evidence is insufficient to support the finding of the court "that the defendant is indebted to the plaintiff in the sum of fifty dollars." The bill of exceptions shows that "defendant engaged in the business of selling liquor within the corporate limits of said town of Susanville between the dates mentioned in plaintiff's complaint, and that he carried on such business without having secured a license therefor, or paying the fee or charge therefor as required by Ordinance No. 7 of said town, although a demand to take out and pay for such license had been made upon him by the marshal of said town." It also shows that the ordinance required a license fee of \$50 per quarter to be paid before carrying on the business of selling intoxicating liquors within the corporate limits of plaintiff. This is sufficient to support the finding.

Finally it is claimed that the ordinance involved is void because not passed by trustees who were such de jure. The bill of exceptions shows that plaintiff was duly incorporated on the 20th day of August, 1900, and that "C. E. Emerson, J. H. Riley, J. E. Humphrey, H. W. Meylert, and J. E. Pardee were duly elected trustees of said town, and that they qualified as such trustees on the 25th day of August, 1900"; that for more than 90 days said trustees failed and neglected to exercise any of the duties or functions of their respective offices; that thereafter, on March 5, 1902, the Governor of the state appointed four of the same parties as

trustees, and also appointed one Asher instead of said Humphrey; that the said trustees so appointed "took the oath of office as said trustees in the manner prescribed by law, and filed the same in the offices of the Secretary of State and county clerk of Lassen county, and thereafter duly met as such trustees." The ordinance was passed March 25, 1902. The trustees were at least officers de facto when they passed the ordinance. Defendant will not be allowed in this proceeding, in which the trustees are not parties, to collaterally attack their title to office. Persons claiming to be public officers while in possession of an office, ostensibly exercising its functions lawfully and with the acquiescence of the public, are de facto officers. Third persons cannot be expected to know, nor to investigate in every instance, the title to such offices. As to them, such officers are what they appear to be—the lawful occupants of the office. The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office, and in full possession of it. The law provides machinery for trying the title to an office, in an action in which the officer is a party, and the right to the office is the question involved. To allow every person prosecuted for the violation of an ordinance, in the proceeding in which he is prosecuted, to question the legality of the formation of the municipal corporation, or the title to office of its various officers, would lead to endless confusion, and embarrass the government of such municipal corporation. The taxpayer could refuse to pay taxes, and defend a suit brought for their collection on the ground that the assessor was not the de jure assessor, or that the tax collector was not the de jure tax collector; a person charged with resisting an officer could defend upon the ground that the officer had not been legally elected or appointed; and so on through the various departments of the municipal government in its varied business transactions with its citizens. It is hardly deemed necessary to cite authorities in support of the principles herein stated, but the following are in point: Dillon on Municipal Corporations (4th Ed.) vol. 1, p. 305; Mech-  
em's Public Officers & Offices, § 330; McQuillin, Municipal Ordinances, § 96; American & English Ency. of Law (2d Ed.) vol. 8, p. 823, and note; People v. Sassovich, 29 Cal. 485; Hull v. Superior Court, 63 Cal. 176.

Appellant further claims that the ordinance is void because at the time it was introduced no time for holding regular meetings had been fixed by ordinance. Section 861 of the municipal corporation act (Gen. Laws 1903, p. 898) provides, in terms, that no ordinance shall be passed at any other than a regular meeting. The bill of exceptions shows that Ordinance No. 1, fixing the

fourth Monday in each month as the time for holding regular meetings, was passed at a regular meeting on March 24, 1902, and, so far as appears, five days after its introduction. This meeting was regularly adjourned till the evening of Tuesday, March 25, 1902, when Ordinance No. 7, fixing the license in contest, was passed. The record fails to show when this ordinance was introduced, but it will be presumed here that it was introduced at least five days before it was passed. Not only this, but, when the ordinance was offered in evidence, no such objection was made to it. The objection was upon the ground that it was irrelevant, incompetent, and immaterial. It was certainly relevant, competent, and material.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 463

LE MESNAGER v. VARIEL. (L. A. 1,516.)

(Supreme Court of California. Aug. 19, 1904.)

JUDGMENT — CONCLUSIVENESS — JURISDICTION—SUFFICIENCY OF COMPLAINT—ATTACK IN EQUITY — NECESSARY ALLEGATIONS — EXECUTORS—STATUTE.

1. Under the direct provisions of Code Civ. Proc. § 1666, persons entitled to distributive shares of an estate in the hands of an executor may maintain an action against such executor therefor.

2. Where an executor was sued in a court having jurisdiction of the subject-matter, under the provisions of Code Civ. Proc. § 1666, authorizing suits by persons entitled to distributive shares of an estate in the hands of the executor, his appearance to the action, and demurring and answering therein, sufficiently shows the jurisdiction of the court over his person.

3. Where the question whether the complaint stated facts sufficient to constitute a cause of action was presented by demurrer to a court having jurisdiction, and determined in the affirmative, the correctness of the ruling cannot be inquired into by suit in equity to set aside a judgment rendered in such action, in the absence of allegation of either fraud, accident, or mistake in the rendition of the judgment.

4. Where a suit is brought in equity to set aside a judgment rendered in a previous action at law, the attack on the judgment is indirect.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by George Le Mesnager against William J. Variel. From a judgment for defendant, plaintiff appeals. Affirmed.

Hass & Garrett, for appellant. Dunnigan & Dunnigan, for respondent.

ANGELLOTTI, J. This action was brought to obtain a decree vacating and setting aside a judgment theretofore obtained by



the defendant against plaintiff for the sum of \$4,298, and restraining defendant from enforcing said judgment. A general demurrer to the complaint was sustained, and, the plaintiff having declined to amend, judgment went for defendant. The plaintiff appeals from the judgment.

It appears from the complaint in this action that the plaintiff was the surviving executor of the will of Miguel Leonis, deceased, and that the original action was brought against him by the defendant herein to recover certain moneys that had constituted a part of the estate, claimed to be due him, as a trustee for certain beneficiaries, from such executor, under the terms of the decree of distribution made in the matter of said estate. Such an action is authorized by express provision of statute (section 1668, Code Civ. Proc.), and, because of the amount sued for, such action could be maintained only in the superior court. The superior court, therefore, had jurisdiction of the subject-matter of the action.

It further appears from the complaint in this action that the plaintiff herein appeared in that action, demurring to the complaint therein upon the ground of insufficiency of facts, ambiguity, and uncertainty, and on the further ground that the cause of action therein attempted to be stated was barred by the statute of limitations, and, such demurrer having been overruled, answering such complaint. It thus appears that the superior court had, in that action, jurisdiction of the person of the plaintiff herein. Judgment in that action was given in favor of this defendant after trial of the issues made. No appeal was taken therefrom, and such judgment has become final. The complaint in this action contained no allegation of fraud, accident, or mistake in the obtaining of the judgment in the original action, which would authorize the interposition of a court of equity, the contention of plaintiff herein being, apparently, that the allegations of the complaint herein show that the complaint in the original action did not state facts sufficient to constitute a cause of action, that consequently the court therein was not authorized to render the judgment against plaintiff, and that such judgment cannot stand against an action to vacate said judgment on that ground, which plaintiff styles a "direct attack upon such judgment."

The question as to whether the complaint in the original action stated facts sufficient to constitute a cause of action was one to be determined in that action. It was, in fact, presented by the demurrer to the complaint therein, and the court, by overruling such demurrer, determined the question against this plaintiff. The question as to the correctness of said ruling on demurrer could have been presented to this court in that action by an appeal taken by this plaintiff from the judgment entered against him,

which would have clearly been a direct attack upon the judgment. But this plaintiff chose not to bring up such judgment, by appeal, for review, and allowed such judgment to become final. The rulings of the court in that action, whether upon issues of law or of fact involved therein, cannot be reviewed in another action. As said by Mr. Freeman, in speaking of the interposition of equity to relieve from judgments, "The adjudication of any question is always final, unless corrected by some appellate tribunal, and is never subject to re-examination in any other than an appellate court upon any issue of law or fact. \* \* \*" Freeman on Judgments, § 486. In certain well-recognized cases, as where a party, without fault on his part, is prevented through fraud, accident, surprise, mistake, or the like, from presenting his defense, appropriate relief may be had by an action on the equitable side of the court, but one who, in fact, appeared and defended against the original action, can never maintain a separate action for the mere purpose of reviewing the rulings of the court having jurisdiction of the original action upon some question of law or fact concerning which such court had the power to decide. There must be an end to litigation, and the question as to the correctness of the rulings of the court upon matters within its jurisdiction are reviewable only by the appellate tribunal.

In the original action against plaintiff the superior court had jurisdiction of the subject-matter of the action, even if it be assumed that the complaint therein failed to state facts sufficient to constitute a cause of action. "There can be no doubt that the filing of a petition or complaint, such as ought not be deemed sufficient upon demurrer, may confer jurisdiction. The power to decide upon the sufficiency of a cause of action as presented by the complainant's pleading, like the power to decide any other legal proposition, though erroneously applied, is binding until corrected by some superior authority." Freeman on Judgments, § 118. In *Blondeau v. Snyder*, 95 Cal. 521, 31 Pac. 591, there was an appeal from an order striking out a portion of a judgment, making a defendant personally liable for the amount found due on a mortgage debt, upon the ground that the complaint did not state any facts showing a personal liability, and that the court was therefore without jurisdiction to adjudge such personal liability. In reversing the order striking out, this court said: "The judgment in this respect was within the relief demanded in the complaint and specified in the summons, and the court had jurisdiction, and indeed was required, to determine in that action whether, upon the facts alleged, the plaintiff therein was entitled to the relief which he demanded in his complaint. The court undoubtedly committed an error in finding such personal liability, but its judgment was not for this reason void."

In *Estate of James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60, where the question was as to whether a decree of divorce was valid, it was contended that it was not, for the reason that the complaint in such action did not state facts sufficient to entitle the plaintiff therein to a divorce. It was held that the judgment could not be successfully attacked in a collateral proceeding because of an imperfect or defective complaint in the action in which it was rendered, and the court said: "If the facts stated in the complaint are not sufficient to entitle the plaintiff to the relief demanded therein and awarded by the judgment, the action of the court in deciding otherwise, and rendering its judgment in accordance with the prayer of the complaint, can be nothing more than error. The complaint in *James v. James* was sufficient to inform the court and the defendant therein of the relief which the plaintiff demanded, and of the facts upon which he based his right to the relief sought, and this was all that was necessary in the way of a statement of facts to give the court jurisdiction of the subject-matter of the action." See, also, *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 672, 677, 74 Pac. 301.

The decisions cited by counsel for appellant to sustain their contention that they may in this action raise the question as to the sufficiency of the statement of the cause of action in the original complaint were all cases of appeal from the very judgment attacked. On such appeals, mere errors of the trial court may, of course, be reviewed. The appeal is given for that purpose. The application of these decisions to the case at bar is not obvious. It is urged that an action in equity brought to vacate and set aside a judgment is, like an appeal, a direct attack upon the judgment. Whether it be a direct attack or not, it is certainly not such a direct attack as will warrant the assumption therein of a jurisdiction which belongs exclusively to the appellate court. But it appears that, where such an action is brought, the attack upon the judgment in the original action is not a direct attack. It was said by this court in *Eichhoff v. Eichhoff*, 107 Cal. 42, 48, 40 Pac. 24, 48 Am. St. Rep. 110, which was an action to set aside a judgment: "In fact, where an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect. Freeman on Judgments, § 485. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. \* \* \* It may be said that in such a case the legal validity of the judgment is admitted, and it is because of the validity, or apparent validity, that the plaintiff requires to be relieved from it."

What has been said renders it unnecessary to discuss the question as to whether the complaint in the original action did state

facts sufficient to constitute a cause of action.

The demurrer to the complaint was properly sustained, and the judgment is therefore affirmed.

We concur: VAN DYKE, J.; SHAW, J.

144 Cal. 306

**CHAPEA WATER CO. v. CHAPMAN et al.**  
(L. A. 1,277.)\*

(Supreme Court of California. Aug. 13, 1904.)

**CONTRACTS FOR WATER—CONSTRUCTION—EXPENSES FOR FURTHER DEVELOPMENT.**

1. Under a contract by which plaintiff bought 40 inches of water flowing in the artesian well on defendants' land, and providing that if, at any time, the well should cease to flow the amount to which plaintiff was entitled, it might proceed to make up the deficiency by developing water on the land—the cost of such development to be borne by plaintiff—but if in making such development, more water was made to flow than plaintiff was entitled to, then plaintiff was to have the option of purchasing, within 60 days from finishing such development, such excess of water, less the amount actually paid by it in making such further developments, at the rate of \$500 per inch, plaintiff, in buying the water developed by it in excess of 40 inches, is not entitled to credit for the cost of developing water to make up the 40 inches, but only for the cost of developing the water in excess of such 40 inches.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Chapea Water Company against Alfred B. Chapman and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Jas. Burdett, William P. James, and William M. Northrup, for appellant. Stephens & Stephens and Charles Lantz, for respondents.

**HARRISON, C.** In July, 1896, the defendants were the owners of a tract of five acres of land situate in the county of Los Angeles, a portion of the Santa Anita Rancho, upon which there was an artesian well known as the "Chapea Well," which was estimated to flow 40 inches of water, measured under a 4-inch pressure (an inch of water being 12,960 gallons), each 24 hours, and the plaintiff herein was desirous of purchasing the water flowing in said well. The parties thereupon entered into and executed a contract by which, in consideration of the sum of \$500 then paid to the defendants by the plaintiff, they sold and delivered to it the perpetual right to take and carry away from the said well 1 inch of water in a continuous flow, defined as aforesaid, and agreed with it that they would at any time within two years from the date of said contract, at the option of the plaintiff, and upon its demand, convey to it any other water that

\*Rehearing denied Sept. 12, 1904.

might be flowing in said well at the same price per inch, and that such option and demand might be exercised as to the whole or any part of said water at any one or more times during said period of two years, but not afterwards. The contract further provided that, in case the defendants should develop other water in said five-acre tract, the plaintiff should have the first right to the quantity of water which it might purchase under the terms of said agreement in any water developed or in said tract, and might take such quantity of water from any source on said tract, if necessary to make up the quantity conveyed or to be conveyed to it. Within two years from the date of the agreement the plaintiff exercised its option from time to time to purchase other water flowing in said well, to the extent of 39 inches—making, in all, 40 inches purchased by it—and proper and sufficient conveyances therefor were executed to it by the defendants. After the expiration of the said two years the flow of water in said well gradually diminished until it shrank below the 40 inches purchased by the plaintiff to the extent of several inches, and the defendants, for the purpose of maintaining a supply of 40 inches, caused another well to be sunk on said tract, designated as "Chapea Well No. 2," by means of which there was developed sufficient water to maintain the supply of 40 inches until July, 1899. In July, 1899, it was found that the combined flow of water from both of said wells fell short of supplying 40 inches by at least 10 inches, and thereupon the plaintiff, for the purpose of making up the deficiency, sank another well upon said tract, called "Chapea Well No. 3," by means of which it developed an additional quantity of water. The work of sinking the well and developing the water therefrom was finished on or about the 30th of September, 1899, and the plaintiff incurred expenses therein amounting to \$2,581. Thereupon measurements of all of the water flowing from the three wells were made, and the quantity of such water ascertained; and on March 24, 1900, an engineer employed therefor by the plaintiff made another measurement, and found that there was then flowing from all of said wells 43.67 inches of water. The defendants thereupon declared that the extra 3.67 inches of water belonged to them, and directed the engineer to divert the same from the conduits of the plaintiff to those of the defendants. Thereafter, viz., April 9, 1900, the plaintiff demanded from the defendants that they execute to it a conveyance of said 3.67 inches of water; and, the defendants refusing to comply with their said demand, the plaintiff commenced the present action to compel them "to convey to it sufficient water from said five-acre tract, at the rate of \$500 per inch, as will amount to or equal the sum of \$2,581, money laid out and expended by it in the development of water upon said tract." Judgment was rendered

in favor of the defendants, from which, and from an order denying a new trial, the plaintiff has appealed.

The contract between the plaintiff and the defendants contains the following provision: "It is further covenanted and agreed upon the part of the said parties of the first part that if at any time, or times hereafter, said well should, from any cause, cease to flow at the present level of the top of said well, the quantity of water to which the party of the second part, its successors or assigns, may at that time be entitled, then in that case said party of the second part, its successors or assigns, may proceed to make up the deficiency of water, either by pumping from said well, or, at its option, may take from any other water on or under said five-acre tract enough water to make up the deficiency, and for this purpose may develop by boring artesian wells, or by developing in other modes, on said five-acre tract, the expenses of such development to be borne by the said second party, or its assigns, but if, in making such development or increase of water, more water is made to flow than the party of the second part, its successors or assigns, are at the time under the terms of this agreement entitled to, then said second party, or its assigns, is to have the option of purchasing within sixty (60) days from finishing such development, such excess of water, or any portion thereof, less the amount actually paid by it or them in making such further development, at the rate of five hundred dollars (\$500) per inch, defined as aforesaid. And said first parties will, on demand, execute a proper deed of grant and conveyance thereof to said second party, or its assigns."

The correctness of the judgment appealed from depends upon the construction to be given to the provisions of the contract thus quoted; the appellant contending that, under these provisions, whenever, in developing water upon the tract, there shall be a flow in excess of the 40 inches already conveyed to it, it is entitled to receive from the defendants a conveyance of such an amount of water as will compensate it for its expenditures in making such development, at the rate of 1 inch of water for each \$500 of expenditure; that, after such compensation has been made, if there be any further excess of water, it has a right to purchase the same at the same rate; that the option provided for in the clause above quoted is to be exercised only with reference to such water as may remain unconveyed after defendants receive said compensation; that, as its expenditures in making the development in question were more than sufficient to consume the entire excess of water above the 40 inches, it was not required to exercise any option for a conveyance thereof, but that the defendants were required to convey the same whenever it should be demanded, in compensation for their expenditures. On the other hand, the

defendants contend that, under this provision of the contract, any expenditure which the plaintiff may make in developing water upon the tract is to be borne by itself; that if, by means of such development, it shall cause a flow of water in excess of the 40 inches already conveyed to it, such excess belongs to the defendants, but that the plaintiff is entitled to purchase it at the rate of \$500 per inch, provided it shall exercise its option and make a demand therefor within 60 days after the work of development is completed; that as the work of development was completed prior to October 1, 1899, and no option or demand for a conveyance was made within 60 days thereafter, the plaintiff is not entitled to a conveyance of any of the water.

In support of its contention the appellant relies upon the second member of the above-quoted clause of the contract, which provides that if, in making such development, more water is made to flow than it is at the time entitled to, it shall have the option of purchasing "such excess of water, or any portion thereof, less the amount actually paid by it \* \* \* in making such further development, at the rate of five hundred dollars (\$500) per inch, defined as aforesaid." This provision of the contract lacks perspicuity, owing, doubtless, to an amendment having been inserted in the original draft of the contract; but, by transposing the last two of the above clauses, so that it will read that the plaintiff shall have the privilege of purchasing "such excess of water at the rate of \$500 per inch, defined as aforesaid, less the amount actually paid by it in making such further development," all of the terms of the agreement are preserved, and its meaning becomes clear. The contract will then be construed as giving to the plaintiff an option to purchase from the defendants, at the rate of \$500 per inch, the excess of water developed by it beyond the 40 inches to which it is entitled, and, in making payment therefor, to deduct from this amount the money actually paid by it in making such further development. Such construction not only makes this portion of the above-quoted clause consistent with the other portion thereof, but is also in harmony with the other provisions of the contract. This clause of the contract consists of two members which relate to the development of water under two distinct conditions, and makes provision in reference to expenses incurred in its development under each of these conditions—one relating to its development for the purpose of making up the deficiency, and the other relating to any excess of water that may be made to flow in making such development. In a development to make up a deficiency, the expenses are to be borne by the plaintiff; and if, in making such development, more water is made to flow than the plaintiff is at the time entitled to, it has the option of purchasing such excess, and

may apply towards the payment therefor "the amount actually paid by it in making such further development." The initial phrase of the second member of the clause, "but if, in making such development," connects it with the matter of the preceding member, and limits its provision to "such" development as is therein named, viz., that which the plaintiff is authorized to make for the purpose of making up a deficiency. As by the express terms of that clause the expenses of such development are to be borne by the plaintiff, it is very clear that for that portion of the expenses incurred by it after July, 1899, in developing water to make up the deficiency under 40 inches, the defendants are not required to compensate the plaintiff either in money or in water; and it is equally clear that it is not entitled to compensation from the defendants for its expenses incurred in making up this deficiency, even though in making such development it has caused more than 40 inches of water to flow.

It cannot be presumed that the parties would have made an agreement by which the plaintiff is required to develop water at its own expense for the purpose of making up the deficiency, and at the same time agree that it shall be compensated for the expenses incurred in making up the deficiency, if, in making such development, more water shall be made to flow than is necessary to make up the deficiency, and their agreement ought not to be so construed unless the terms in which they have expressed it require such construction. It would require very clear language to that effect in the agreement to authorize a court to hold that the parties had agreed that the appellant should, at its own expense, develop sufficient water to make up a deficiency, but that if, in making such development, it should cause to flow an excess of a single inch, it should then be entitled to compensation for all the expense it had incurred in developing the deficiency as well as the excess. The provision by which the plaintiff, in making a purchase of such extra water, is authorized to receive a credit upon such purchase for "the amount actually paid by it in making such further development," does not, in terms, create in its favor any right to receive compensation for its expenditures, unless it shall elect to make such purchase, and even in that case it is only "the expenditures in making such further development" that can be deducted. The further development here referred to is the development further, or beyond what is necessary to make up the deficiency—the development of the excess of water which the plaintiff had the option of purchasing, and upon purchasing which he is entitled to a credit for the amount actually paid in its development.

It must be held, therefore, that under the

terms of the contract the plaintiff is not entitled to any compensation for the expenditures incurred by it in the development of water to make up the deficiency under 40 inches; that, for the excess above 40 inches which was made to flow by reason of such development, it had an option to purchase the whole or any portion thereof from the defendants; that, if it would exercise such option, it was entitled to a credit for the amount actually paid by it in making the development of such excess, or such portion thereof as it might elect to purchase; that, in order to be entitled to make such purchase, it must manifest its option therefor "within sixty days from finishing such development," and at the same time indicate to the defendants the portion of such excess which it desired to purchase. The superior court has found that the work of development was completed on or about the 30th day of September, 1899, and that the plaintiff did not attempt to exercise any option to purchase any of the excess of water within 60 days after the completion of its development, and that it never demanded a deed to said water prior to April 9, 1900. The defendants were therefore under no obligation to convey any water to the plaintiff, and the court properly rendered judgment in their favor.

Certain rulings of the court upon the admission of evidence are urged as erroneous, but, as these rulings were upon matters which in no respect conduced to the judgment finally given by the court, they need not receive any consideration. For the same reason, the objection to certain findings of fact on the ground that they are unsupported by evidence need not be considered, since the judgment does not depend upon these facts, and must have been the same even if those facts had been found otherwise.

In the second count of the complaint the plaintiff, in addition to the matters set forth as above stated, has also alleged certain other facts tending to show that the contract as signed by the parties did not represent the agreement which was in fact entered into between them, and upon these allegations the plaintiff has asked for a judgment directing a reformation of the contract. The court, however, found against the truth of these allegations, and denied a reformation of the contract. As there was a conflict of evidence upon these allegations, the correctness of the decision of the superior court cannot be reviewed.

The judgment and order denying a new trial should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BETTS v. SOUTHERN CALIFORNIA  
FRUIT EXCH. (L. A. 1,263.)

(Supreme Court of California. Aug. 18, 1904.)

FACTORS — BREACH OF CONTRACT — OSTENSIBLE  
AUTHORITY—EVIDENCE OF MARKET PRICE.

1. Plaintiff, at defendant's request, delivered to it a car of lemons for the purpose of completing a sale already effected by defendant at a stated price, defendant to receive a certain commission on the sale. *Held*, that defendant's relation to plaintiff, after the delivery of the lemons to it, was substantially that of a factor, and that it, having, without plaintiff's authority or knowledge, taken them elsewhere, and sold them at a loss, was liable for their value.

2. A corporation is bound by the transaction of its secretary within his ostensible authority of general manager, and its charter powers.

3. Testimony as to the market price of fruit is not incompetent because witness has derived his knowledge from the information of others.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by George A. Betts against the Southern California Fruit Exchange. Judgment for plaintiff, and defendant appeals. Affirmed.

McKinley & Graff and Hunsaker & Britt, for appellant. Gibson & Halstead, for respondent.

HARRISON, C. The defendant is a corporation organized under the laws of this state. Among the purposes for which it is formed are, as stated in its articles of incorporation, to engage in the general business of buying, marketing, and selling fruit and other merchandise; to engage in a general brokerage, factor, auction, and commission business; to conduct a forwarding and shipping business; to establish and maintain agencies of said classes of business in this state and in other states of the United States, etc. A. B. Wright was its agent at Wichita, in the state of Kansas, and A. H. Cargill was its secretary at Los Angeles, in this state, during the times herein considered. In 1895 defendant entered into a contract with certain other corporations, one of which was the Orange County Fruit Exchange, by which it was appointed the agent and representative of those corporations, and given the exclusive right to market, sell, and dispose of the fruit handled by them. The Orange County Fruit Exchange consists of certain subordinate associations within the county of Orange, which are also incorporated, and with which it entered into written contracts for marketing their fruits. These associations consist of fruit growers for whom they act in their dealings with the Orange County Fruit Exchange. August 11, 1896, the defendant received at its office in Los Angeles the following telegram from Wright, its agent at Wichita: "We want car lemons. Ship in choice and fancy. One-third 300, balance 360. 4.50 and 5. A. B.

Wright." (The numbers 4.50 and 5 meaning \$4.50 per box for choice and \$5 for fancy grade for the fruit, and the numbers 300 and 360 designating certain sizes of the fruit.) At the time of its receipt the plaintiff was in the office of the defendant, and Mr. Cargill showed him the telegram, and proposed to him to fill the order. The plaintiff agreed thereto, and thereupon Cargill wrote the name of the plaintiff across the telegram, and in his presence wrote the following telegram which he sent to Wright on the next day: "We have your telegram of 11th. Will ship car on 14th or 15th. 4.50 choice here. Shall we ice. Southern California Fruit Exchange." On the same day Wright sent the following telegram in reply: "Wichita, August 12, 1896. Southern California Fruit Exchange: Telegram of 12th received. Lemons arriving as sound as the general run at this season of the year. Don't ice. A. B. Wright." After agreeing with Cargill to fill the order, the plaintiff went to his orchard and packed the lemons upon the car. Before the car was loaded, Cargill sent him the following letter: "Los Angeles, Cal., Aug. 12, 1896. Mr. George A. Betts—Dear Sir: Please don't ice the car you are loading now for Wichita. Ship the car to the Southern California Fruit Exchange from the Orange County Fruit Exchange, and send the original bill of lading and car report invoice to the Orange County Fruit Exchange, and they will forward same to Mr. A. B. Wright, Wichita. Also send copy of the car report to this office. Route the car via A. T. & S. F. Yours truly, A. H. Cargill, Secretary." After receiving this letter the plaintiff finished packing the car, and shipped and billed it as therein directed. August 19th the defendant sent to Wright the following telegram: "Los Angeles, August 19th, 1896. A. B. Wright, Wichita, Kansas. Shipped 15th car A. T. 929, 70 fancy, 230 choice. Southern California Fruit Exchange." The car arrived at Wichita on the 21st of August, but prior to that date Wright had supplied the purchaser for whom he had sent the order with another car of lemons received from a different source, and at the time the car sent by the defendant arrived the market at Wichita was overstocked with lemons, and the defendant, without consulting the plaintiff, and without his knowledge, sent the lemons to New York, and there caused them to be sold for less than the cost of their transportation. The present action was brought to recover from the defendant the value of the lemons as damages for failing to comply with its agreement with the plaintiff. Judgment was rendered in favor of the plaintiff, and from an order denying the defendant's motion for a new trial the present appeal has been taken.

By this transaction between Cargill and Wright on the one hand, representing the defendant, and the plaintiff on the other hand, the defendant agreed with the plaintiff to

take from him a car load of lemons at the prices named in the telegram, for the purpose of carrying into effect the sale which its agent had made at Wichita, and upon the delivery of the lemons at Wichita to account to him for them, after deducting its commission, which it was agreed between them should be five cents per box. Although the defendant was not, in this transaction, within the technical definition of a factor, in that the lemons were not first placed in its possession by the plaintiff for the purpose of a sale, but were delivered to it by him at its request, for the purpose of completing a sale already effected, yet its relation to the plaintiff after he had delivered them to it was substantially that of a factor. The court has found all the facts of the transaction; and the fact that it has designated the defendant as a factor, or found that in these transactions it acted as a factor for the plaintiff, is immaterial. The defendant has not shown that by reason of the transaction it has any rights as a factor which are inconsistent with the decision of the court. As the lemons were delivered to it for a special purpose, it was not at liberty to divert them from that purpose without the consent of the plaintiff. By taking them to a different market, and there selling them without his authority or knowledge, it violated its obligation to him. Performance on his part, which was required by virtue of the transaction, was complete when he delivered the lemons to the Orange County Fruit Exchange, as directed by the defendant. Upon such delivery there was imposed upon the defendant the obligation to transport them to Wichita, and receive from the purchaser payment therefor at the price at which they had been sold and to account therefor to the plaintiff.

The transaction between Cargill and the plaintiff is not controverted, but the appellant contends that Cargill had no authority to create such an obligation against it, and that the agreement arising out of the transaction between him and the plaintiff is not binding upon it. Whether the defendant is bound by the transaction does not depend upon the presence or absence of any express delegation of authority to Cargill, or resolution therefor by its board of directors, but is to be determined upon a consideration of all the circumstances connected with the transaction, including the relation of the defendant to the subordinate exchanges, the manner in which it ordinarily conducted its business, and the plaintiff's previous dealings with it. From the facts disclosed at the trial herein, as set forth in the bill of exceptions, Cargill appears to have attended to nearly all of the business of the defendant, and there does not appear to have been any other person charged with the management of its affairs. He was the secretary of the defendant, and was also a member

of the board of directors of the Orange County Fruit Exchange, and acted for it in the shipment of the lemons after they had been delivered to it by the plaintiff. The managing agent of that exchange was absent on a vacation at this time, and Cargill prepared the manifest, and sent it and the bill of lading to the defendant's agent at Wichita. Mr. Naftzger, the president of the defendant, testified that he knew nothing about the transaction until after the shipment had been made. He also testified that the duties of Cargill, as secretary, were "to keep the records of the business transacted, to see that fruit turned over to the Southern California Fruit Exchange by the various exchanges was forwarded and marketed to the best advantage, and to see that the collections were properly made, and to take care of the correspondence of the corporation." Cargill himself testified: "My duties as secretary with reference to filling those orders was to apportion the orders amongst the different exchanges in accordance with a certain ratio, when they could fill them. If I got an order for a car load of lemons that an agent wired me he had sold for a certain amount for future delivery, my duty was simply to call up the lemon exchanges, and endeavor to see whether they could fill that order. \* \* \* In this matter I was dealing as the secretary of the Southern California Fruit Exchange in the apportionment of orders, and with Mr. Betts as a member of the Brookhurst Association." A few days prior to this transaction with the plaintiff the defendant had received an order for a car load of lemons from Montana, and Cargill had induced the plaintiff to fill the order, stating to him that the exchange stood back of him, and that he ran no risk of loss. The plaintiff refused to ship them to be sold on commission, or in any way except upon an f. o. b. order, and upon being told by Cargill that the order was f. o. b. he let it have the lemons. When the car was shipped it was billed from the Orange County Fruit Exchange to the defendant herein, in Montana, and at the direction of Cargill the plaintiff sent a duplicate bill of lading to the defendant. Upon the sale of the lemons the plaintiff received the amount at which it was ordered, less the brokerage of five cents a box, which had been agreed upon between them. The payment was made by a draft in favor of the Orange County Fruit Exchange, which was delivered to the plaintiff by Cargill, and afterwards indorsed to him by the secretary of that exchange. After this transaction Cargill wrote to the plaintiff that he had "another" order for lemons, and to see him about it. In response to this the plaintiff visited the office of the defendant, when the transaction above stated was had.

We are of the opinion that under the evidence before it the court was authorized to hold that the defendant was bound by the

acts of Cargill in his transaction with the plaintiff. The defendant was publicly engaged in the occupation of marketing fruits grown in Southern California, shipping them therefrom, and selling them in different places in the United States. This was stated in its articles of incorporation to be within the purposes for which it was incorporated. In its contract with the several exchanges for the marketing of fruit in their behalf it is recited that it is organized for the purpose of engaging in the general business of marketing and selling fruit and other Southern California products, as well as for acting as the agent of those exchanges. There is no provision in its contract which limits its business to that which it may transact in behalf of these exchanges. The public were in no respect informed that it was engaged solely in the transaction of such business, but was authorized to assume that its regular occupation was that which was indicated by its acts, so far as those acts were within its corporate powers, as defined in its articles of incorporation. The functions of Cargill were far more extensive than the ordinary functions of a secretary. They included, as was stated by Mr. Naftzger, the duty "to see that the fruit turned over to the defendant was forwarded and marketed to the best advantage, and to see that the collections were properly made." Cargill thus became clothed with nearly all the functions of a general manager of the business, and his open and public exercise of these functions was a notice that he had the authority of a manager. The plaintiff herein had no knowledge or notice of the existence of a contract between the defendant and the exchanges, or that the business of the defendant was in any respect limited to marketing the fruit furnished by the exchanges. The defendant had, only a few days previous, taken a car load of his lemons, shipped them to Montana, sold them at the price fixed by him, deducted its commission, and returned to him the proceeds. Although the defendant sought to show that in this transaction the plaintiff had availed himself of the contract between defendant and the exchanges, and had shipped his fruit through the Orange County Fruit Exchange, as a member of the Brookhurst Association, yet the plaintiff testified that he had no knowledge of the contract, or of any agreement between that exchange and the Brookhurst Association, and had never been a member of the Brookhurst Association; that he had billed the car as being sent from the Orange County Fruit Exchange to the defendant simply because he had been directed so to do. The superior court accepted the testimony of the plaintiff instead of that on behalf of the defendant, and we are not at liberty to disregard its action in that respect.

The testimony of the plaintiff with reference to the market price of the lemons was not incompetent merely because his knowl-

edge was derived from the information of others, and, in the absence of any other evidence, was sufficient to sustain the finding of the court as to their value. The market price of an article is often shown by reference to published statements of that fact. His testimony with reference to the price when he shipped the Montana car was introduced for the purpose of showing the character of that transaction, and not for the purpose of establishing the value of the lemons in dispute.

Exception was taken to several rulings of the court upon the admission of evidence, but none of these rulings was of such a character as to require particular consideration, or to justify a reversal of the order appealed from. The bill of exceptions does not show what portion of the testimony of Mr. Naftzger was the "answer" which the plaintiff asked to have stricken out.

We advise that the order appealed from be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 387

PIERCE v. LUKENS. (L. A. 1,267.)

(Supreme Court of California. Aug. 16, 1904.)

SALE—AGREEMENT TO REPURCHASE—TENDER EXCUSED.

1. Defendant, in selling bonds to plaintiff, agreed to repurchase them, at the sale price, at any time within three years, at plaintiff's election. Within that time plaintiff called on defendant to repurchase them, and asked how and when he should send them. Defendant replied that he had no recollection of such an agreement, and asked for a copy of his letter; stating that he had always kept his agreements, and intended to do so. On plaintiff's sending him the letter, he replied by letter—which could not reach plaintiff till after expiration of the three years—that he could not find in his letter any agreement to repurchase, but said that he was going away, and would correspond further on his return. *Held*, that defendant, by his first letter, having led plaintiff to believe that, if he had agreed to repurchase, he would keep his agreement, and not having notified plaintiff to the contrary till it was too late to make tender within the three years, plaintiff was excused from making tender.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by C. Q. Pierce against T. P. Lukens. Judgment for defendant. Plaintiff appeals. Reversed.

W. S. Wright, for appellant. C. J. Willett, for respondent.

CHIPMAN, C. This is an action to recover from defendant the consideration paid by plaintiff to defendant for the purchase of certain bonds of the Perris irrigation district.

It is alleged in the complaint that, "in order to induce this plaintiff to purchase said bonds, the said defendant represented and promised in writing to this plaintiff that he (the defendant) would buy the said bonds all back from plaintiff in three years after the purchase, and pay the plaintiff the price which plaintiff paid to defendant therefor." Judgment passed in favor of defendant, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Finding 2 is as follows: "That at the time of said sale, and as a part of the transaction, the said defendant offered to buy back from said plaintiff the said bonds at any time within three years after their purchase, which would not be later than July 8, 1896, and pay the plaintiff the price which plaintiff paid defendant therefor; that plaintiff at the time of purchase did not agree to resell said bonds, but reserved until July 8, 1896, to determine whether he would resell the same to the defendant on the terms offered; that thereafter, and about the 10th day of June, 1896, and not before, said plaintiff notified defendant of his acceptance of defendant's offer to repurchase said bonds." The court also found (finding 3) that none of the bonds were tendered to defendant by plaintiff on July 8, 1896, nor at any time until May 1, 1897, when he made tender, which was refused by defendant; "that said plaintiff had not been prevented by the defendant from at any time tendering him said bonds." Appellant contends that the findings stated above in italics are contrary to the evidence. The entire evidence is found in certain letters. Defendant's offer to sell was made in his letter dated Pasadena, Cal., June 14, 1893, to plaintiff, at Boston, Mass. In this letter defendant assures plaintiff that the bonds are valid, and that "if there was a shade of doubt I would not offer them to any one." He adds: "I will agree to buy them all back from you in three years at what you pay, for I am preparing to sell my real estate as fast as I can to advantage and get everything in bonds." To this letter plaintiff replied by letter dated June 24, 1893, in which, among other things, he says: "• • • Taking into consideration your agreement to buy back in three years the Perris bonds, I will now take some of them (although now I do not expect to ask you to carry out that agreement)." Plaintiff ordered part of the bonds in question, stating that in a few days he would want more, and on the same terms. On July 3, 1893, he ordered the balance. On May 26, 1896, plaintiff, at Boston, wrote defendant, reminding him of his agreement to buy back these bonds, and of the former correspondence. The letter concluded as follows: "Now, under the circumstances, I wish you to carry out that agreement and take the No. 5500 Perris Irrigation bonds bought of you at the same price I paid you for them as agreed. The three years will have expired on or about July 1st [the court



found July 8th] and will you please write me how, and when, I shall send them to you." On June 3, 1896, defendant, at Pasadena, replied as follows: "Your registered letter of May 26th at hand. I am quite surprised at its contents. While I did recommend the bonds and firmly believed they were good, and do yet, I have no recollection of giving any sort of a guaranty. Won't you kindly send me press copy of my letter you refer to. I have so far in my life kept all my promises and agreements in business matters, and certainly intend to in the future." On June 23, 1896, plaintiff answered this letter, stating that he had been out of the state for three weeks, and had just returned, and hastened to reply, sending defendant a copy of his letter of June 14, 1893, and calling attention to his (plaintiff's) letters of June 24 and July 3, 1893. In reply to plaintiff's letter of June 23, 1896, defendant wrote plaintiff July 6, 1896, in which defendant stated that he found no proposition in his former letters "to guaranty the bonds," or that he "would repurchase them." He stated that, if there had been any such agreement between him and plaintiff, he would "have tendered the money long ago." He concludes the letter as follows: "However, I am about starting on my mountain trip to be gone a part of the summer, and I am in hopes by the time I return a decision will be rendered by the Supreme Court. Will correspond with you as soon as I return." On November 23, 1896, plaintiff wrote defendant: "I see by the papers the Supreme Court have decided in favor of the bondholders, which I suppose will now make the Peris bonds good and all right, and therefore I trust you will now take the bonds I had of you according to my understanding of the agreement. Please let me hear from you in regard to same." On December 2, 1896, defendant replied: "Your proposition in regard to Irrigation Bonds I cannot entertain. Your understanding and mine are quite different." This closed the correspondence and the evidence, except that, as found by the court, "plaintiff caused said bonds to be tendered to defendant on May 1, 1897, and defendant refused to accept and pay for the same."

It is not necessary to consider plaintiff's first point as to an apparent uncertainty in the meaning of finding marked "II." We think the finding shows that the court understood from the evidence that defendant agreed to buy back the bonds he sold to plaintiff in three years, and, had plaintiff made formal demand and tender within the three years stipulated in the agreement, the decision of the court would doubtless have been in favor of plaintiff. The only question in the case, as it seems to us, is whether plaintiff was excused by defendant from making formal tender of the bonds prior to July 8, 1896, as it is conceded that tender

was necessary unless excused. By his letter of May 26, 1896, plaintiff called upon defendant, in plain terms, to perform his agreement to buy back these bonds; and, assuming that he would do so, plaintiff requested defendant to say how and when he should send them to defendant. In replying on June 3d, defendant does not refuse to perform, nor does he deny the contract, but states that he has "no recollection of giving any sort of a guaranty," and asks for a copy of his letter. At the same time he gives plaintiff the following assurance: "I have so far in my life kept all my promises and agreements in business matters, and certainly intend to in the future." It seems to us that defendant could not much more plainly have said to plaintiff, "Let me see my letter, and, if it is true that I agreed as you say I did, you may rest secure that I will make my promise good." The confidence which business men ordinarily have the right to repose in each other justified plaintiff in assuming that no further demand or tender was necessary, and that all he had to do was to send defendant a copy of his agreement, which, beyond all question, as the court found, was an agreement to repurchase the bonds. Plaintiff sent a copy of the letter to defendant, who replied on July 6, 1896: "I cannot find in my letters \* \* \* any proposition \* \* \* that I would repurchase them [the bonds] from you." This letter was written only two days before the expiration of the time within which plaintiff was to exercise his right under the contract. It was not possible for defendant's letter to reach plaintiff, at Boston, before July 8th, and necessarily not possible within that interval for plaintiff to act upon that letter, and make further demand or tender. Indeed, if this letter of defendant can be regarded as a refusal, it would have excused tender, had it reached plaintiff in time. Mr. Wharton states the rule as follows: "The general principle is that a party cannot defend himself on the ground of the nonperformance on the other side of conditions whose performance he had already notified the other party would have been nugatory. If he declares himself not bound by the contract, he cannot set up failure in either demand or tender." Wharton on Contracts, § 995; Civ. Code, § 1440. It was said in *Hills v. Exchange Bank*, 105 U. S. 321, 26 L. Ed. 1052: "It is a general rule that, when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused; that payment or performance will not be accepted." Looking further, however, into defendant's letter of July 6th, the closing paragraph would seem to convey the impression that defendant did not intend his letter to be understood as refusing to per-

form, but rather to hold the matter over for further correspondence. He said he was going away for part of the summer, and hoped in the meantime that the Supreme Court would pass upon the bonds, and that on his return he would correspond with plaintiff. He undoubtedly meant to correspond further about the matter of these bonds and his contract to repurchase, and it was not until December 2, 1896, in reply to plaintiff's letter of November 23d, that he refused to take the bonds. Section 1511 of the Civil Code provides that performance or offer of performance of an obligation, or any delay therein, is excused when the performance or offer is prevented or delayed by the act of the creditor, or "when the debtor is induced not to make it by any act of the creditor, intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time." *Herberger v. Husman*, 90 Cal. 583, 27 Pac. 428, was a case where defendant agreed that, if plaintiff was dissatisfied with the purchase of certain lots at the end of one year, the defendant would return the money paid, "provided the plaintiff gave him thirty days' notice, and a surrender of the title to the lots." Plaintiff gave the notice, and offered to surrender the title, but did not tender deed. In discussing the phase of the case relating to whether a written release was necessary to restore the title, the court said: "Be that as it may, defendant is estopped by his conduct from claiming that no release was tendered, or that the contract was not tendered for cancellation. The only claim or objection he made was that he did not have the money at the time. He led the plaintiff to believe that he would return the money as soon as he could raise the amount, and, having induced the defendant [plaintiff] to act upon the belief that he would do so, it is too late now to change his position, and defeat the plaintiff on the ground that a complete technical tender was not made." Citing cases. In the present case, defendant led plaintiff to believe that, if he had agreed to repurchase the bonds, he would keep his agreement; and defendant did not notify plaintiff to the contrary, even if his letter of July 6th can be said to be such a notice, until it was too late for plaintiff to make tender within the three years. Plaintiff was therefore excused from making tender, and defendant is now estopped from claiming that there was no sufficient tender.

It is advised that the judgment and order be reversed.

We concur: SMITH, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 423

PEOPLE v. NORRIS. (L. A. 1,336.)\*

(Supreme Court of California. Aug. 17, 1904.)

PUBLIC LANDS—ACTION TO FORECLOSE DELINQUENT PURCHASER—PUBLICATION OF SUMMONS—COLLATERAL ATTACK ON JUDGMENT.

1. Pol. Code, § 3549, providing that in an action by the state to foreclose the interest of a delinquent purchaser of public land service of summons may be by publication for four weeks, is to be construed as an exception to Code Civ. Proc. § 413, providing generally for publication for two months of a summons against a nonresident defendant, or one absent from the state.

2. A motion to set aside a default judgment on the ground of want of jurisdiction is a collateral attack, or, if a direct attack, is within the rule that on collateral attack, the judgment being valid on its face, evidence dehors the record is not admissible to impeach it.

3. The validity of a judgment is not otherwise affected by the erroneous inclusion of a personal judgment for costs.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the people against Smith Norris. Defendant's motion to set aside the default judgment was denied, and he appeals. Affirmed.

F. D. Brandon and Edwin A. Wells, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Cassius Carter, Dist. Atty., for the People.

SMITH, C. The suit was brought to foreclose the interest of defendant in certain lands purchased by him from the state. The service of summons was by publication, and judgment against the defendant was entered by default May 26, 1896. Motion to set aside the judgment was made on June 27, 1902, on the ground—stated generally—of want of jurisdiction in the court over the subject-matter or over the person of the defendant. The motion was denied, and from the order denying the motion the defendant appeals.

The principal grounds urged for reversal are that the affidavit for the order for publication of summons was defective in not showing due diligence of inquiry on the part of plaintiff as to the whereabouts of the defendant, and that the publication under the order (which was for four weeks only) was insufficient. The latter point rests upon the assumption that it appears from the record that the defendant was a nonresident at the time of the publication, and, such being the case, it is claimed by the appellant that by the provisions of section 413 of the Code of Civil Procedure the publication should have been for "two months," as provided in that section. But this contention is disposed of by the explicit provisions of section 3549 of the Political Code, which provide generally that the publication in the class of

\*Rehearing denied September 16, 1904.

cases referred to shall be for "four weeks" only. It is no doubt true, as claimed by both parties, that the provisions of the Political Code and those of the Code of Civil Procedure are to be construed together (*People v. Applegarth*, 64 Cal. 229, 30 Pac. 805); but in comparing them it seems evident, from the language used and the incongruous nature of their provisions, that they are to be understood as referring respectively to distinct classes—that is to say, to those specifically described in section 3549 of the Political Code, and to those not coming under that description; and that the provisions of section 413 of the Code of Civil Procedure are inapplicable as to matters expressly provided for by section 3549, Pol. Code (Pol. Code, §§ 4480, 4481). The general rule is established by section 413, Code Civ. Proc., which is but a re-enactment, with a slight change, of the rule previously existing. But by section 3549, Pol. Code (with this in the mind of the Legislature), it is provided that in the class of cases referred to in that section publication "may be made" in a different manner, both as to time and in other respects. In *People v. Applegarth*, supra, and cases following it, the question was as to the applicability of the provision of the Code of Civil Procedure relative to service of summons in regard to those matters concerning which section 3549, Pol. Code, is silent.

As to the showing of diligence the affidavit was substantially similar to that involved in *People v. Wrin*, 76 Pac. 646, 27 Cal. Dec. 725, and, like it, comes within the rule laid down in *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. The present case differs from *People v. Wrin* only in this: that we have here the affidavit of appellant showing that his post-office address was inserted in his application to purchase, as required by the rules of the land office, and that he has not since changed his residence, and other facts. But the judgment being valid on the face of the record, neither this nor other evidence dehors the record was admissible to impeach it. *People v. Davis*, 23 Cal. Dec. 8; *People v. Thomas*, 101 Cal. 571, 86 Pac. 9; *People v. Temple*, 103 Cal. 453, 37 Pac. 414; *People v. Harrison*, 107 Cal. 544, 40 Pac. 956; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601. The rule is different in cases of direct attack on a judgment by appeal or motion under section 478, Code Civ. Proc., or otherwise in the line of the proceedings in the case. But, though an attack of the kind now before us may, in one sense of the term, be said to be direct, it is, in the technical sense, regarded as collateral; that is, it is a proceeding aside from or outside of the regular proceedings in the case. Or, if we should prefer a different definition, then we must hold that the same rule applies to direct attacks of this kind as to collateral attacks. Nor, though it be admitted, for the purposes of the decision, that there was a rule of the

land office requiring applications to be accompanied by the post-office address of the applicant, and that the court will take judicial notice of the rule, yet the case would not be affected. The same point was involved in *People v. Wrin*, and, though not discussed in the briefs, was considered.

It is objected also that the personal judgment for costs of suit and publication is without jurisdiction, which may be admitted. But this part of the judgment is long since outlawed, and the validity of the judgment otherwise is not affected. Other objections made are that the summons was defective in stating "the nature of the action"; that the register had no power to include in the delinquent list more than one year's interest—that is to say, more than the last of the five years' interest in default; that the judgment failed to reserve to the defendant, in explicit terms, the right to vacate it upon the terms allowed by sections 3550, 3551, Pol. Code, or to redeem within a year, as provided by the act of 1881 (St. 1881, p. 65, c. 53); that the complaint is defective; and, finally, that "the judgment is not sustained by the facts found"—i. e., by the facts recited in the judgment. But it will be sufficient to say of these contentions that we do not regard any of them as well taken.

We advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

7 Cal. Unrep. 191

PEOPLE v. McFADDEN. (L. A. 1,452.)\*  
(Supreme Court of California. Aug. 17, 1904.)  
SUMMONS—ORDER FOR PUBLICATION—LENGTH OF PUBLICATION—APPEAL.

1. It cannot, on appeal, be said that the court erred in construing its order for publication of summons in the "San Diego Union" as referring to the "San Diego Union and Daily Bee," in which it was published.

2. The requirement in an order for publication of summons that it be published for two months must yield to Pol. Code, § 3549, making four weeks' publication sufficient; so that it is enough that it was published four weeks.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the people against Sarah J. McFadden. From the judgment, defendant appeals. Affirmed.

F. D. Brandon and Edwin A. Wells, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Cassius Carter, Dist. Atty., for the People.

PER CURIAM. In this case, which is otherwise similar to the case of *People v. Nor-*

\*Rehearing denied September 16, 1904.

ris, L. A. 1,336 (just decided) 77 Pac. 998, the order of the court directed publication "in the San Diego Union," and the actual publication was in the "San Diego Union and Daily Bee," and the order of publication ordered that publication be made for two months, and publication was made for five weeks only. We cannot say that the court was not justified in construing its order as referring to the paper in which it was published, and the requirement of the order as to time of publication must yield to the provisions of section 3549, Pol. Code, under which four weeks' publication is sufficient.

On the authority of the decision cited, and for the reasons here given, the judgment is affirmed.

144 Cal. 471

PEOPLE v. SULLIVAN. (Cr. 1,158.)

(Supreme Court of California. Aug. 19, 1904.)

ROBBERY—EVIDENCE—ADMISSIBILITY—CODE.

1. In a prosecution for robbery, testimony that the defendant, on the day before the robbery, came into witness' store in a shabby condition, and the day after the robbery came into the store dressed in a new suit of clothes, offering to treat one of witness' employes, and exhibiting to witness a \$20 gold piece, stating that he had all kinds of money, was admissible.

2. Pen. Code, § 1111, providing that the testimony of an accomplice is not admissible unless corroborated by other evidence, does not affect the admissibility of testimony of an accomplice in robbery to the effect that defendant was one of three that committed the robbery, and that defendant got most of the money in a division shortly after the crime, where the prosecuting witness recognized the accomplice, whose testimony was offered as one of the robbers, and the defendant made conflicting statements to the arresting officer, during which he admitted being present when the "hold up" occurred, but said he ran away because he did not want to be mixed up in it, and also admitted that he met the other two persons involved shortly afterwards, and refused to accept any of the money, but did not make the fact of his meeting them known to any officer for the same reason that he had given for running away, and also failed to make any satisfactory explanation of having money the day after the robbery.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Edward Sullivan was convicted of robbery, and from the judgment and an order denying his motion for a new trial appeals. Affirmed.

F. W. Allender, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

CHIPMAN, C. Defendant was informed against for the crime of robbery, committed in the city of Los Angeles jointly with one Gus Shoemaker. He was separately tried and convicted, and sentenced to 20 years' imprisonment in the state prison. He appeals from the judgment and from the order denying his motion for a new trial.

1. One Devor, a dealer in "general clothing, shoes, and a little of everything," was a witness for the prosecution, and testified, against defendant's objection, that on the day before the robbery defendant came to his store and asked witness if he couldn't give him an old pair of pants. Witness testified: "When he came in he had ragged clothes on. \* \* \* I know he had a coat on; was kind of shabby one. The pants was really gone." Witness testified that the day after the robbery, of which witness had heard, defendant came to witness' place of business dressed in a new suit of clothes, and said to one Errick, who was working for witness: "'Come on, Bill, let's have something.' \* \* \* I said: 'Why, yesterday you were begging for a pair of pants and to-day you got money.' He said, 'I got all kinds of money,' and he pulled out a twenty-dollar gold piece and said, 'I have got all kinds of money.'" Witness was positive that it was a \$20 gold piece. We think the testimony was admissible.

2. The principal point urged for reversal is that the testimony of Shoemaker, the accomplice, was not corroborated as required by section 1111, Pen. Code. The prosecuting witness, Burdell, testified fully to the circumstances of the robbery. He had been at a saloon from about 10 p. m. until shortly after 12 midnight. He saw defendant there, and drank with him. After leaving the saloon, he had gone about a block, when Shoemaker overtook him, and while engaged in conversation with Shoemaker two men approached from behind and held him up while the three robbed him. Witness recognized Shoemaker, but not the others. Shoemaker testified to all the circumstances, and stated that defendant was one of the other two men; the third he did not know by name. Shoemaker's story as to the number of men engaged and the place, manner, and circumstances of the robbery were corroborated by the prosecuting witness in these particulars, who also testified that he was robbed of \$95 gold coin, mostly \$20 pieces, and some silver. Shoemaker testified that in the division of the money shortly after the robbery defendant got the most of it. They were arrested the next day. Defendant made conflicting statements to the arresting officer, during which he admitted being present when the "hold up" occurred, but ran away, because he didn't want to be "mixed up in it." He admitted meeting the other two shortly afterwards, but said he refused to accept any of the money. He did not, however, make known the facts to any officer for the same reason, as he testified, given by him for running away when he saw that Burdell was being robbed. The only explanation made by defendant for having money the next day was that he had received a railroad ticket from his sister in Nevada and had sold it for \$10. Defendant's testimony at the trial and his conflict-

¶ 1. See Robbery, vol. 42, Cent. Dig. § 21.

ing testimony at the preliminary examination introduced at the trial, tended strongly to corroborate the testimony of the accomplice Shoemaker.

We find no prejudicial error in the record, and therefore advise that the judgment and order be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

(144 Cal. 473)

**MEANS v. SOUTHERN CALIFORNIA RY. CO. (L. A. 1,132.)**

(Supreme Court of California. Aug. 19, 1904.)

**NEGLIGENCE—SULPHURIC ACID—FREIGHT DEPOT—EXPLOSION—PERSONAL INJURIES—PRECAUTIONS AGAINST INJURY—DUTY OF OWNER OF PREMISES—STATUS OF PLAINTIFF—DANGEROUS SUBSTANCES—EVIDENCE—SUFFICIENCY.**

1. A railroad company, as owner and occupant of premises for freight depot purposes, owes a mere licensee entering on the premises no legal duty except that while on the premises no wanton or willful injuries shall be inflicted on him.

2. In an action against a railroad company as owner and occupant of the premises for freight depot purposes to recover for personal injuries resulting from the explosion of a tank of sulphuric acid while plaintiff was in defendant's freight depot, evidence examined, and held insufficient to show that plaintiff was anything more than a mere licensee on the premises.

3. In an action against a railroad company as owner and occupant of premises for freight depot purposes to recover for personal injuries, resulting from the explosion of an iron tank of sulphuric acid, evidence examined, and held insufficient to show that such acid so consigned is inherently such a dangerous substance as required defendant to take extra precautions, or exercise more than ordinary care in disposing of it in its freight depot.

4. No positive duty is cast on a railroad company as owner and occupant of premises for freight depot purposes to examine a tank containing sulphuric acid, shipped over its lines, to ascertain whether the tank is in good condition, and a failure so to do amounts to nothing more than passive negligence.

5. A mere licensee on the premises of a railroad company used for freight depot purposes has no right of action against the railroad for injuries received by the explosion of a tank of sulphuric acid, where the defendant is shown to be guilty of nothing more than passive negligence in failing to examine the tank to ascertain whether it was in good condition.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Walter Means, a minor, by his guardian ad litem, against the Southern California Railway Company. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Milton K. Young and J. W. McKinley, for appellant. O. N. Sterry and Henry J. Stevens, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff through the bursting of a tank of sulphuric acid in the freight house of defendant. Prior to October 20th, defendant, as a common carrier, received at its station at North Ontario, Cal., consigned to one Jesson, a druggist at that place, an iron tank containing sulphuric acid, which was placed by its agent in its freight house. This tank was of the customary size and kind used in the shipment of sulphuric acid in large quantities. The freight house is separate and distinct from any other building on the depot premises, and is used solely for freight purposes. It is built on a platform, raised some four feet from the ground, the eastern portion being entirely closed, with doors opening to the north, south, and east, and the western portion adjoining being roofed, but uninclosed on the sides. The freight house is reached by inclined approaches at three ends of the platform, and there is ample unobstructed space around the building on the platform for the convenient handling of freight and the passage of persons. The tank in question, with other tanks of similar character and contents, had been placed by defendant's agent about the center of the uninclosed portion of the freight house, and the consignee had made arrangements to take it away upon the day when the accident occurred. In the afternoon of that day—October 20th—plaintiff, a boy 16 years of age, in company with two other boys of about the same age, started for the defendant's depot, the object of plaintiff's visit being to get an express package from the office of Wells, Fargo & Co. This office was located in the passenger building, which in no wise was connected with the freight house or its premises. When some distance from the depot, he saw standing somewhere in the uninclosed portion of the freight house a man to whom he wished to talk about moving a shanty, and, instead of continuing towards Wells, Fargo & Co.'s office, he went with his companions over to the freight house. When he got there the person he wished to see was not in sight, but, hearing voices in the inclosed portion of the freight house, he supposed he was there, and concluded to await his coming out through the south door of the inclosed freight house, which was open. Plaintiff could readily have gone to this south door, to which there was a clear approach, and waited there, and spoken to the party he wished to see, or could have ascertained whether he was in fact inside, and, if not, could have gone directly along down the inclined approach on that side of the freight house to the office of Wells, Fargo & Co., his original point of destination. Instead of doing this, however, plaintiff and his companions went into the uninclosed freight house to about the middle thereof, to wait, and for that purpose seated themselves upon some cement barrels located

a few feet from where the iron tanks of sulphuric acid had been placed. They were only seated a few minutes when one of said tanks burst, throwing some of its contents upon plaintiff, causing the injuries to recover which this action was brought. The evidence further shows that numerous persons, having no business to transact with the defendant company, had been for years permitted to be around and about such freight platform, and were not ordered away by the officers of defendant. At the close of plaintiff's case the court, on defendant's motion, granted a nonsuit. Thereafter plaintiff moved for a new trial, which was denied, and from the order denying the same this appeal is taken.

If it were assumed that there was sufficient proof of negligence on the part of defendant to otherwise warrant the submission of the cause to the jury, we are nevertheless satisfied that upon the entire showing made the plaintiff was not entitled to recover. The complaint alleged, among other things, that one Short was the common agent of the defendant, the railway corporation, and Wells, Fargo & Co., a common carrier for hire of express packages; that the latter had its office in the depot premises of defendant as its tenant, and that, in order to transact business with Wells, Fargo & Co. at its office, it was necessary to go upon the premises of defendant; that plaintiff, when said accident occurred, was upon said premises to inquire at the office of said Wells, Fargo & Co. whether a package for him had arrived, etc. The complaint was framed upon the principle that the owner or occupant of premises owes a legal duty to one lawfully entering upon them for the transaction of business to exercise such reasonable care or caution as a prudent person under like circumstances would exercise in seeing that the premises are in a safe condition, so as not to expose one lawfully entering upon them to injury or danger, and that for failure to do so he is liable in damages for any injury sustained through a failure to discharge such duty. The principle is correct. In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery. The facts stated in the complaint met all these essential requirements, but the evidence adduced upon the trial did not accord with the allegations of the complaint, nor square with the principle of law referred to. The plaintiff was not on the freight house premises to obtain any package from Wells, Fargo & Co. He had changed his mind about going to that office. In fact, the office of Wells, Fargo & Co. was not on the freight house premises, was not near the freight

house proper, but was in an entirely different, separate, and distinct building. Nor was the plaintiff in the freight house on business connected with either the defendant company or Wells, Fargo & Co. He was on his own particular business for his own purpose, and with reference to a matter wholly unconnected with either of the companies, and was seated in a place where even the personal business he was to attend to neither required his presence nor gave him any right to enter. This evidence showed an entire absence of any duty resting upon the defendant towards the plaintiff with reference to his safety upon the premises where the accident occurred, and hence the absence of one of the essential requirements to a recovery. While the allegations of the complaint showed the existence of this duty, the evidence failed to substantiate it. On the contrary, it shows that no such duty existed.

If the plaintiff was not technically a trespasser in entering the freight house of the defendant, he was at best but a licensee, entering thereon subject to the rule determining the measure of responsibility of the owner of premises to a mere licensee. He was not upon the premises by the invitation, express or implied, of the defendant, nor for any business purpose connected with defendant, nor in relation to any business for which the freight house in which he was injured was used. He went there of his own volition, uninvited, concerning a matter which was personal to himself, in which the defendant had no interest. As a mere licensee, the defendant owed him no legal duty except that while upon the premises no wanton or willful injury should be inflicted upon him. It owed no duty to him to have its premises, or the contents thereof, in safe condition; and when he entered, uninvited, upon the premises of defendant, he assumed all the ordinary risks which attach to the condition of such premises or the manner of the conduct of defendant's business by its agents therein. Under such circumstances, as has been repeatedly held, he enters upon the premises at his own risk, and enjoys the license with its concomitant perils. "As a general rule," says Thompson in his Commentaries on the Law of Negligence, vol. 1, 946, "the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who go upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." And in harmony with the general rule it is said in *Schmidt v. Bauer*, 80 Cal. 569, 22 Pac. 256, 5 L. R. A. 580: "Conceding that the respondent was not wrongfully in the place where the accident occurred, and giving the most liberal construction to his evidence, he was there by the mere license of the appellant, and for that reason the appellant owed

him no duty, and he went there subject to all the risks attending his going." In *Kennedy v. Chase*, 119 Cal. 642, 52 Pac. 35, 63 Am. St. Rep. 153, it was likewise said: "We have found no support for any rule," says Mr. Thompson, in speaking of the rights of trespassers or mere licensees, 'which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant.'" It is said in *Gibson v. Leonard*, 143 Ill. 189, 32 N. E. 183, 17 L. R. A. 588, 36 Am. St. Rep. 376: "Actionable negligence, or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that he will refrain from willful or affirmative acts which are injurious." In *Cusick v. Adams*, 115 N. Y. 59, 21 N. E. 673, 12 Am. St. Rep. 772, the court says: "The principle is now well settled by repeated adjudications in this country and in England that where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises the owner is not liable for negligence, for such person has taken all the risk upon himself. The theory of liability in negligence cases is a violation of some legal duty to exercise care." And again, in *Moffatt v. Kenny*, 174 Mass. 315, 54 N. E. 851, the rule is laid down as follows: "It is a general rule that a licensee going upon the land of another must take the land as he finds it. Of course, the landowner is liable if he does him intentional injury, or wantonly or recklessly exposes him to danger. It has sometimes been said that he is liable for a trap upon his land. We are not aware of any decision which distinctly defines the word 'trap' in this use. It would at least, include any very dangerous construction or condition designedly arranged to do injury. But we are of opinion that an owner is under no liability for an unsafe condition of his premises caused by a mere failure to use ordinary care for the safety of persons who may chance to go there by permission while he is using the place for his own proper purposes, and is not intending needlessly to expose others to danger; otherwise there would be no important distinction between his duty to licensees and his duty to invited persons." This general principle is too well settled to need further particular citations, but attention is directed to a few authorities from various jurisdictions which sustain the uniformity of the rule: *Straub v. Soderer*, 53 Mo. 43; *Plummer v.*

*Dill*, 156 Mass. 423, 31 N. E. 123, 32 Am. St. Rep. 463; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Fitzpatrick v. Glass Mfg. Co.*, 61 N. J. Law, 379, 39 Atl. 675; *Woodruff v. Bowen*, 136 Ind. 441, 34 N. E. 1113, 22 L. R. A. 198; *Leary v. Cleveland, etc.*, 3 Am. & Eng. R. Cas. p. 498; *Mathews v. Bensel*, 51 N. J. Law, 33, 16 Atl. 195; *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 183, 17 L. R. A. 588, 36 Am. St. Rep. 376; *Victory v. Baker*, 67 N. Y. 369; *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701; *Redigan v. B. & M. R. R. Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Kinney v. Onsted*, 113 Mich. 90, 71 N. W. 482, 38 L. R. A. 665, 67 Am. St. Rep. 455; *Pitts. & Fort Wayne & Chicago R. R. Co. v. Bingham*, 29 Ohio St. 364; *Gillis v. Pa. R. R. Co.*, 59 Pa. 129, 98 Am. Dec. 317; *Parker v. Portland Pub. Co.*, 69 Me. 176, 31 Am. Rep. 262; *U. S. Y. & T. Co. v. Rourke*, 10 Ill. App. 474. Also *Grundel v. Union Iron Works*, 141 Cal. 564, 75 Pac. 184, and cases there cited.

Appellant insists, however, that under the facts of this case a different rule of liability is to be applied; that this consignment of sulphuric acid was of such a dangerous character that the defendant was under legal obligation to the public generally not to so place and expose it in its freight house that a person—licensee or otherwise—could readily come in proximity to it, but was in duty bound to exercise such care in arranging and disposing of it that no one might be exposed to injury or harmed from it. While the general rule is that one using or handling dangerous articles does so at his peril, and for injuries occasioned thereby, other than through the interposition of strangers or caused by extraordinary natural occurrences, must respond in damages, this rule is nevertheless limited to articles essentially and in their elements dangerous, and calculated, in their nature, to cause injury to property or person. There is nothing in this case to show that sulphuric acid is essentially and inherently a dangerous agency, or that from its nature any particular peril is attendant upon handling it in iron tanks. This is the usual—in fact, the only—method disclosed by the evidence which is employed in its shipment in large quantities. Such tanks had been received and handled by the defendant in considerable quantity at its depot in Ontario prior to the accident in question, and aside from that particular accident there is no evidence showing any similar occurrence attending its receipt or handling on defendant's premises. From the testimony of witnesses—the only ones who had any practical experience in handling sulphuric acid in iron tanks—it appears that they handled it in considerable quantities, covering in one instance a period of eight years, and in the other probably a longer period; that they had handled it in large quantities; and that it

was only in exceptional cases, and after long exposure to the change of seasons, that any of the tanks burst, and then only in a comparatively few instances. There was nothing to show that these witnesses deemed it dangerous to handle it in iron tanks; in fact, the method of their dealing with it would indicate that they did not, and one of them stated that he did not know it was supposed to be, and did not think it was, unsafe so to handle it. These tanks were kept, with others which did not burst, in the open air, without any protection or covering, subject to all changes of weather and variations of temperature, and only burst after months of exposure under these conditions. No reasons could be assigned by the witnesses for their bursting, nor was the fact that they had done so a matter of notoriety in North Ontario, nor was there any evidence that defendant or its agents were advised of this particular fact, or knew under what, if any, circumstances, such tanks were liable to burst. Neither does the evidence disclose the actual cause of the bursting of the tank whereby plaintiff was injured. The reasonable inference is that there was some slight leak in the tank, through which moisture was absorbed, and, as one of the expert witnesses for the plaintiff stated, under the action of the sun's rays on the iron vessel in the presence of the moisture a generation and accumulation of hydrogen gas was induced, which caused the bursting of the vessel. We mention these facts, not as bearing upon the general question of the presence or absence of negligence on the part of defendant, because we do not discuss that branch of the case, but as addressed to the point that sulphuric acid consigned and handled in tanks is not inherently such a dangerous substance as to have required defendant to take extra precautions, or exercise more than ordinary care in disposing of it in its freight house, or which calls for the application of the rule contended for by plaintiff, enlarging the liability of defendant. As the acid was not in itself a dangerous agency, and was contained in iron tanks, such as were usually employed for like shipments, the defendant had a right to assume, as far as plaintiff was concerned, that such tanks were sound and secure, and sufficient to withstand the ordinary perils or dangers incident to transportation, handling, and storage. No positive duty was cast upon defendant to examine the tank to ascertain whether it was in good condition or not. A failure to do so amounted to nothing more than passive negligence, and for injury arising from such negligence plaintiff, as a mere licensee, has no right of action.

We are satisfied that the order denying a motion for a new trial was properly made, and it is affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

144 Cal. 488

WILLIAMS v. CORKER et al. (SALZGEBER, Intervener). (L. A. 1,253.)

(Supreme Court of California. Aug. 19, 1904.)

AUCTIONS—SALE OF MORTGAGED PERSONALTY—  
PAYMENT BY CHECK—ACTION BY AUCTIONEER  
—FINDING — EVIDENCE — SUFFICIENCY —  
RIGHTS OF PURCHASER—RIGHTS OF MORTGAGEE.

1. In an action on checks given to plaintiff as an auctioneer for the price of personalty sold it appeared that the property was mortgaged at the time, and the mortgagee intervened, claiming payment of the amount due on the checks. The written authority given to the plaintiff to make the sale was signed by both the mortgagor and the mortgagee. Plaintiff's book as auctioneer was put in evidence, and, together with his testimony, showed that the property was sold as property of the mortgagee, under an agreement that the proceeds were to be turned over to the mortgagee. The evidence also showed that for several days before the sale, and up to the sale, the mortgagee was furnishing feed for the stock included in the property sold, and assisted in their care, and performed other acts of possession and control over them. *Held*, that a finding that the plaintiff, as auctioneer, went into possession of the property on behalf of and as agent of the mortgagor, and not otherwise, was contrary to the evidence.

2. It also appeared from the plaintiff's book as auctioneer, and from his testimony, exactly what part of the property mortgaged to the intervener was sold at the sale, and also how much it sold for, which was not disputed by other evidence. *Held*, that a finding that a portion of the property described in and covered by the mortgage was included in the property sold, but what portion thereof was so included did not appear, was contrary to the evidence.

3. The evidence warranted a finding that the property for which the checks were given was taken possession of by the mortgagee, with the consent of the mortgagor, and that pursuant to the terms of the mortgage it was sold at public auction by an auctioneer, acting as agent of the mortgagee, for the purpose of turning over the proceeds of the sale to the mortgagee in satisfaction of his note and mortgage so far as they would go.

4. Where mortgaged personalty is taken possession of by the mortgagee, with the consent of the mortgagor, pursuant to the terms of the mortgage, and the property sold at public auction by an auctioneer acting as agent of the mortgagee for the purpose of turning over the proceeds of the sale to the mortgagee in satisfaction of his note and mortgage, so far as they would go, the purchaser at the sale has no right to deduct any indebtedness due her from the mortgagor from the amount she agreed to pay to the auctioneer on account of her bid for that portion of the property sold under the mortgage.

5. Where mortgaged personalty is taken possession of by the mortgagee with the consent of the mortgagor, pursuant to the terms of the mortgage, and the property sold at public auction by an auctioneer acting as the agent of the mortgagee for the purpose of turning over the proceeds of the sale to the mortgagee, in satisfaction, so far as they would go, of his note and mortgage, the proceeds of the sale, being less than the amount due the mortgagee, became his absolute property against everybody concerned, by reason of the agreements between the parties, and not by reason of the lien of the mortgage attaching to the proceeds of the sale.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; J. L. Campbell, Judge.



Action by C. B. Williams against Aurelia J. Corker and others, Louis Salzgeber, intervener. From the judgment and from an order denying a motion for a new trial the intervener appeals. Reversed.

N. C. Burch and J. L. Murphey, for appellant. Oscar Lawler, Carroll Allen, and Walter Horgan, for respondents.

GRAY, C. The plaintiff above named, as auctioneer sold at auction the running gear of a wagon, 32 cows, and 5 horses for the aggregate sum of \$1,337.50. The property described was sold with other property, and the whole was purchased by defendant, Corker, who gave to the plaintiff auctioneer her checks in payment therefor. These checks were dishonored, and this suit is commenced by the auctioneer to recover from Corker on the checks. This particularly described property belonged to Eliza J. Moore at the time of its sale, and the intervener, Louis Salzgeber, had a chattel mortgage, duly executed by said Moore, and duly recorded, embracing said property. In his complaint in intervention Salzgeber claims the said \$1,337.50 as due him upon said sale to Corker in part satisfaction of his note and mortgage on said property held by him against Moore. L. D. C. Gray, trustee in bankruptcy of the estate of said Moore, also intervened in the action. The case was tried before the court without a jury. The findings and judgment were against Salzgeber, and he appeals from an order denying him a new trial and from the judgment.

1. Appellant attacks finding 4, which is to the effect that the plaintiff, as auctioneer, went into possession of the property "on behalf of and as the agent of said Eliza J. Moore only, and not otherwise." This finding is contrary to the evidence, oral and written. The written authority given Williams as auctioneer is signed by both said Moore and said Salzgeber, and reads as follows: "I hereby authorize said C. B. Williams to dispose of the above described property and further agree to pay said C. B. Williams a commission of 10 per cent. on said sale if sold by him, or me at private sale or by auction." Williams had agreed to make the sale on September 27th, but the sale seems to have been postponed, the parties signing an instrument, as follows: "This sale is adjourned till October 4, at 10 a. m." and signed by Eliza J. Moore and Louis Salzgeber. The book of the auctioneer, which was put in evidence without any objection to its competency, together with his testimony, shows that the property here in controversy was sold as the property of Salzgeber under an agreement between the two that the proceeds of the sale were to be turned over to Salzgeber. It also appears from the evidence that for several days before the sale and up to the sale Salzgeber was furnishing feed

for the stock, assisting in their care, and performing other acts of possession and control over them. In short, it conclusively appears that, whatever may have been Mrs. Moore's intention, the purpose of Salzgeber and the auctioneer was to sell the property for the purpose of satisfying the Salzgeber mortgage.

2. It is also found as follows: "That a portion of the personal property described in and covered by said chattel mortgage was included in the property sold on said 4th day of October, 1899, but what portion thereof was so included does not appear." This finding is also not supported by the evidence. It does appear from the aforesaid book and from the testimony exactly what part of the property mortgaged to appellant was sold at said sale, and also how much it sold for; the amount thereof being \$1,837.50, according to the auctioneer's book, which is not disputed by any other evidence.

3. Under the evidence the findings should have been to the effect that the property described as above was taken possession of by Salzgeber by the consent of Mrs. Moore, and that, according to the terms of the mortgage providing that he might do so, it was sold at public auction by the auctioneer acting as the agent of Salzgeber for the purpose of turning over the proceeds of the sale to Salzgeber in satisfaction, so far as it would go, of the note and mortgage belonging to Salzgeber. If the finding had been thus drawn in accordance with the evidence, it would follow that the purchaser at the sale would have no right to deduct any indebtedness due her from Moore from the amount that she should pay to the auctioneer on account of her bid for that portion of the property sold under the Salzgeber mortgage. And the amount that said property brought being less than the amount due Salzgeber, it would follow that Salzgeber was entitled to and should have had judgment for the whole of said amount. This deduction from the evidence in the case is supported by the reasoning of a recent decision of this court. *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69. Salzgeber had the right to sell the property and receive the proceeds under the terms of the mortgage, and, the sale having been made by him with the consent of the owner of the property, the proceeds belong to Salzgeber as against everybody concerned. It is not a case of the lien of the mortgage attaching to the proceeds of the sale, but, to the contrary, by reason of the agreements between the parties the proceeds of the sale became the absolute property of Salzgeber. In this respect the case is distinguishable from *Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151.

The judgment and order appealed from should be reversed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 445

YOLO COUNTY v. NOLAN et al. (Sac. 1,087.)

(Supreme Court of California. Aug. 18, 1904.)

GOVERNMENT SURVEYS—RELOCATING LINES.

1. In locating the lines of subdivisions of a government survey, the courses and distances and monuments given in the field notes of the government surveyor should be followed, without regard to whether this gives more land to one subdivision than to another.

Commissioners' Decision. Department 2. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by the county of Yolo against Isabella Nolan and others. From the judgment, defendant D. N. Hershey appeals. Affirmed.

E. R. Bush, Dist. Atty., and Hudson Grant, for appellant. R. Clark, for respondents.

COOPER, C. Action to quiet title. The case was tried before the court, findings filed, and judgment ordered and entered in favor of defendants, other than Hershey. This appeal is from the judgment and order denying the motion of appellants for a new trial. The issue involves the title to a strip of land one mile in length north and south, and twenty feet wide. It is stipulated that appellant Hershey is the owner of the east half of the west half of section 24, T. 12 N., R. 1 W., M. D. M., and that the respondents are the owners of the west half of the west half of the same section. The plaintiff claims to be the owner of a right of way over the strip, through a conveyance from Hershey, but its claim must fail if Hershey has no title. It is thus evident, in view of the stipulation, that the evidence and discussion in the record and briefs as to the statute of limitations may be wholly disregarded. As stated by appellants, the real issue is as to whether the strip of land is part of the east half or part of the west half of the said west half of section 24. The court found that the land is wholly within the west half of the west half of the said section, and accordingly ordered judgment for respondents. The evidence supports the finding. The respondents' witness Brasfield, who appears to be a competent surveyor, testified that the land in controversy is a part of the west half of the west half of the section. In determining this, he deemed it essential to find the true line, as established in the field, running north and south separating sections 23 and 24. He commenced by getting a copy of the field notes from the United States land office, and finding the southeast corner of section 25 on the meridian line, or what he deemed to be the corner. This corner appears to have been

marked by one Ashley, the surveyor who testified for appellants, and was shown to the witness by one McCullough. From this starting point the witness ran north 80 chains, thence west along the south line of section 24 one mile from the meridian line to what he deemed to be the southwest corner of section 24. He then ran the line north one mile between sections 23 and 24. The field notes as to this line are as follows: "From post in mound of earth (corner to section 23, 24, 25 and 26.) North between secs. 23 & 24, 19.50, cross a creek; Course N. E. 33.50 cross a creek, Course N. W. 40.00 set  $\frac{1}{4}$  sec. post and raised a mound of earth; 51.00 cross road to lone tree; 53.50 creek 60 links wide, Course N. E. 56.00 leave the same. 80.00 set post and raise mound of earth cor. to secs. 13, 14, 23 & 24. Land level; and soil 1st rate. No timber."

The creek referred to in the field notes is known in the vicinity as "Bird Creek," and is the only creek there. The witness followed the line as indicated by the field notes, and found the line, in courses, distances, and crossing the creek, to agree in every respect with the field notes, except, at the point of leaving the creek, instead of being 56 chains, it was a distance of 56 chains and 30 or 40 links, which the witness accounted for by the fact that there had been some erosion of the bank of the creek since the government survey, which made the line leave the creek at a greater distance than 56 chains. The witness further testified that he found by this line that section 24 was "just about full, and an equal division, observing the line as I found it by Bird creek, would give each one their proportion of land. \* \* \* I say the line which I located between Nolan and Hershey is the correct line, because it is an equal division of the land between the natural objects along the line between sections 23 and 24, and between the meridian line or east boundary 24. I don't think there is the slightest question about that on this line." The witness further testified that he identified the creek by the field notes, and that it would be impossible for a line to be made more than four or five feet from the line described in the field notes without wholly disregarding the creek as a natural object referred to therein. There is no evidence tending to show that this witness did not correctly locate the line between sections 23 and 24 from the field notes. Not only this, but the testimony of appellant's surveyor Ashley corroborates the testimony of Brasfield. Ashley was first employed by defendants, and made a survey by the field notes, locating the line practically in the same place as located by Brasfield. He testified as to this first survey, "As those notes called for a certain stream running up through, along, or near the line between 23 and 24, I took that as a basis to make my survey upon, and made the survey from the corner. \* \* \* These were gov-

ernment field notes that I had there. This arroyo or creek is well defined. It is a pretty good arroyo there. \* \* \* In chaining along it [the arroyo] I found the chains to correspond substantially with the field notes. \* \* \* There was no other natural object there upon that section called for by the field notes, outside of the arroyo. \* \* \* The accuracy of my first survey, as I understand it, depends upon whether this creek you speak of is or is not a monument of the survey. If the creek is a monument of the survey, my last survey is incorrect."

After Ashley had made this first survey for defendants, and been paid by them, for some reason or other he made another survey without compensation. He says that he became suspicious that his first survey was not correct, because there was a surplus in section 23 of some 204 feet; that he thought this surplus should be divided between the two sections. Among the reasons for making the second survey, the witness states: "Another thing was the palpable injustice of giving one section a surplus, and the other such a great deficiency. \* \* \* My object was to make the survey conform, if I could, to the west line of the Nolan place [respondents' land]. \* \* \* Two theories were advanced as a reason for relocating these corners: One was the theory of considering the slough the monument, and the other was to divide the excess between adjoining holders. I don't know what theory Hurst advanced that caused me to change those stakes. I had lots of theories myself." It is evident that the surveyor, Ashley, was not looking for the true government lines, but, as he says, his object was to "prorate the surplus." He desired to make the survey conform to a certain line, and he did not desire section 23 to have too much land. But the rule as to restoring lost corners by putting them at an equal distance between two known corners has no application if the line can be retraced as it was established in the field. The field notes should be taken, and from the courses and distances, natural monuments, or objects and bearing trees described therein, the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located, it must be done, and, when so located, it must control. It is not the business of the surveyor to speculate as to whether one government subdivision is short, and the other long, in acres. He is not authorized to correct what the government has done. The line as surveyed and described in the field notes is the description by which the government sells its land. If its description makes one section contain 320 acres, and another 960 acres, the parties must take according to the calls of their patents. As said in *Kaiser v. Dalto*, 140 Cal. 172, 73 Pac. 830: "The lines as originally located

must govern in such cases. The survey as made in the field, and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed, must control. The parties who own the property have a right to rely upon such lines and monuments." In *Tognazzini v. Morganti*, 84 Cal. 161, 23 Pac. 1085, it is said by this court, speaking through the Chief Justice: "The rights of the respective parties, of course, depend upon a correct relocation of the Terrill line. \* \* \* The road it crosses [speaking of the Von Schmidt line] is a road running north and south, while the road called for in Terrill's field notes and delineated on his map runs nearly east and west. \* \* \* We think this call for the course surveyed is much less certain and trustworthy than the calls for the entrance to and exit from the Cañada, the crossing of the road east and west, the entrance to the Cañada Verde, and the distance of the course from the adobe houses, all of which sustain the Minto survey." It is said in *Harrington v. Boehmer*, 184 Cal. 199, 66 Pac. 215: "The question in all cases similar to this is, where were the lines run in the field by the government surveyor? A government township lies just where the government surveyor lines it out on the face of the earth. These lines are to be determined by the monuments in the field."

In view of what has been said, the alleged errors as to rulings on the admission or rejection of evidence need not be discussed. They could not have affected the result, and hence are not material.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

On Motion for Rehearing.

(Sept. 17, 1904.)

PER CURIAM. The petition for a rehearing in the above-entitled cause is denied. The sentence in the opinion beginning "After Ashley had made this first survey" is modified to read as follows: "After Ashley had made this first survey for defendants, he made another survey."

144 Cal. 410

PARSONS v. WEIS. (L. A. 1,264.)

(Supreme Court of California. Aug. 16, 1904.)

QUIETING TITLE—COMPLAINT—SUFFICIENCY—MARRIED WOMEN—RIGHT TO SUE—CODE—JUDGMENT PROCESS—SUBSTITUTED SERVICE—STATUTES—EQUITY—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. A complaint to have the plaintiff adjudged the owner of lands described therein, and to

have a judgment in favor of the defendant quieting his title to the lands declared void as against plaintiff, states but a single cause of action.

2. A complaint to quiet title to land alleged to belong in fee to a female plaintiff need not allege whether plaintiff was married or a single woman, as even a married woman is entitled under the Code to sue alone in such case.

3. Where summons in a suit to quiet title was by publication as to several defendants, the fact that the affidavit was sufficient as to some of the defendants is immaterial on the question of its sufficiency as to other defendants.

4. Whether a judgment is void on its face is to be determined by an inspection of the judgment roll.

5. A judgment rendered by the superior court is always presumed to be within its jurisdiction.

6. Where it affirmatively appears on the face of the judgment record that the court did not have jurisdiction of the defendant, a judgment of the superior court is at all times open to either a direct or collateral attack.

7. A direct attack on a judgment is some proceeding in the action in which it was rendered, either by a motion before the court which rendered it or an appeal therefrom.

8. An attempt to impeach a judgment by matters dehors the record is a collateral attack.

9. An attack on a judgment on the ground that it was procured by fraud is a direct attack.

10. The fraud from which relief may be given does not include a judgment regularly obtained on a fraudulent claim or by false testimony, but is limited to a fraud in procuring the judgment.

11. Under the direct provisions of Code Civ. Proc. § 412, the court is authorized to order the service of summons by publication where the person on whom service is to be made resides out of the state.

12. Under Code Civ. Proc. § 412, authorizing summons by publication, the jurisdiction of the court is brought into exercise by the presentation of an affidavit stating the fact that the person on whom service is to be made resides out of the state.

13. Under Code Civ. Proc. § 412, authorizing service of summons by publication, where an affidavit is made and filed stating the fact that the person on whom service is to be made resides out of the state, it is not necessary to set forth therein that such person cannot, after due diligence, be found within the state.

14. Where an affidavit is filed stating the fact that the person on whom service is to be made resides out of the state, and that the residence of such person is known, the court, in addition to directing a publication of summons, must, under the express provisions of Code Civ. Proc. § 412, direct a copy of the summons and complaint to be deposited in the post office addressed to the person to be served at his place of residence.

15. Under Code Civ. Proc. § 670, providing that the affidavit for publication of summons and the order directing its publication shall form a part of the judgment roll, they are to be considered in determining whether the court obtained jurisdiction of the person on whom service was so made.

16. Where a judgment recited that plaintiff in an action to set it aside had been duly served with process, and the recital was sustained by the affidavits of publication of the summons and of depositing in the post office the copy of the summons and complaint in accordance with the order of court, the recital is a judicial determination by the court of the sufficiency of the service, and, though entitled to the same presumption of verity as its determination on any other issue, may be impeached by some extraneous matter.

17. The validity or effect of a judgment being a matter of record, it cannot be overcome by evidence of any lower degree.

18. Courts of equity will relieve a party from an unjust judgment against him by another tribunal, through fraud, or where, for want of service of process, he has had no opportunity to defend.

19. Where the remedy by motion before the original tribunal has expired without any charge of laches or negligence on the part of a person seeking to have a judgment set aside in equity on the ground of fraud, the remedy in equity is not lost.

20. In a suit to set aside a judgment where the record of the judgment showed that the summons therein had been by publication, and that it had been directed to plaintiff in a certain city, proof of the allegation of plaintiff's complaint that she had never resided in that city, and that she had no notice of the action or of the judgment until more than one year after the judgment was rendered, sufficiently relieved her from any charge of laches or negligence during the time within which a motion could have been made in that action to set aside the judgment.

21. In a suit to quiet title and set aside a former judgment alleged to have been procured by fraud, in which the title to the real estate was quieted in defendant, allegations in the complaint that the plaintiff was at all times prior to the commencement of the former action the owner in fee of the lands in controversy, and that the statements of the defendant in his complaint in the former action that he was the owner of the property were wholly false, and were known by him to be false, were sufficient averments of a meritorious defense to the former action.

22. In a suit to quiet title and set aside a former judgment in which the title to the real estate had been quieted in defendant, where plaintiff alleged that she was at all times prior to the commencement of the former action the owner in fee of the lands in controversy, and proved that she became vested with the title some years prior to the rendition of the judgment, and that she had never sold, conveyed, or otherwise disposed of it, the presumption that she continued to remain the owner supported the allegations of her complaint, and of itself imposed on defendant the burden of showing that her title had been transferred to him.

23. In a suit to quiet title and set aside a former judgment in which the title to the real estate had been quieted in defendant, where plaintiff alleged and proved ownership in fee prior to the bringing of the former action, the presumption that she continued to remain the owner making it incumbent on defendant to show that her title had been transferred to him, the former judgment was not admissible for that purpose after it had been shown that plaintiff had had no actual notice of that action, and had made no defense thereto, or had any opportunity to present her defense.

24. In a suit to quiet title and set aside a judgment in which the title to the real estate had been quieted in defendant in a former action, it is essential, in order to authorize a court of equity to grant relief, for plaintiff not only to allege and prove that she had a meritorious defense to the former action, but also that the former judgment was fraudulently obtained.

25. In a suit to quiet title and set aside a former judgment, in which the title to the real estate had been quieted in defendant, plaintiff alleged that at the time of the commencement and prosecution of the former action defendant knew that the averments of his complaint therein that he was the owner of the land, and that the plaintiff had no interest therein, were false. Her proof showed that defendant's averments in the former action were in fact false, and she made reasonable efforts to show that defendant had no plausible grounds for making the false

avermments, to which efforts defendant successfully objected. *Held*, that the court was warranted in finding that the false statements were willfully false, it appearing that defendant had the ability to show the fact as to whether they were willfully made, but simply stood mute.

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Suit by Susan H. Parsons against H. F. Weis to quiet title and set aside a judgment. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Stearns & Sweet, for appellant. Hendrick & Wright, for respondent.

PER CURIAM. In February, 1895, H. F. Weis, the appellant herein, commenced an action against the plaintiff and 31 others in the superior court of the county of San Diego to obtain a judgment quieting his title as against them to certain lands in that county, and declaring that the defendants had no estate or interest therein. Service of the summons upon the defendants was made under an order for its publication, and for the purpose of obtaining such order an affidavit by Sylvester Kipp, the attorney for Weis, was presented to the court, in which he stated that the plaintiff herein resided at Chicago, Ill.; that he did not know the residence of many of the other defendants (naming them); that he had made diligent search and inquiry for each of them, and that they, including the plaintiff herein, "cannot be found within the state of California." The court thereupon made an order for the publication of the summons in the San Diego Weekly Union, and directed that a copy of the summons and complaint be deposited in the post office at San Diego, addressed to the plaintiff herein at Chicago, Ill. After the expiration of the time for which the publication was ordered, an affidavit of the due publication of the summons, and also an affidavit of the deposit in the post office at San Diego of a copy of the summons and complaint "directed to Susan H. Parsons, Chicago, Illinois," was filed, and the default of the defendants entered, and on June 15, 1895, judgment was entered in favor of Weis as prayed by him.

The present action was brought by the plaintiff to have it adjudged that she is the owner of the lands described in the complaint herein—the same being a portion of those included in said judgment—and that the defendant Weis has no estate or interest therein, and that the said judgment in his favor be declared void as against her. In support of her claim that the judgment is void, she alleges in her complaint that the affidavit of Kipp for an order for the publication of the summons was not true; that she never resided at Chicago; that at that time and ever since she has lived in the city

of Des Plaines, in the state of Illinois; that she had never seen a copy of the San Diego Weekly Union, or had any notice of the commencement of the action, or of its pendency, or any notice that the judgment therein had been given until December, 1898. She also alleged that she had at all times since June 5, 1888, been the owner in fee simple of the lands described in her complaint, and that the allegations of Weis in his action against her to the effect that she was not such owner, and also his allegation that he was the owner and entitled to the possession, were wholly false, and were known by him to be false. At the trial the court found that all the allegations of the plaintiff's complaint were true, and rendered judgment declaring her to be the owner in fee of the lands described in her complaint, and that the judgment of 1895 in favor of Weis, declaring that she had no interest therein, and that he was the owner of said lands, is void, and perpetually enjoining him from asserting any right or interest in said property by virtue of said judgment. From this judgment and an order denying a new trial Weis has appealed.

The complaint states only a single cause of action, viz., to quiet the plaintiff's title, as against the defendant, to the land therein described, and, as incidental thereto, for the purpose of making the judgment more effective, to have the instrument under which the defendant asserts title declared void. It was not necessary to allege whether the plaintiff was married or a single woman. The complaint alleges that she is the owner in fee of the land, and, whether she is married or single, she is authorized by the Code to sue alone with reference thereto.

The plaintiff is not interested in the validity of the judgment obtained by Weis in 1895 against any of the defendants except herself. As it was stated in the affidavit for the publication of the summons that she was a nonresident of this state, and her residence was at Chicago, the sufficiency of the showing for a service of the summons upon the other defendants by publication is immaterial.

Whether a judgment is void upon its face is to be determined by an inspection of the judgment roll. A judgment rendered by the superior court is always presumed to have been within its jurisdiction (*In re Eichhoff's Estate*, 101 Cal. 600, 36 Pac. 11); but if it affirmatively appears upon the face of the judgment record that the court did not have jurisdiction of the defendant, its judgment is at all times open to either a direct or a collateral attack. When we speak of a direct attack upon the judgment, we usually refer to some proceeding in the action in which it was rendered, either by a motion before the court which rendered it, or an appeal therefrom; whereas, an attempt to impeach the judgment by matters dehors the record is a

collateral attack. See, also, *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110. An attack upon a judgment on the ground that it was procured by fraud is a direct attack, since the establishment of the fraud shows that no judgment has been rendered. The fraud, however, from which said relief may be given, does not include a judgment regularly obtained upon a fraudulent claim or by false testimony, but it is limited to a fraud in procuring the judgment. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

Under section 412, Code Civ. Proc., the court is authorized to order that the service of the summons may be made by publication "where the person upon whom service is to be made resides out of the state." The jurisdiction of the court to order the service of the summons by publication is brought into exercise by the presentation of an affidavit stating this fact. If this fact is shown by the affidavit, it is not necessary to set forth therein that such person cannot, after due diligence, be found within the state. *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; *Furnish v. Mullan*, 76 Cal. 646, 18 Pac. 854; *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143. If, in addition to this fact, it is shown by affidavit that the residence of the defendant is known, the court, in addition to directing a publication of the summons, must direct a copy of the summons and complaint to be deposited in the post office, "directed to the person to be served at his place of residence." Unless it appear that it was so directed, the record will fail to show a compliance with the order, and the proof of service will be incomplete.

At the time that the judgment of 1895 was rendered, the statute (Code Civ. Proc. § 870) provided that the affidavit for publication of summons and the order directing its publication should form a part of the judgment roll, and these documents are therefore to be considered in determining whether the court obtained jurisdiction of the plaintiff herein. It is recited in said judgment that the plaintiff had been duly served with process, and this recital was sustained by the affidavits of publication of the summons and of depositing in the post office the copy of the summons and complaint in accordance with the order of the court. This recital was a judicial determination by the court of the sufficiency of the service, and is entitled to the same presumption of verity as its determination upon any other issue. *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; *In re Eichhoff*, 101 Cal. 600, 36 Pac. 11. Upon the face of the judgment record it therefore appears that the court had obtained jurisdiction of the plaintiff herein for the purpose of determining the claim of Weis against her, and this judgment against her

must stand unless it can be impeached by some extraneous matter. Being a matter of record, its validity or effect cannot be overcome by evidence of any lower degree. The plaintiff has therefore invoked the aid of equity, setting forth in her complaint and establishing at the trial that the affidavit for the order of publication of the summons was not true in fact, and contends that, as the authority for any constructive service of the summons depends upon the sufficiency of this affidavit, as soon as it was shown that the affidavit was insufficient the authority for the service disappeared, and the court is shown to have had no jurisdiction to hear the complaint or render the judgment.

Courts of equity will relieve a party from an unjust judgment entered against him by another tribunal through fraud, or when, without service of process, either actual or constructive, no opportunity has been given him to be heard in his defense. *Freeman on Judgments*, § 495; *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110. The cases cited on the part of the respondent (*Martin v. Pond* [C. C.] 30 Fed. 15; *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907; *Weber v. Weitting*, 18 N. J. Eq. 441) to the effect that a judgment obtained by publication of the summons is conclusive, notwithstanding the summons was directed to the defendant at a place at which he did not reside, were cases of collateral attack upon the judgment, and therefore are not applicable here. Equity will not, however, set aside the judgment merely upon the ground of some irregularity or defect in the service of process upon the defendant, unless there is also presented some equitable ground for relief. *Connely v. Rue*, 148 Ill. 217, 35 N. E. 824. See, also, *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. It may be conceded that the determination of the court that the plaintiff had been duly served with the summons in the action of Weis was erroneous, but in the absence of any charge of fraud, or other equitable ground for relief, a court of equity would not, for that reason alone, be authorized to annul the judgment entered thereon against her. *Herbert v. Herbert*, 49 N. J. Eq. 70, 565, 22 Atl. 789, 25 Atl. 366. Neither will a complaint be entertained in equity so long as there is a remedy by motion before the original tribunal; but the party may however be entitled to equitable relief if the time for making such motion has expired without any charge of laches or negligence on his part. *Brackett v. Banegas*, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164. The record of the former judgment showing that the summons therein had been directed to the plaintiff in Chicago, and her averment herein that she had never resided in that city, and that she had no notice of the action or of the judgment until December, 1898—more than one year after the judgment was entered—sufficiently relieved her from any charge of lach-

es or negligence during the time within which a motion could have been made in that action to set aside the judgment.

A party who would invoke the aid of equity for relief from a judgment must not only set forth the matters wherein the judgment is unjust or was fraudulently obtained, but he must also allege that he has a meritorious defense to the action. Equity will not interfere to annul a judgment or restrain its enforcement if it is a correct and just determination of the rights of the parties thereto. In *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639, the defendant in the former judgment had not been served with process, but the court refused to enjoin its execution upon the ground that he did not allege that he had a defense to the action. See, also, *Collins v. Scott*, 100 Cal. 452, 34 Pac. 1085; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944. The pleader evidently had this rule in view in preparing the complaint in the present case, for it is alleged therein that the plaintiff was at all times prior to the commencement of the action the owner in fee of the lands described therein; that the allegations of the defendant in his complaint in the former action that he was the owner of said property were wholly false, and were known by him to be false. These allegations were sufficient averments of a meritorious defense to the action of Weis, and, though denied by him, yet, if found by the court to be true, would show an equity entitling the plaintiff to a decree declaring the former judgment to be void. In support thereof it was shown at the trial that on June 5, 1888, the plaintiff became vested with the title to the land described in her complaint, and that she had never sold or conveyed or otherwise disposed of it. The presumption that she continued to remain the owner supported the allegation of ownership in her complaint, and, in the absence of any other evidence, imposed upon Weis the necessity of controverting this evidence, or showing that her title had been transferred to him. The judgment of 1895 was not available for this purpose after it had been shown that the plaintiff had had no actual notice of that action, and had made no defense thereto, or had any opportunity to present her defense. *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10. It was not sufficient, however, for the plaintiff merely to show that Weis had no right or interest in the land at the time he commenced his action. It was also essential, in order to authorize a court of equity to grant her relief from the judgment to also allege and establish at the trial that the judgment was fraudulently obtained. The rule upon this point is well stated in *Irvine v. Leyh*, supra, and quoted with approval by this court in *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep.

143, as follows: "To entitle the plaintiffs to the relief which they asked and procured in this case, it is not enough for them to simply show that Leyh had no valid cause of action against them. They must, at least, show that the claim was founded upon or conceived in fraud, and that the machinery of the law was resorted to for the purpose of enforcing what was known to be a fraudulent demand." The allegations in a complaint may be erroneous as matter of law, or they may be untrue in point of fact, and yet be made in good faith, and in the belief that they are true; but, if they are made with the knowledge on the part of the party making them that they are false, a judgment rendered thereon is fraudulently obtained, and should be set aside and annulled. For a plaintiff to present to a court a complaint whose averments he knows to be false, and to obtain from the court a judgment thereon, in the absence of the defendant, and without any knowledge on his part of the pendency or existence of the action, or opportunity to controvert the allegations of the complaint, or present any defense thereto, is a fraud upon the court in procuring the judgment, and the party against whom such fraudulent judgment is obtained is entitled to relief in equity. Such a judgment is not within the rule declared in *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and in similar cases, where relief is sought from a judgment charged to have been obtained by false testimony upon a controverted issue, and where the parties have had an opportunity to meet and overcome such testimony. To knowingly present to a court a false petition and have it acted upon without the knowledge of the adverse party, is a fraud upon the court. *Aldrich v. Barton*, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43. See, also, *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703. The extrinsic fraud for which a judgment may be set aside is defined by Lord Cairns in *Patch v. Ward*, Law Rep. 3 Ch. App. 207, to be "actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." To meet this requirement, the plaintiff has alleged that the averments of Weis in the former action were not only false, but that he knew that they were false, and the court has found that these charges were true. These allegations, taken in connection with her ignorance of the existence of his action against her, and the circumstances by reason of which she had failed to receive any notice thereof, were sufficient, if established by proof, to justify the court in setting aside the judgment upon the grounds that it had been fraudulently obtained.

The only additional question to be consid-

ered is whether the evidence supports the finding that the appellant, at the time of the commencement and prosecution of the former action, knew that the averments of his complaint that he was the owner of the land and that the present plaintiff had no interest therein, etc., were false. We think that the evidence to support that finding was sufficient. Whether or not the appellant knew of the falsity of the averments in question was a matter peculiarly within his knowledge, and respondent could not well be expected to produce evidence directly showing the condition of his mind on that subject. Greenleaf lays down the rule that, "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." 1 Greenl. Ev. § 79. And while this statement of the rule may perhaps be too broad, still it is beyond doubt the rule that in such case very slight evidence is sufficient. In *Russell v. McDowell*, 83 Cal. 81, 23 Pac. 187, this court said: "The doctrine is well established that slight proof makes out a prima facie case when a negative is to be proved. In all such cases rebuttal is comparatively easy, and is consequently of imperative obligation." Leaving out of view the untrue affidavit that the respondent resided in Chicago, there was sufficient evidence to warrant the court in finding that appellant knew of the falsity of his averments of his title and the want of any title in respondent. In the first place, the actual falsity of these averments was clearly shown, and appellant introduced no evidence, and made no effort whatever, to show that he did not know of such falsity. The situation was therefore one to which we think should be applied the rule stated in *Robins v. Hope*, 57 Cal. 495, that a person is "presumed to know the state of his own title to real property." Moreover, the respondent herself endeavored to get before the trial court the want of any reasonable or plausible pretense for the said averments in the complaint in the former action, but appellant frustrated her efforts in that respect, while offering nothing himself on the subject. She alleged in her complaint that the only claim of title which appellant pretended to have to the premises in contest at the time of the said false averments was founded on two certain tax deeds, which were invalid and of no legal consequence; but appellant moved to strike out of her complaint the allegations as to said tax deeds, and succeeded in having them stricken out by the court. Respondent also procured an order from the court under section 1000, Code Civ. Proc., that appellant and his attorneys give her an inspection and copy of the instruments upon which appellant relied at the time of the trial of the first case, and served such order on his attorneys. In response to this order one of appellant's attorneys handed to respondent's attorney several packages of papers, but said that he did

not give them as containing any evidence or muniment of title upon which appellant had relied at the time of the trial of the former action; that he (appellant's attorney) knew nothing about that, and had never inquired of appellant upon what papers he had relied for his title; that appellant had never told him, and that he (appellant's attorney) had not been his attorney at the time of the former trial, and did not know anything about it. Among the two papers thus delivered were the two tax deeds, which respondent offered in evidence; but upon objection of appellant that it did not appear that appellant had relied on the said deeds they were ruled out. It appears, therefore, that respondent proved that the said averments were, in fact, false; that she made reasonable efforts to show that appellant had no plausible grounds for said false averments, to which efforts appellant objected; and that appellant, having the ability to show whether or not the averments were willfully false, simply stood mute. Considering these things, the court was warranted in finding that the false averments were willfully false.

The judgment and order appealed from are affirmed.

144 Cal. 434

**BANK OF WOODLAND v. PIERCE**, City Treasurer and Tax Collector. (Sac. 1,071.)\*

(Supreme Court of California. Aug. 17, 1904.)

**TAXATION—MORTGAGE ON PERSONALTY—CONSTRUCTION OF CONSTITUTION.**

1. Const. art. 13, § 4, providing that a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and the value of such security shall be taxed to the owner thereof where the property affected thereby is situate, applies only to liens on real estate.

Department 2. Appeal from Superior Court, Yolo County; John O. Gray, Judge.

Injunction suit by the Bank of Woodland against L. R. Pierce, city treasurer and tax collector of the city of Woodland. Judgment for plaintiff. Defendant appeals. Reversed.

Arthur C. Huston and Charles W. Pickard, for appellant. N. W. Hawkins, for respondent.

**HENSHAW, J.** The city of Woodland assessed the Bank of Woodland, the form of the assessment being as follows: "Solvent credits, money loaned on wheat, \$65,000." The Bank of Woodland contested the assessment, and brought injunction to restrain the collection of the taxes. It prevailed in the trial court, and the defendant treasurer and tax collector of the city appeals.

Plaintiff's contention in the trial court was

\*Rehearing denied September 16, 1904.



based upon article 13, § 4, of the Constitution, as follows: "A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." The wheat upon which the major part of the money had been loaned by the bank was actually situated in the county of Contra Costa, and had there been assessed for its full value. Plaintiff contended, under the language of the constitutional provision, that, as the moneys had been loaned upon the security of the warehouse receipts, the transaction constituted a "contract or other obligation by which a debt is secured," and that such contract or obligation must be deemed an interest in the property affected thereby. The rest of the argument then follows naturally and irresistibly. The value of such "security" cannot be assessed either in the city of Woodland or in the county of Yolo, but can be assessed only in the county of Contra Costa, in which the wheat, "the property affected thereby," is situate. So not only the assessment by the city of Woodland could not be upheld, but additionally, as the wheat had been taxed for its full value, to countenance the assessment here attempted to be made would be double taxation.

The strain of this case, therefore, comes upon the construction to be given to the first sentence of article 13, § 4, above quoted. It may be conceded that in its language it is broad enough to include all contracts of lien, hypothecation, pledge, chattel mortgage, and the like affecting personal property; but was such the intention of the framers of the Constitution and of the people in adopting it? We think not. Reference to the constitutional debates will show that no word of

discussion was ever addressed to the subject of personal property. All of the arguments dealt exclusively with the effect of the provision upon the "landowner" and the "money lender." The purpose of the provision, as repeatedly stated, was to relieve the owner of "mortgaged land" or "mortgaged farm" from paying all the taxes, and at the same time to arouse an interest in the hitherto untaxed "money lending class" by making them pay the taxes upon their mortgage security. By the constitutional debates it is established that "mortgage," as used therein, had reference to mortgages upon realty alone; an employment of the word countenanced even in legal usage, where "mortgage" is generally employed and meant to apply to the creation of liens upon real estate, while like liens upon personalty are designated "chattel mortgages." The use of the phrase "deed of trust" following had undoubted reference to those deeds of trust in common use in this state which answer the purpose and have many of the attributes of a strict mortgage upon realty. Under the maxim of *noscitur a sociis* it would thus appear that the remaining terms "contract or other obligation" were inserted to cover any and all possible contracts of lien upon realty which the ingenuity of lawyers might attempt to devise to evade the constitutional requirement, and the belief that such is the real meaning of the section is strengthened when consideration is paid to its subsequent provisions, notably that requiring that the value of the security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate. This, as to real property, is both an understandable and feasible scheme. Liens upon real property, to be effective, must be recorded in the county in which the property is situated. It is therefore quite practicable for the assessor, in making up his rolls, to determine from an inspection of the books of record in the recorder's office what deductions in favor of the owner are to be made from the assessed value, and what assessments are to be charged against the holders of liens thereon. In the case of personal property, except in the few and insignificant instances of recorded chattel mortgages, if the same rule were to be applied, it would be utterly impracticable to tax millions and millions of dollars loaned upon security of this kind. The case at bar itself presents a typical instance of this. It cannot be assessed in the county of Yolo, notwithstanding that it is a solvent credit of the bank there situate and that the money was there loaned, because it must be assessed where the "property affected thereby," namely, the wheat, is situate. The wheat is in the county of Contra Costa. The assessor of Contra Costa has and can have no information of the existence of the loan in some other county, and therefore cannot assess it. San Francisco is the

financial center of this state. Millions of dollars are loaned upon such and like securities, and, if respondent's contention of the construction of the Constitution is to prevail, it must escape taxation. In short, the scheme as to personal property is so utterly impracticable that it would require the compulsion of direct mandate before a court would declare that it could ever have been designedly adopted into the Constitution.

Again, when regard is had to legislative enactments touching the revenue laws and construing the Constitution, it will be found that that co-ordinate and independent branch of government has construed this section of the Constitution as here set forth. And while such construction is, of course, never binding upon courts, it is entitled to a certain amount of persuasive force. Thus, Pol. Code, § 3617, subd. 3, affords a direct legislative interpretation of the first sentence of the constitutional section in question, and reads as follows: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged for the payment and discharge thereof, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." And subdivision 6 declares: "The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed." And not alone has the legislative branch of the government thus voiced its interpretation of the Constitution, but the executive department has uniformly adopted it, and it has been the universal practice of assessors to pursue the course here followed. We conclude, therefore, that the provisions of the constitutional section under consideration have reference to land, and that the term "property" applies to land and estates therein, and does not apply to the assessment and taxation of personal property. For the foregoing reasons it follows, since credits have their situs at the domicile of the creditor, and are taxable at the place of his domicile (*Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696), that these credits of the Bank of Woodland, situated within the city of Woodland, were properly assessed and taxed by the municipality.

The judgment appealed from is therefore reversed.

We concur: McFARLAND, J.; LORIGAN, J.

144 Cal. 334

**LAW v. CITY AND COUNTY OF SAN FRANCISCO et al.** (S. F. 3,870.)

(Supreme Court of California. Aug. 15, 1904.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONSTITUTIONAL LAW—CHARTER—CONSTRUCTION—ORDINANCE—TITLE—SUBJECTS EMBRACED—ELECTION.

1. The Charter of San Francisco, art. 2, c. 1, § 2, providing that an ordinance shall embrace but one subject, which shall be expressed in its

title, and that, if any subject be embraced in an ordinance not expressed in its title, such ordinance shall be void as to so much thereof as is not expressed in its title, is directory to the legislative body alone, and not a subject of judicial cognizance, there being no charter requirement that the provisions thereof are mandatory and prohibitory.

2. Under the Charter of San Francisco, art. 2, c. 1, § 2, providing that an ordinance shall embrace but one subject, which shall be expressed in its title, an ordinance on the subject of incurring a bonded indebtedness for ten distinct species of public improvements, which are separately set forth in the title and in the ordinance itself, is valid.

3. The Charter of San Francisco, art. 2, c. 2, § 22, providing that the board of supervisors shall have power to provide in the annual tax levy for a special fund to be used in the construction of a general system of drainage and sewerage; and section 29, art. 16, providing that when the supervisors shall determine that the public interest requires the construction or acquisition of any permanent improvement or improvements, the cost of which, in addition to the other expenses of the city, will exceed the income and revenue provided for any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors at a special election to be held for that purpose only—are in *pari materia*.

4. Under the Charter of San Francisco, art. 16, § 29, providing that when the supervisors shall determine that the public interest requires the construction of any permanent "improvement or improvements," the cost of which, in addition to other expenses of the city, will exceed the income for any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors of the city at a special election to be held for that purpose only, the words "improvement or improvements" include the construction of sewers, and hence a contention that section 22, c. 2, art. 2, to the effect that the board shall have power to provide in the annual tax levy for a special fund to be used in the construction of a special system of drainage and sewerage, is the exclusive mode by which sewers may be constructed within the city, is untenable.

5. The acquirement of lands for public parks for children's playgrounds is within the power of the municipal authorities of San Francisco.

6. Under Const. art. 2, § 6, providing that the charters of cities heretofore or hereafter organized shall be subject to the general laws, except in municipal affairs, San Francisco has power to incur a bonded indebtedness for the erection of new schoolhouses, of improvements to existing schoolhouses, for the acquisition of land for these purposes, and of additional land for playgrounds of established schools.

7. In case of a conflict between the charter provisions of San Francisco and the general improvement act of 1901 (St. 1901, p. 27), the charter provisions supersede the requirements of the general improvement act.

8. The Charter of San Francisco, art. 2, c. 1, § 21, providing that, except as otherwise provided in the Constitution of the state, or as otherwise provided in the charter, every ordinance for the purchase of land of more than \$50,000 in value must be submitted to the electors at the election next ensuing after the adoption of such ordinance; and section 29, art. 16, providing that when the supervisors shall determine that the public interest requires the acquisition of any land or lands, the acquisition of which, in addition to other expenses, will exceed the income and revenue provided for in any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors at a special election to be held for that purpose—are in *pari materia*.

9. The Charter of San Francisco, art. 16, § 29, providing that when the supervisors shall determine that the public interest requires the acquisition of any land the cost of which, in addition to other expenses, will exceed the revenue provided for in any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors at a special election to be held for that purpose, is mandatory, and hence a contention that the ordinance must be submitted at the election next ensuing after its adoption under article 2, c. 1, § 21, is untenable.

10. As the assessment roll of San Francisco is \$420,000,000, a contention that an ordinance providing for the incurring of a bonded indebtedness of \$17,771,000 may exceed 15 per cent. of the assessed value of all real and personal property therein is without merit.

11. The Charter of San Francisco, § 11, art. 12, provides that bonds issued for public improvements shall be issued in denominations of not less than \$10 or greater than \$1,000. Section 10 of the same article provides that after the expiration of 10 days from the publication of the ordinance calling for a special election the supervisors shall cause to be published a notice of such special election, specifying the purpose for which the indebtedness is to be incurred, and the number and character of the bonds to be issued. *Held*, that the fact that in some instances the denominations of the bonds were changed in the ordinance providing for their issuance, sale, and redemption from those in the ordinance authorizing the publication of notices of the special election was immaterial, it appearing that in no instance were the denominations less than \$10 or greater than \$1,000.

12. Under the Charter of San Francisco, art. 12, § 4, providing that the board of supervisors shall submit the question of bonded indebtedness for public improvements at a special election called for that purpose, and that at least two-thirds of the electors voting at such election shall be necessary to secure the acquisition of such public utilities and to warrant the issuance of municipal bonds therefor, a favorable two-thirds vote of all the votes cast at the election is required.

13. Where several propositions for incurring bonded indebtedness for public improvements are separately submitted to the electors, under Charter of San Francisco, art. 12, § 4, the failure of one proposition to carry does not affect the validity of others which had received the requisite number of votes.

**In Bank.** Appeal from Superior Court, City and County of San Francisco; M. O. Sloss, Judge.

Action by Herbert E. Law against the city and county of San Francisco and others. From a judgment for defendants, plaintiff appeals. Reversed in part.

Henry C. McPike and Edgar C. Chapman, for appellant. Percy V. Long, City Atty., and W. I. Brobeck, Asst. City Atty., for respondents.

**HENSHAW, J.** Plaintiff, a taxpayer of the city and county of San Francisco, brought this action to restrain the municipal authorities from issuing any of the \$17,000,000 of bonds voted for municipal improvements. This bond issue was declared carried at an election held for the purpose, and the petitioner's attack is directed principally to alleged irregularity of the proceedings of the board of supervisors. A demurrer to the petition was sustained without leave to

amend. Judgment thereupon followed in favor of defendants, and plaintiff appeals. No complaint is made of the court's refusal to allow amendments to the petition, but it is contended that the petition states a cause of action, and that the order sustaining the demurrer was therefore erroneous.

1. The first point raised against the validity of the proposed issue is that the ordinance providing therefor is void in attempting to legislate upon more than one subject, namely, the issuance of bonds for ten different distinct purposes or subjects. The title of the ordinance in question is as follows:

"Bill No. 1,283.

"Ordinance No. 1,114.

"Providing for the issuance, sale and redemption of bonds of the city and county of San Francisco to the amount of seventeen million seven hundred and seventy-one thousand dollars (\$17,771,000) for the following purposes, to wit: One million dollars (\$1,000,000) for the construction of a new City and County Hospital; seven million two hundred and fifty thousand dollars (\$7,250,000) for the construction of a sewer system; three million five hundred and ninety-five thousand dollars (\$3,595,000) for the construction of new school houses, of improvements to existing school houses, the acquisition of lands for erecting thereon new school houses, and also for additional lands for playgrounds for established schools; one million six hundred and twenty-one thousand dollars (\$1,621,000) for the repair and improvement of the accepted streets of the city and county; six hundred and ninety-seven thousand dollars (\$697,000) for the construction of a new county jail, to construction of additions to the Hall of Justice, and the acquisition of lands for the construction thereon of said county jail, and additions to said Hall of Justice; one million six hundred and forty-seven thousand dollars (\$1,647,000) for the construction of a building to be used as a 'public library and reading rooms' and the acquisition of land for the construction thereon of said building; seven hundred and forty-one thousand dollars (\$741,000) for the acquisition of lands for public parks to be used as children's playgrounds; three hundred and thirty thousand dollars (\$330,000) for the acquisition of lands for the extension of Golden Gate Park northerly between Thirteenth and Fourteenth avenues to the Presidio Military Reservation; five hundred and ninety-seven thousand dollars (\$597,000) for the acquisition of lands for an additional public park in that portion of the city and county known as 'Telegraph Hill'; two hundred and ninety-three thousand dollars (\$293,000) for the acquisition of lands for an additional public park in that portion of the city and county known as the 'Mission,' in accordance with the result of a special election held in said city and county September 29, 1903."

The charter of the city and county of San Francisco provides (article 2, c. 1, § 2): "An ordinance shall embrace but one subject, which shall be expressed in its title. If any subject be embraced in an ordinance and not expressed in its title, such ordinance shall be void as to so much thereof as is not expressed in its title." This provision of the San Francisco charter has been taken verbatim from section 24, art. 4, of the present Constitution of this state, which in turn was adopted from section 25 of article 4 of the earlier Constitution of 1849. This provision of the Constitution of 1849 repeatedly came before this court for construction, and was uniformly held to be directory merely, and persuasive only to the minds and consciences of the legislators. "We regard this section of the Constitution as merely directory." *Washington v. Page*, 4 Cal. 388. "Except in so far as the provision may influence the official action of individual members of the Legislature, the Constitution shall be read as if the provision referred to had never been written in it." In the *Matter of the Boston M. & M. Co.*, 51 Cal. 624. Nor was this construction peculiar to this state. In other states where like provisions existed the same construction was given by the courts. *Shields v. Bennett*, 8 W. Va. 85; *Pim v. Nicholson*, 6 Ohio St. 176. When the Constitution of 1879 became the organic law of the state, it contained a section not found in the earlier one. Section 22, art. 1, declares that "the provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise." Under the compulsion of this section alone this court declared the provision to be mandatory. *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251. There is no mandate in the charter of the city and county of San Francisco corresponding to that of the Constitution of this state, and therefore it might well be sufficient upon this subject to declare, in accordance with the uniform construction of such provisions, that it is directory to the legislative body alone, and not a subject of judicial cognizance. But it may be further added that, even if the provision be regarded as mandatory, the ordinance in question is not violative of it. But one subject is embraced in the ordinance—that of the incurring of a bonded indebtedness for specified purposes. The purposes, it is true, are distinct, and are set forth (as properly they should be) distinctly and separately in the title and in the ordinance itself; but they are all germane to the general subject to be submitted to the voters—the expediency or inexpediency of bonding the city for specified public improvements. The purpose of the enactment, as declared by this court, is "merely to prevent legislative abuses or the passage of acts bearing misleading or deceitful titles, or titles which give no indication of the matters contained therein."

*Ex parte Liddell*, *supra*; *Beach v. Von Detten*, 139 Cal. 465, 73 Pac. 187; *People v. Mullender*, 132 Cal. 220, 64 Pac. 299; *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492. "It was never designed," says the Supreme Court of Nebraska, "to place the Legislature in a straightjacket, and prevent it from passing laws having but one object under an appropriate title." And "the title of an act is not open to attack because it is comprehensive in its scope, provided the numerous provisions having one general object are germane to the single subject of the act." *Abell v. Clark*, 84 Cal. 226, 24 Pac. 383; *People v. Parks*, 58 Cal. 624; *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. The Circuit Court of the United States in *Geer v. Commissioners of Ouray County*, 97 Fed. 435, 38 C. C. A. 250, has well said: "The object of this constitutional provision was twofold; it was to prevent surreptitious legislation, the insertion of enactments in bills that were not indicated by their titles, and to forbid a treatment of incongruous subjects in the same act. It was never intended to prevent the Legislature from treating all the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to its general subject." And in the numerous authorities which that court cites in support of its declaration will be found many cases evidencing a much wider departure from the letter of the provision than is shown by the ordinance in question, while that case itself is identical in principle with the one at bar. There the act called for the issuance of bonds for two distinct purposes (one to refund an existing indebtedness evidenced by bonds, and the other to issue bonds to fund an indebtedness evidenced by judgments); and it was held (as in this case it is held) that the distinct subjects were germane to the general one, namely, the proposition of incurring or not incurring a bonded indebtedness for indicated purposes.

2. It is contended that so much of the ordinance as provides for the issuance of bonds for a sewer system is void. Herein the contention is that section 22, art. 2, c. 2, of the charter of San Francisco, provides as follows: "The board of supervisors shall have power to provide in the annual tax levy for a special fund to be used in the construction of a general system of drainage and sewerage." It is argued that this is the declaration of a mode, and of the exclusive mode, by which sewers may be constructed within the city. But all the provisions of the charter, under familiar rules of construction, are to be taken as a whole, and are to be construed harmoniously. Section 29 of article 16 of the same instrument provides: "When the supervisors shall determine that the public interest requires the construction or acquisition of any permanent

building or buildings, improvement or improvements, land or lands, the cost of which, in addition to the other expenses of the city and county, will exceed the income and revenue provided for the city and county for any one year, they must by ordinance submit a proposition or propositions to incur a bonded indebtedness for such purpose or purposes to the electors of the city and county at a special election to be held for that purpose only," etc. The phrase "improvement or improvements" includes the construction of sewers. This is not even debatable, for, as was said in *McHugh v. San Francisco*, 182 Cal. 381, 64 Pac. 570: "By the facts disclosed upon this appeal there is no question whatever but that bonded indebtedness is to be created for the purpose of acquiring 'permanent municipal buildings and improvements.' Schoolhouses, sewers, etc., come directly within that classification." Section 29, above quoted, in the case last cited was expressly interpreted by this court as conferring power upon the municipality to issue bonds for sewer construction. The simple and natural construction—indeed, the obvious construction—of the two sections is that they are not in conflict, but afford distinct methods to be used within the discretion of the supervisors as the circumstances justify—the one to build such sewers as may be built out of funds derived from the annual revenues within the dollar limit; the other, where the expenditure will exceed such an amount as thus may be reserved, to issue bonds for the construction of a general system of sewerage and drainage.

3. The ordinance provided "for the acquisition of lands for public parks to be used as children's playgrounds." Appellant does not contest the right of the municipal authorities to acquire lands for public parks, but insists that to acquire lands for public parks for children's playgrounds is beyond the power of the municipal authorities, and therefore void. No person will question the wisdom or benefit of such acquisition in a densely crowded municipality like San Francisco, and such playgrounds are the breath of life to thousands and tens of thousands of the city's children. No authority is cited by appellant, and it may be confidently asserted that none can be found, sustaining the contention that the use of such parks for such purposes is in any wise unlawful. The right to acquire the land for park purposes being undisputed, if after their acquisition one should contest the use proposed to be made of them upon the ground that it would be illegal, and such contention were sustained, the result would be merely to limit the use strictly to park purposes. We are of the opinion that lands may be acquired for park purposes, and that it is a part of park purposes to devote some of those lands to children's parks. The general public is not thereby denied access to, and the use of, these lands, and with as

little justice can be heard to complain of the use made of them as could the children, because in other parks were provided for adults pleasures by way of speed tracks, automobile roads, and bicycle paths, in the enjoyment of which they could not share.

4. It is contended that the provisions of the ordinance calling for a bonded indebtedness for the erection of new schoolhouses, of improvements to existing schoolhouses, for the acquisition of land for these purposes, and of additional land for playgrounds of established schools, are invalid "for the reason that education is a state affair, and not a municipal affair." No authority is cited in support of this contention, but, to the contrary, in the case of *Wetmore v. City of Oakland*, 99 Cal. 151, 33 Pac. 769, it is decided that the above-named objects are "municipal affairs" within the meaning of section 6, art. 2, of the Constitution, which provides that the charters of cities heretofore or hereafter organized shall be subject to and controlled by general laws, except in municipal affairs. The language of this court in *Wetmore v. City of Oakland* is as follows: "As schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor, or buildings for its fire engines; and the school buildings, when so erected, are as fully municipal buildings as are its engine houses and hospital buildings." It follows, therefore, that the city authorities were justified in calling for a bonded indebtedness for the indicated purposes, and that the charter provisions in this regard supersede the requirements of the general improvement act of 1901 (St. 1901, p. 27, c. 32), should conflict be found to exist between the two.

5. It is contended that the ordinance providing for bonds for the acquisition of lands is void for a failure to follow the provisions of section 21, c. 1, art. 2, of the charter, as follows: "Except as otherwise provided in the Constitution of the state, or as otherwise provided in this charter, every ordinance \* \* \* for the purchase of land of more than fifty thousand dollars in value, must be submitted to the vote of the electors of the city and county at the election next ensuing after the adoption of such ordinance." But section 29 of article 16 of the same charter declares: "When the supervisors shall determine that the public interest requires the construction or acquisition of any \* \* \* land or lands, the cost of which in addition to the other expenses of the city and county will exceed the income and revenue provided for the city and county for any one year, they must by ordinance submit a proposition or propositions to incur a bonded indebtedness for such purpose or purposes to the electors of the city and county at a special

election to be held for that purpose only." The bond proposition was submitted to the electors in accordance with this section at a special election called for that purpose. The contention of appellant is that the question of the acquisition of lands should have been submitted at the next ensuing regular election following the adoption of the ordinance. These charter provisions, as we have said, are to be read and construed in connection with each other, and so reading them there is no conflict between the provisions, and their meaning is quite plain. Whenever the public interest requires the acquisition of any land, and its purchase will exceed the moneys available out of the income of any one year, the supervisors "must" submit the proposition to incur a bonded indebtedness for this purpose at a special election held for that purpose only, but where funds are available from the income of any one year for this purpose (so that a bonded indebtedness is not necessary), and where the purchase price will exceed the sum of fifty thousand dollars, the conditions are radically changed. The money is in hand and available, and there is to be submitted to the voters merely the question of the wisdom and propriety of buying the land. To resolve this question, a special election becomes an unnecessary expense, and it is therefore provided that it shall be determined at the municipal election next following.

6. It is next urged that the bonded indebtedness thus incurred may exceed the 15 per centum of the assessed value of all real and personal property in San Francisco, thus violating the provisions of section 9, art. 12, of the charter; but, as the assessment roll of San Francisco exceeds \$420,000,000, and as 15 per centum of this would be \$63,000,000, and as the contemplated bond issue is but \$17,771,000, it is not apparent how appellant's contention in this regard can be upheld.

7. It is contended that the proposed bond issue is void upon the ground that there is a variance between the number and denomination of the bonds called for by Ordinance No. 1,114 and those contemplated by Ordinance No. 956. Ordinance No. 1,114 provided for the issuance, sale, and redemption of the bonds, while Ordinance No. 956 provided for notice of a special election called to authorize their issuance. By section 11 of article 12 of the charter it is provided: "The bonds so issued shall be exempt from all taxation for municipal purposes, and shall be issued in denominations of not less than ten dollars nor greater than one thousand dollars, and preference in the sale and allotment thereof shall be given to subscribers for the smallest amount and lowest denominations." In section 10 of the same article, it is provided that, after the expiration of 10 days from the publication of the ordinance calling for a special election "the supervisors shall cause to be published daily for not less

than two weeks in the official newspaper a notice of such special election. Such notice shall specify the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof." All this was done. The same number of bonds (11,963) of all denominations is called for by both ordinances. The number of the bonds to be issued for each separate purpose is the same in both ordinances, but in some instances the denominations of the bonds were changed, though in no instance did the denomination fail to conform to the requirements of section 11, art. 12, above quoted, namely, that no bonds shall be issued of a less denomination than \$10 or greater than \$1,000. The variance complained of is immaterial, and in the case of *Derby v. The City of Modesto*, 104 Cal. 522, 38 Pac. 900, where the same question arose, was so declared to be. The provisions of section 9, art. 12, of the charter of San Francisco, to the effect that the notice of election shall state the number and character of the bonds to be issued, is taken without substantial change from section 3 of the municipal improvement act of 1889 (St. 1889, p. 400). The city of Modesto issued and sold bonds under this act for the construction of sewers and a water system. A taxpayer resisted upon the ground "that the board had no power to change the number and denomination of the sewer bonds." It was made to appear that the ordinance authorizing the publication of notice of the special election stated the number of bonds proposed to be issued for that purpose to be 50, denomination \$500 each. After it was voted to issue the bonds, the number was changed by a subsequent ordinance to 40 bonds of \$500 each and 20 bonds of \$250 each. It thus appears that in the *Modesto* case the departure was much more marked, in that the action of the board of supervisors took place after the people had voted for the issuance of a specific number of bonds of a specific denomination, whereas in this case the number and total amount of the bonds in each case remained the same, and such changes as were made in the denominations were made before election, and duly submitted to and authorized by the voters. This court said (in the *Modesto* case): "The amount of the bonds or of the indebtedness to be incurred for the specific purpose was not changed. Those directions which are not of the essence of the thing to be done, and by the failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory. *Sutherland on Statutory Construction*, § 447. The change did not affect the validity of the bonds, and, as no greater burden is imposed upon the taxpayers, the appellant cannot complain."

8. It is last contended that the proposition

to issue bonds for the acquisition of Telegraph Hill did not receive the assent of two-thirds of the voters. The election commissioners found that at the election 27,308 votes had been cast, of which 17,932 votes were cast in favor of the issuance of bonds for the acquisition of Telegraph Hill, and 8,187 votes were cast against such issue. The result is that 1,189 voters failed to register their will in the matter of the issuance of the Telegraph Hill bonds. While it is admitted that more than the necessary two-thirds of the vote of those voting upon the question was cast in favor of the acquisition, it is contended that there should have been two-thirds of the 27,308 votes, and that otherwise the bond issue was not carried. Universally courts have been reluctant to defeat the fair expression of the popular will in elections, unless the plain mandate of the law permits of no alternative. So, where the law of Kansas required that in case of the purchase of property in excess of a given value the proposition should be submitted to a vote of the people at some general election, and a majority of all the votes cast at a poll open for that purpose must be in favor of the purchase, it is held by the United States Circuit Court sufficient if the proposition receive a majority of all the votes cast upon that subject, although not a majority of all the votes cast at that election. *Armour Bros. Packing Co. v. Board of County Commissioners* (C. C.) 41 Fed. 321. So, also, where the Constitution of Missouri provided that the General Assembly shall not authorize any county, city, or town to loan its credit to any company, association, or corporation "unless two-thirds of the qualified voters of such county, city, or town at a regular or special election to be held therein shall assent thereto," and where two-thirds of the qualified voters did not assent thereto, but two-thirds of those voting did assent thereto, the Supreme Court of the United States decided that the voters who absented themselves were presumed to assent, and that such election was duly carried upon the favorable vote of two-thirds of those voting. *County of Cass v. Johnson*, 95 U. S. 360, 24 L. Ed. 416. And in our own state, construing the constitutional provision (article 11, § 18) to the effect that no county shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, and where an election to pass upon the question of incurring a bonded indebtedness was called for and held at the same time with a general election, and the returns showed that two-thirds majority of those voting at the general election did not vote in favor of incurring the bonded indebtedness, but that two-thirds of those

who voted upon the proposition did so vote, although at the general election and at the bond election the same ballot was used, this court held that the bond election was a special election, and that the votes cast for and against the issuance of the bonds were to be treated as all of the votes cast at that election. But, upon the other hand, where the meaning of the law is plain, and permits of but one construction, naught is left for a court to do but to give legal effect to its provisions. Thus, in *City of Santa Rosa v. Bower*, 142 Cal. 299, 75 Pac. 829, this court, by the language of the law, which in terms required that the proposition ordered submitted at a general or special election must receive the assent of the majority of the qualified electors voting at that election, was reluctantly compelled to hold that the proposition there under consideration had not been carried, notwithstanding the fact that it had received the requisite majority of those voting upon the proposition. A like situation is presented by the matter under consideration. Section 4, art. 12, of the charter provides that the board of supervisors shall submit the questions at a special election called for the purpose, and "at least two-thirds of the electors voting at such special election shall be necessary to secure the acquisition of such public utility or utilities, and to warrant the issuance of municipal bonds therefor." It scarcely admits of doubt that this section contemplates and requires a favorable two-thirds vote of all the votes cast at the election, and that, accordingly, the proposition to issue bonds for the acquisition of Telegraph Hill failed to carry. Whatever doubt, however, a reading of this section might leave in the mind is absolutely removed when consideration is paid to the fact that section 4 of article 12, as originally adopted, declared that "at least two-thirds of the electors voting thereon at such election shall be necessary to secure such acquisition and to warrant the issuance of municipal bonds therefor." Under the earlier charter provision it would have been quite permissible to hold that the law meant that each proposition severally was to receive a two-thirds vote of those voting upon it, but, *ex industria*, this language has been changed so as to require a two-thirds vote of those voting at the special election. Since these propositions were submitted separately, as the charter contemplates, the failure of one to carry does not affect the validity of the others which have received the requisite number of votes.

The judgment of this court therefore is that the judgment of the trial court is affirmed as to all saving the ninth cause of action pleaded in plaintiff's complaint. As to that cause of action, touching the acquisition of Telegraph Hill for a public park, the demurrer of defendants to be overruled, and, if the proofs of plaintiff upon trial shall correspond



to the allegations of the complaint, then upon this cause of action to enter its judgment in accordance with the prayer of the complaint.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

144 Cal. 374

O'DEA v. MITCHELL et al. (L. A. 1,259.)  
(Supreme Court of California. Aug. 15, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT ASSESSMENT—VALIDITY—STATUTE—CONSTITUTIONAL LAW—ESTOPPEL—ENGINEER'S CERTIFICATE—ENGINEER'S ESTIMATE—SUFFICIENCY—LIEN—FORECLOSURE.

1. Under the Vrooman act (St. 1891, p. 198, c. 147, § 3), providing that when, in the opinion of the city council, the contemplated work is of more than local or ordinary public benefit, the council may make the expense of such work or improvement chargeable on a district, which shall be declared in the resolution of intention to be the district benefited by the work or improvement, it is not mandatory on the city council to establish a district of larger area than that of the lots fronting on the streets, though in the resolution of intention it was declared that such work was of more than local and ordinary public benefit.

2. Under the Vrooman act (St. 1891, p. 198, c. 147, § 3), providing that when, in the opinion of the city council, the contemplated work is of more than local or ordinary public benefit, the council may make the expense of such work or improvement chargeable upon a district, which shall be declared in the resolution of intention to be the district benefited by the work or improvement, and that objections to the extent of the district may be made in writing by interested parties within 10 days after the expiration of the time of publication of notice, and that, if the objections be sustained, all proceedings shall be stopped, the failure of an aggrieved party to seek the remedy provided in the statute, and permitting the work to progress to completion without objection, estops him to make the objection that the expense was made a charge on a district which included only the lots fronting on the street.

3. Such failure also estops him to make the objection that the assessment is repugnant to the fourteenth amendment of the federal Constitution on the ground that the lots which should have been included in the district were not included, and that therefore excessive and unjust burdens were placed on the lots which were assessed, thus violating the principle of equality.

4. In an action to foreclose the lien of a city assessment, an objection that the assessment is repugnant to the fourteenth amendment of the federal Constitution on the ground that the lots which "should" have been included in the district were not included, and that therefore excessive and unjust burdens were placed on the lots which were assessed, thus violating the principle of equality, is not available, it not appearing from the record that any particular lots or portions of land not included in the assessment district should have been so included, and there being only a general statement that the work was "of more than local and ordinary benefit."

5. Under the act of February 27, 1893 (St. 1893, p. 33, c. 21, § 2), providing that a city council may determine as to the issuance of bonds for the payment of a street work, when it finds on estimates of the city engineer that the cost will exceed \$1 per front foot along each line of the street, a report of the city engineer that an estimated cost of the work is \$2.95 per

front foot is a sufficient estimate to validate proceedings for assessment where no bonds are issued.

6. Under St. 1891, p. 205, c. 147, § 9, relating to assessments for street improvements, and providing that the warrant, assessment, and diagram, together with the certificate of the city engineer, shall be recorded, but without any provision that the engineer shall make such a certificate, that there is none is immaterial.

7. St. 1891, p. 203, c. 147, § 7, subd. 10, requiring a city engineer to make a certificate, applies only to cases where the owner of the lot assessed for street improvements does the work himself.

8. St. 1891, p. 206, c. 147, § 34, providing that every certificate signed by the city engineer in relation to street improvements shall be prima facie evidence in the courts of the truth of its contents, does not require the city engineer to make a certificate.

9. A certificate of the city engineer, showing the quantum of the grading for street improvements, and that the work was done in accordance with the lines and grades, is sufficient to sustain the validity of an assessment for street improvement, though there is no express statement in the certificate that the engineer examined the work or measured it.

10. A lien for street improvements is on the property, and is paramount to the lien of a mortgage.

11. Under the act approved March 9, 1893 (St. 1893, p. 89, c. 79), providing that no change of an established grade shall be ordered except on petition of the owners of a majority of the property affected by the proposed change of grade, the validity of a petition signed by a majority of the owners of the land which at the time of the petition was to be affected by the proposed change of grade as to which the change was asked by the petitioners is not affected by the fact that subsequently the council created a larger district for the purpose of assessment.

12. An owner of land, who joins in a petition to change the grade of the street on which his land fronts, is not injuriously affected, or in any way aggrieved, or deprived of any constitutional right, because the order for the change of grade included a larger district than that contemplated by the petition, it appearing that his burdens were lightened, in that the order as changed compelled others to share in the expense, if any, incident to the change.

Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Michael F. O'Dea against J. B. Mitchell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hunsaker & Britt, for appellants. Frank G. Finlayson, for respondent.

McFARLAND, J. This is an action to foreclose the lien of a certain street assessment against lots of defendant Mitchell for certain work done on Sixth street, between Fremont avenue and Bixel street, in the city of Los Angeles. Judgment was for plaintiff in the court below, and defendants appeal from the judgment.

We do not think that any of the contentions of appellants for a reversal are maintainable. No doubt interested parties sometimes succeed in forcing premature improvements, and imposing on lot owners burdens

¶ 10. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1225.



not, at the time, called for by the conditions surrounding the property affected. But necessary street improvements can be practically accomplished only by a law under which they can be enforced; and while the property owner may demand that all material requirements of the law be followed, the law itself should not be frittered away by sustaining objections to trivial irregularities and slight negligent omissions of public officials not including anything material. Such a course would only result in more onerous burdens in the end, for bids for the work would be at higher rates if contractors had to run the hazard of losing all compensation if a little slip in a matter of no material importance would make the assessment void.

1. Appellants contend that all the proceedings upon which the assessment was based were void, because in the resolution of intention to have the work done it is declared that such work was "of more than local and ordinary public benefit," and at the same time the expense was made chargeable on a district which included only the lots fronting on the street. The said resolution really does not show on its face what the district created was; but, at all events, the matter of the size of the district is not jurisdictional. Section 3 of what is known as the "Vrooman Act," which is the statutory proceeding relied on by appellants (St. 1891, p. 198, c. 147), is not mandatory on the city council to establish a district of larger area than that of the lots fronting on the streets. It merely provides that when, in the opinion of the council, the contemplated work "is of more than local or ordinary public benefit," the council "may make the expense of such work or improvement chargeable upon a district," which shall be declared in the resolution of intention "to be the district benefited by said work or improvement" (German Sav. & L. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067, and cases there cited); and, under any view, the mere omission of lots from an assessment does not make the assessment void (Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125). Moreover, the section provides that "objections to the extent of the district" may be made in writing by interested parties within 10 days after the expiration of the time of publication of notice; that the clerk shall lay such objection before the council, and the council at its next meeting shall fix a time for hearing the objections; that the clerk shall notify the objectors; that the council shall hear and pass upon the objections, and its decision shall be final and conclusive; that, if the objections be sustained, all proceedings shall be stopped, but, if overruled, the proceedings shall continue. This is a remedy which the party interested should, at least in the first instance, avail himself of; and appellants, not having done so, and having allowed the work to progress and to be completed without objection, cannot now be heard to make the objection which they

should have made before the work commenced, and at the time and in the manner prescribed in the statute, where the error, if any, could have been corrected. See cases above cited. "The aggrieved owner should exhaust the special remedies provided before he applies to the court," and "should not thus sit by and see his property improved, and expect to escape the expense." Harney v. Benson, 113 Cal. 814, 45 Pac. 687.

2. Appellants contend that the assessment here involved is in conflict with the fourteenth amendment to the Constitution of the United States, because lots which should have been assessed were not included in the district, and therefore excessive and unjust burdens were placed upon the lots which were assessed; thus violating the principle of equality. But, for the reasons above stated, if for no other, this contention cannot be maintained. Appellants, having failed to invoke the remedy provided by the statute, are now in no position to assert rights, if any they have, which could have been secured by that remedy. Furthermore, it does not appear in the record in this case that any particular lots or parcels of land not included in the assessment district should have been so included. The only thing touching that matter is the general statement in the petition of intention that the contemplated work was "of more than local and ordinary benefit." If any other particular lots had been included, the owners thereof might possibly have made valid "objections to the extent of the district," and shown that the lots should not have been included therein. What is there in the record to show the court that any other particular lot or area should have been put in the district?

3. By section 2 of an act "to provide a system of street improvement bonds," approved February 27, 1893 (St. 1893, p. 33, c. 21), it is provided that the city council may determine that certain serial bonds may be issued for the payment of street work, when the council find "upon estimates of the city engineer" that the cost will exceed "one dollar per front foot along each line of the street," etc. In the case at bar the city engineer reported to the council that "the estimated cost of said work is \$2.95 per front foot," and it is contended that the whole proceeding is invalid because this report is not full enough to meet the requirements of the statute, stress being laid on the use of the plural word "estimates." It is not entirely clear how this question can arise here, for it would seem to involve at most only the validity of any bonds that might be issued in payment of the assessment, and there is no issue here as to the validity of bonds. The act provides that, if the owner of a lot assessed shall notify the treasurer that "he desires no bond to be issued for the assessments" on his land, "no such bonds shall be issued"; and in the case at bar appellant

Mitchell, the owner of the lots in question, gave such notice, and no bonds were issued for assessments on his property. But, under our view, the clear meaning of the statute is merely that the city engineer, being supposed to have special knowledge of the subject, should inform the council what his estimate is of the cost of the proposed work per front foot. There is no requirement that he shall enter into details; and there is no warrant for holding the whole proceeding void because that official did not do something which the statute does not require him to do.

4. It is contended that the assessment is void because the certificate of the city engineer, after the work was done, does not meet the requirements of the law. There is really no express requirement in the statute that the city engineer shall make any certificate at all. In section 9 (St. 1891, p. 205, c. 147) it is provided that "said warrant, assessment, and diagram, together with the certificate of the city engineer, shall be recorded"; but there is no provision requiring him to make a certificate, except in subdivision 10 of section 7, which applies only to cases where the owner of the lot does the work. There is no provision whatever as to the form of the engineer's certificate, or what it must contain. By section 34 it is provided that the city engineer is the proper person to render certain services, but there is no provision that he shall make any certificate. There is merely a provision that "every certificate signed by him" shall be prima facie evidence in the courts of the truth of its contents; and it has been said in one or two opinions that the certificate referred to in section 9 is presumably the one mentioned in section 34. But to put into the statute by implication, first, a requirement, not there, that the engineer must make some kind of a certificate, and, second, the requirement, not there, that the certificate must be of a certain form, or must contain certain things, and then to hold the assessment void because the engineer's certificate does not fully comply with these implications, would be, even as against proceedings in invitum, to carry the doctrine of strict construction beyond all reasonable bounds. Assuming that any certificate is required, the certificate in the case at bar shows the quantum of the grading, and that the work was done in accordance with the lines and grades; and we do not think that the assessment is void, as contended by appellants, because there is no express statement in it that the engineer examined the work or measured it, etc. Appellants rely on the case of *Frenna v. Sunnyside L. Co.*, 124 Cal. 437, 57 Pac. 302, which was followed in *Obermeyer v. Patterson*, 130 Cal. 531, 62 Pac. 926. The decision in the *Frenna* Case seems to have been based mainly upon the ground that the certificate of the city engineer referred to was based upon an-

other certificate, which was signed by a person who was neither the engineer nor a deputy; but, if it cannot be distinguished from the views above expressed, it must give way to the later case of *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262. (In the opinion in this later case, as published, there is evidently a clerical error. It refers to subdivision 10 of section 5 of the act, when section 7 is clearly meant.) By subdivision 10 of section 7 (St. 1889, p. 164, c. 151) it is provided that the owner may himself do certain street work at his own expense, and that in such case he, at his own expense, must procure a certificate from the city engineer showing the amount of work done, etc., and must file the same with the superintendent of streets, who must record it. In *Reid v. Clay*, which was a suit to enforce a street assessment, one of the points made by the appellant, who was defendant in the court below, was insufficiency of the engineer's certificate, and on that point the decision of the court was as follows: "Nor is there anything in the objection to the sufficiency of the engineer's certificate. A certificate of the engineer is not required, except in the case provided for in subdivision 10 of section 5 [7] of the act. He is, indeed, empowered by section 34 (St. 1889, p. 171, c. 151), when required, to make a certificate of the work done; and where the certificate is made it must, under the provisions of section 9, be recorded. But this provision must be construed as requiring its record only in cases where the certificate is in fact made, or is required to be made by section 5, subd. 10 [subdivision 10, § 7]. Where the certificate is made otherwise than in the case provided for in the subdivision cited, it is simply for the purpose of assisting the superintendent of streets, upon whom, by section 8, is devolved the function of determining whether the contract had been satisfactorily performed. It follows that the certificate, if satisfactory to the superintendent, cannot be defective; or, in other words, that its contents are immaterial to the validity of the lien. *Gray v. Lucas*, 115 Cal. 434 et seq., 47 Pac. 354; *Jennings v. Le Breton*, 80 Cal. 13, 14, 21 Pac. 1127; *Finlayson on Street Law*, 103."

5. The appellant *Azelia C. Huntington* holds a mortgage on the premises owned by defendant *Mitchell* and covered by the assessment here in question, and she contends that her mortgage lien is superior to that of the assessment lien; but this contention is not maintainable. A lien for public taxes and assessments is upon the property, and is paramount to all liens acquired by personal contract. There is no difference in this respect between taxes for street improvements and general taxes. As is said in *Dressman v. National Bank*, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121: "Both are levied under the sovereign power of the state, and both are levied under the theory

that they are for the general good, and the same general powers for enforcing their collection are given." See, also, *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829; *Wilson v. California Bank*, 121 Cal. 631, 54 Pac. 119; *Odell v. Wilson*, 63 Cal. 159; *German S. & L. Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1007. In the late case of *German S. & L. Society v. Ramish*, supra, the rule is clearly stated that the lien of an assessment for street improvement, like the lien of a tax for general purposes, is "superior to all other liens prior or otherwise"; for while, in that case, the bond act, which expressly provides that the bond shall be a first lien, was involved, still the decision went on the broad ground that an assessment for street improvement was paramount to all other liens.

6. The foregoing are all the points calling for discussion which concern the particular proceeding out of which this litigation arose; that is, the assessment proceeding. Appellants, however, claim the right to go back and attack another and distinct proceeding which was for a change of grade of Sixth street under an amendatory act providing for such change, approved March 9, 1893 (St. 1893, p. 89, c. 79), which proceeding was inaugurated and completed prior to the said assessment proceeding. Appellants contend that the said proceeding for a change of grade was void, and therefore all subsequent assessment proceedings must fail. The statute provides that "no change of an established grade shall be ordered except on petition of the owners of a majority of the property affected by the proposed change of grade." There was a formerly established grade of Sixth street, and the order for a change of grade in the case at bar was based on the petition for a change of grade of Sixth street between Fremont avenue and Bixel street, and was signed by a majority of the owners of lots fronting on that part of Sixth street where the grade was asked to be changed. The council determined the petition to be sufficient; but it seems that for the purpose of assessment in relation to this change of grade order the council established a district which included a part of Sixth street, and lands adjoining it, where there was not to be any change of grade, and it appears that the original petition did not include the owners of a majority of the area included within the district, which, of course, was established after the filing of the petition, and after the council had determined the petition sufficient; and appellants' contention is that, because the petition did not include a majority of the owners of land in the district subsequently created for the purpose of assessment, therefore the change of grade order and all subsequent proceedings were void. The facts as to this former order, for a change of grade, as disclosed by the record, are very meager. It does not appear what the change ordered was—whether

it was merely formal and trivial, and not substantially affecting the rights of any one; or whether it was of material consequence; it merely appearing that the change was asked to be made in accordance with a certain map, which map does not appear in the record; and it does not appear whether or not any assessment ever followed the order or was enforced or collected.

It is doubtful if the change of grade proceeding can be considered at all in this case (see *Wingate v. Astoria*, 39 Or. 603, 65 Pac. 982, and authorities there cited); but, conceding that it can, the contention of appellants for a reversal on account of the former proceeding is not maintainable. In the first place, the petition was sufficient. It included a majority of the owners of land which, at the time of the petition, was to be affected by the proposed change of grade of that part of Sixth street as to which the change was asked by the petitioners. Its sufficiency was not affected by the fact that subsequently the council created a larger district for the purpose of assessment. Moreover, how could the owners of lands fronting on that part of the street on which the grade was to be changed, of whom appellant Mitchell was one, be injuriously affected, or in any way aggrieved, or have any of their constitutional rights invaded, because their burdens were lightened by an order which compelled other persons, whether rightfully or not, to share with them the expenses, if any, incident to the mere paper order for the change of grade? Those other persons are not appealing, nor does it appear that they ever made any objections to the order which brought them within the assessment district. Again, if it could be held on this appeal that the order for the change of grade was invalid, then the grade remained as originally established, and appellants' remedy would be an appeal to the council, under section 11 of the Vrooman act, from the acceptance of the work by the city engineer. See *German S. & L. Soc. v. Ramish*, supra, and cases there cited.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

144 Cal. 439

WEED et al. v. SNOOK et al. (L. A. 1,284.)  
(Supreme Court of California. Aug. 18, 1904.)

PUBLIC LANDS—MINING CLAIMS—LOCATION—MINING LANDS—CONVEYANCES—LEASES—RIGHTS OF LESSEE—RELOCATION—QUIETING TITLE—BURDEN OF PROOF.

1. Where plaintiffs located 80 acres of public oil land, and made a discovery thereon, and thereafter located 160 acres, which included the 80 acres first located and an 80-acre tract adjoining, then in the possession of another, plaintiffs' prior discovery on the first 80 acres was unavailable for the purpose of perfecting a consolidated claim to the 160-acre tract.

2. The discovery of oil in public land located as a placer oil mining claim, after the posting of notice and the marking of the claim, is available for the purpose of perfecting the locator's claim thereto, in the absence of intervening rights of third persons.

3. Where a lessee of a placer oil mining location was in possession, and was actively at work, and expending money for the purpose of sinking an oil well and discovering oil on the claim, the rights of such lessee could not be forfeited to third persons during the progress of such work, who attempted to relocate the land on the ground that the original locator or such lessee had not actually discovered oil in the land prior to such location.

4. Where public land was located as a placer oil mining claim, the rights of the locator were subject to conveyance or lease either before or after discovery.

5. In an action to quiet title to a placer oil mining location, as against persons claiming a prior right thereto, plaintiff must recover, if at all, on the strength of his own title.

Commissioners' Decision. Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by F. F. Weed and others against Walter Snook and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

H. V. Reardan and Geo. E. Whitaker (A. B. McCutchen, of counsel), for appellants. P. W. Bennett and Fred E. Borton, for respondents.

COOPER, C. This action was brought by plaintiffs to quiet title to the south half of the northeast quarter of section 12, T. 11 N., R. 4 W., S. B. M. The case was tried before the court, and findings filed, upon which judgment was entered for defendants. Plaintiffs made a motion for a new trial, which was denied, and bring this appeal from the order.

The facts are fully found, and, while appellants in their brief have argued the evidence and many propositions as to the mining laws and decisions applicable to certain theories of the case, yet as the findings cannot be successfully assailed on this appeal, the case on the merits involves the single proposition as to whether or not the facts are such as to support the judgment and order. It is admitted that in January, 1900, the land in controversy was a part of the public domain of the United States, and open to location and sale under its mineral laws and regulations. The plaintiffs and defendants all claim under locations made or claimed to have been made of the land as mineral land. The mineral claimed and conceded to exist in the land is oil. Under Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], the location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims. The questions material to the decision of this case do not involve the marking of the locations, nor the posting of no-

tices; but the validity of the locations of the respective parties as to their respective dates and the discovery of oil in the land. It may be stated preliminarily that oil was not discovered, under either location, until found by sinking or driving a well down to the sand. The mere finding of surface indications, such as seepage of oil, is not ordinarily sufficient. Oil must have been discovered within the limits of the claim. *Nevada Sierra Oil Co. v. Home Oil Co. (C. C.)* 98 Fed. 673; *Miller v. Chrisman*, 140 Cal. 446, 73 Pac. 1083, 74 Pac. 444. The facts and dates as to the respective locations and discoveries in and to the 80 acres in contest are substantially as follows: On January 20, 1900, defendants Walter Snook, John Snook, Maria B. Snook, E. A. Baer, W. L. Dixon, G. J. Plantz, F. N. Sawyer, and R. Frizelle, each being a citizen of the United States, made a location and marked the boundaries of a consolidated placer mining claim called the "Pacific Placer Mining Claim," which location included the land in contest. On the 10th day of April, 1900, William Carter, G. E. Squires, and C. J. Harvey, three of the plaintiffs, together with one Ross, each being a citizen of the United States, located a mining claim consisting of the north half of the southeast quarter of said section, being the 80 acres of land south of the land in contest, and known as "Ohio No. 1 Placer Claim." On the 23d day of May, 1900, the said locators of the north half of the southeast quarter of said section, including three of the plaintiffs, conveyed to the Lion Oil Company, a corporation, 10 acres of the said 80 located by them. The said Lion Oil Company proceeded to develop the 10 acres conveyed to it, and in October, 1900, had driven a well 750 feet deep, and discovered oil therein. This discovery completed and validated the location of the said north half of the southeast quarter of said section. At this time the defendants had not succeeded in discovering oil, and thus perfecting their location of the south half of the northeast quarter of said section. On November 28, 1900, before there was any conflict as to the land in contest, the Vesuvius Oil Company, a corporation, having leased from and through defendants the said lands, went into actual possession thereof, and began the active work of preparing to drill a well therein for the discovery of oil. At this time there was still no conflict as to the land in contest, and neither plaintiffs nor any one else other than defendants were claiming any interest in or possession to the said lands so leased to the Vesuvius Oil Company. On the 24th day of December, 1900, while the said Vesuvius Oil Company was in the quiet and peaceable possession of the lands in contest, and erecting its buildings, derricks and machinery thereon for the purpose of drilling for oil, the plaintiffs, without permission of defendants, made out a notice in due form for a

consolidated placer mining claim for the south half of the northeast quarter and the north half of the southeast quarter, being the lands embraced in both the prior locations, the Ohio No. 1 placer claim and the Pacific placer claim. The plaintiffs were citizens of the United States, and entitled to locate mineral lands. They properly marked the location of the claim so as to indicate its boundaries, and posted a notice upon the same, claiming it as "Lion No. 1 Placer Claim." At the time of so attempting to locate the entire 160 acres, the plaintiffs had made no discovery of oil or mineral in the south half of the northeast quarter, nor had they attempted to do so, and the claim to the north half of the southeast quarter had been perfected by the discovery of oil therein on the 10 acres conveyed to the Lion Oil Company. They have never entered upon the land in contest, nor discovered oil thereon; the only discovery being that made by the Lion Oil Company as aforesaid. On December 27, 1900, the Vesuvius Oil Company commenced the work of drilling a well upon the land in contest. On January 15, 1901, while the said lessee of defendants was in possession of the land in contest, and had expended a large amount of money in machinery and labor, and was so engaged in drilling for oil on the premises, the plaintiffs commenced this action. In February, 1901, the said Vesuvius Oil Company discovered oil in the said well so drilled by it on said land, and at the time of the trial of this action had expended for machinery, building, and drilling for oil the sum of about \$10,000.

Upon the above facts defendants were entitled to judgment. The plaintiffs must rely upon the strength of their own title. They have not expended money nor entered upon the development of the lands in contest. They have made no discovery of oil thereon. They have merely posted notices and marked the boundaries of the land in connection with the south 80 acres, which they, or at least three of them, had already located. The discovery of oil had been made upon this south 80 acres, but the plaintiffs here cannot claim such discovery as being a discovery upon the land in contest. The claim of appellant that the prior discovery on the south 80 can be availed of for the purpose of making a consolidated filing upon the whole 160 acres cannot be upheld. If such be the law, eight parties might locate 20 acres each of a quarter section, and each begin the work of putting in machinery and drilling on his 20 acres. It is at once apparent that the first discovery of oil by either of the parties would depend upon many circumstances, such as the means of the party, his experience, the kind of land or rock through which he must drive his well. Some one of the eight would be the first to discover oil. Could such party then get seven others, and relocate his claim, with

the entire 160 acres, as a consolidated claim, and thus claim the first discovery as to the entire 160 acres, and obtain title thereto to the exclusion of the seven other original locators? Such course cannot be sanctioned by the courts. It would lead to strife, riots, and the shedding of blood. And yet such is, in principle, the claim of the plaintiffs in this case.

The statutes and mining laws of the United States do not contemplate the forcible or clandestine entry and location of lands in the peaceable possession of other parties, who have located the same in good faith, and who are endeavoring to secure their claims. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Nevada Sierra Oil Co. v. Home Oil Co. (C. C.)* 98 Fed. 680; *Miller v. Chrisman*, 140 Cal. 449, 73 Pac. 1085. Cases are cited to the effect that a location cannot be made unless the mineral discovery precedes the location. Such is not the better rule, nor the rule adopted in this state. In *Miller v. Chrisman*, supra, it was said by this court in bank: "It has been said that it is not necessary that discovery should precede nor coexist with posting of notice and the marking of the claims, but that a discovery subsequently made perfects the title, except so far as the rights of others may have intervened. This proposition is perhaps too well recognized to require citation of authorities, but reference may be made to 1 *Lindley on Mines and Mining*, § 330; *Jupiter Mining Company v. Bodie Con. Min. Co. (C. C.)* 11 Fed. 666; *North Noonday Mine Co. v. Orient Min. Co. (C. C.)* 1 Fed. 522; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Erwin v. Perego*, 93 Fed. 608, 35 C. C. A. 482; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; *English v. Johnson*, 17 Cal. 108, 76 Am. Dec. 574. It is therefore evident that the location and subsequent discovery of oil by defendants perfected their title if plaintiffs have no intervening right. As before stated, the first attempt to in any way connect themselves with the title was by attempting to locate the land December 24, 1900. The correct rule is stated in *Miller v. Chrisman*, supra: "One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. \* \* \* They [the locators] have, then, this right of possession, and with it the right to protect their possession against all illegal intrusions, and to work the land for the valuable minerals it is thought to contain. We cannot conceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery." If defendants had been guilty of such laches that it could have been presumed that they had

abandoned their location, and if plaintiffs had made an open peaceable entry and acquired bona fide rights at a time when defendants were not in possession thereof and prosecuting the work of development, the case would have been very different. But the plaintiffs attempted to locate while defendants were in possession, and actively preparing to drill a well. As to the time that elapsed between the date of defendants' location and November of the same year, and the reasons why defendants were not actively at work trying to discover oil during all of said time, it is not necessary here to inquire. As to plaintiffs, it is sufficient that defendants were so in possession and actively at work when they attempted to locate. It was said by the Commissioner of the General Land Office in an opinion rendered December 18, 1900 (Kern River Oil Company v. O. W. Clarke): "One who has made a mining location upon the public land in the manner provided for in the statute, and in conformity with local laws and regulations of miners, has a qualified title to the lands, which may be bought and sold as other property. \* \* \* He is on the land in personal occupancy, and under color of right, and should be allowed an opportunity to show that the land possessed mineral in paying quantities, in which event his right would relate back to the date of location." And we regard the law as settled that, while a locator, who has made his location, is engaged, in good faith, in prospecting it for minerals, and complies with the laws as to expenditures, and is in possession, the land is not open for location by others. In case of petroleum lands the discovery cannot, in most cases, be made except by considerable labor and expense in sinking wells. In making the location the locator necessarily takes into consideration surface indications, geological formations, proximity to known mines or wells producing oil. He must make his location in good faith, and use proper diligence to make discovery of oil. If he does not do so, he will lose his rights, under his location, as to parties who may afterwards in good faith acquire rights. But where the locator is in possession under his location, and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation with a view of protecting prior rights acquired in good faith.

We advise that the order be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(20 Colo. A. 181)

BURLINGTON & C. R. R. et al. v. PEOPLE ex rel. CITY OF DENVER. DENVER & R. G. R. CO. v. SAME. UNION PAC. R. CO. v. SAME. COLORADO & S. BY. CO. v. SAME.

(Court of Appeals of Colorado. Sept. 12, 1904.)

RAILROAD COMPANIES—BRIDGING TRACKS ON STREETS—ORDINANCES—MANDAMUS—SUIT IN EQUITY.

1. An ordinance requiring railroad companies to construct viaducts across their tracks, where they cross or extend along streets, is not void for uncertainty, because expressing its requirements in general terms, and not incorporating such details. Plans and specifications for the work, prepared by authority of the council, will supplement the ordinance.

2. A writ of mandamus to a railroad company to bridge its tracks along and across streets, the same involving a complication and variety of detail, should be specific in its terms as to plans and details of the work; such plans being furnished by the city and found by the court to be reasonable and practicable, or reasonable and practicable plans being formulated by the court.

3. A suit in equity, where all the rights and duties of the parties may be adjusted, and not mandamus, a purely legal remedy, is the proper remedy for compelling the bridging of the tracks of several railroad companies, where they cross streets; individual action by a single railroad being sufficient in the case of certain bridges, and joint action by all the railroads being necessary where a continuous viaduct crossing the tracks of all of them is required.

Appeals from District Court, Arapahoe County.

Separate mandamus proceedings, on the relation of the city of Denver, against the Burlington & Colorado Railroad, the Denver & Rio Grande Railroad Company, the Union Pacific Railroad Company, and the Colorado & Southern Railway Company. From judgments granting the writs, respondents appeal. Reversed.

By an act of the Legislature approved March 11, 1889, amendatory of the charter of the city of Denver, the city council was empowered "to require railroad companies to construct, at their own expense, such bridges and their approaches, tunnels, or other conveniences at public crossings, and such viaducts and their approaches over their tracks, where the same cross or extend along the public highways or streets, and to put such streets in such condition and state of repair as not to interfere with the free and proper use of such street or crossing, as the city council may deem necessary, and, where viaduct or viaducts cross the tracks of several railroad companies, to compel them to build their proportion of a continuous viaduct or viaducts over said tracks with their approaches." *Sess. Laws 1889, p. 127, § 7.* On the 18th day of January, 1890, pursuant to the foregoing provisions, the following ordinance was enacted by the city council:

"Section 1. Whereas the construction and operation of a great number of railroad tracks that intersect and extend along Nineteenth street in the city of Denver has and

does impede travel along said street to a great extent and has made said Nineteenth street dangerous for public travel thereon as a highway:

"Sec. 2. Therefore all railroad companies, the tracks of which intersect or extend along Nineteenth street in the city of Denver, are hereby required to construct at their own expense a good and sufficient viaduct of the width of fifty feet over and across their said tracks, at a height of twenty-two feet in the clear above such tracks. Where the distance between any two of said railroad tracks is not sufficient to permit an approach to the viaduct over each track from the ground to be made at a grade of not to exceed seven per cent., then the railroad company owning each of such tracks shall build such viaduct at said height to a point midway between said tracks and in such manner as to make the same one continuous viaduct over such tracks. They are also hereby required to construct at their own expense good and sufficient approaches to such viaduct or viaducts at a grade of not to exceed seven per cent.; and such railroad companies, their successors and assigns, shall thereafter at their own expense keep and maintain said viaduct or viaducts and the approaches thereto in a good state of repair. Said viaduct or viaducts to be constructed entirely of iron or steel cross-beams and supports, set on substantial stone foundations; the longitudinal joists between such cross-beams to be of iron, steel, or wood, and the floor to be of wood. Such viaduct or viaducts and the approaches thereto shall be set in said Nineteenth street so as to leave an equal distance of said street unoccupied on each side of the same. The said viaduct or viaducts to be constructed with a roadway thirty-eight feet in width for vehicles and with sideways six feet in width upon each side of such roadway for foot passengers. The said approaches shall be constructed of good and substantial stone abutments and stone and earth approaches, or the said approaches may be constructed of the same material as the said viaduct, or partly of each. The width of said approaches to be thirty-eight feet in the clear from the street, until the same reaches a height of at least twelve feet above the street and for that distance the approaches shall be used only as a roadway, and from that point until they meet the viaduct the approaches shall be of the same width as the viaduct, with the roadway and sideways to conform thereto. At the point on said approaches where the sideways begin there shall be constructed stairways of iron or wood leading to the sidewalk below on Nineteenth street. Said viaduct or viaducts and approaches on the outsides thereof shall have good and substantial iron or steel railings.

"Sec. 3. The work of constructing said viaduct or viaducts and approaches thereto shall be commenced in good faith within

sixty days after the passage of this ordinance and shall be actively continued thereafter until said viaduct or viaducts be completed and ready for travel, which shall not be later than six months after the passage of said ordinance.

"Sec. 4. Upon the completion of such viaduct or viaducts and approaches, the railroad companies whose tracks run under the same shall not be required to keep either flagman or gateman at the crossings of their tracks with said Nineteenth street.

"Sec. 5. Upon the completion of such viaduct or viaducts, any of the railroad companies aiding in the construction of such viaduct or viaducts shall have the privilege of constructing across said Nineteenth street under said viaduct or viaducts such new railroad tracks as may be necessary without any special permission of the city council first had and obtained."

On the 30th day of January, 1890, the mayor gave written notice to the appellants, whose tracks intersected or lay along Nineteenth street, to construct a viaduct in accordance with the provisions of the ordinance; but they failed to comply with the demand. On the 23d day of May, 1890, a separate and independent proceeding against each of the appellants was commenced in the name of the people, on the relation of the city, for a writ of mandamus to compel it to construct a viaduct or viaducts as required by the ordinance. The petition was adjudged insufficient, and the cases were taken by writ of error to the Supreme Court, where, on the points made against the petition, the rulings below were reversed. *People v. U. P. Ry. Co.*, 20 Colo. 186, 37 Pac. 610. An answer was then made in each of the several cases. Upon the hearing, the court awarded in each case a peremptory writ of mandamus, as follows:

"Now, therefore, we being willing that speedy justice should be done in this behalf to it, the city of Denver, do command and enjoin you that immediately after the receipt of this writ, you do construct at your own expense a good and sufficient viaduct of the width of fifty feet on and along Nineteenth street over and across your said railroad track and tracks, which intersect or extend along said Nineteenth street, at a height of twenty-two feet in the clear above said tracks; and where the distance between any two of your said tracks, or the distance between your track and the next nearest track of any other railroad company crossing said street, is not sufficient to permit an approach to the viaduct over each track from the ground to be made at a grade not to exceed seven per cent., then you shall build said viaduct at said height to a point midway between said tracks, and in such manner so as to make the same one continuous viaduct over such tracks. And we do hereby further command and enjoin you to construct at your own expense good and suffi-

cient approaches to said viaduct or viaducts at a grade not to exceed seven per cent., and you, your successors and assigns, shall forever thereafter, at your and their own expense, keep and maintain said viaduct or viaducts and the approaches thereto in a good state of repair. And we do further command and enjoin you to construct said viaduct or viaducts entirely of iron or steel cross-beams and supports, set on substantial stone foundations, the longitudinal joists between such cross-beams to be of iron, steel, or wood, and the floor to be of wood; and such viaduct or viaducts and the approaches thereto shall be set in said Nineteenth street so as to leave an equal distance of said street unoccupied on each side of the same. The said viaduct or viaducts to be constructed with a roadway thirty-eight feet in width for vehicles, and with sidewalks six feet in width upon each side of said roadway for foot passengers. The said approaches shall be constructed of good and substantial stone abutments, and stone and earth approaches, or said approaches may be constructed of the same material as the said viaduct, or partly of each; the width of said approaches to be thirty-eight feet in the clear from the street until the same reaches a height of at least twelve feet above the street, and for that distance the approaches shall be used only as a roadway, and from that point and until they meet the viaduct the approaches shall be of the same width as the viaduct, with the roadway and sidewalks to conform thereto; that at the point on said approaches where the sidewalks begin there shall be constructed stairways of iron or wood, leading to the sidewalk below on Nineteenth street; and said viaduct or viaducts and approaches on the outside thereof shall have a good and substantial iron or steel railing. And how you shall have executed this, our writ, make known to our said district court, at the courthouse at Denver, on the first day of May, A. D. 1902."

The respondents separately appealed to this court, and, the questions involved being the same, the cases were consolidated for the purposes of argument and decision.

Teller & Dorsey, for appellant Union Pac. R. Co. Dines & Whitted, for appellant Colorado & S. Ry. Co. Wolcott, Valle & Waterman (William W. Field, of counsel), for appellants Burlington & C. R. R. and Denver & R. G. R. Co. Halsted M. Ritter and Calvin P. Butler, Asst. City Attys., Harry A. Lindsley, City Atty., and John H. Reddin, for appellee.

THOMSON, P. J. (after stating the facts). It is contended that the ordinance is void for uncertainty. We assent to the proposition that, before the respondents can be compelled to construct the viaduct or viaducts contemplated by the ordinance, the details of the work should be specified with such reasonable

certainty that an adherence to the specifications in the performance of the duty must be accepted as a fulfillment of the requirement. But it does not follow that such details must be incorporated in the ordinance, or that the ordinance is invalid because its requirements are expressed in general terms. Plans and specifications for the purposes of the work, prepared by the authority of the council, would supplement the ordinance and afford the requisite guidance. These, however, must be practicable and reasonable. The arbitrary will of the council respecting them would not be final, so that, at last, in case of resistance to the requirements, a settlement of the details would devolve upon the courts. When this case was before the Supreme Court in *People v. U. P. Ry. Co.*, 20 Colo. 186, 37 Pac. 610, only two questions were raised: One, that the petition did not show a reasonable public necessity for the viaducts; and the other, that it appeared from the petition and the ordinance that the city proposed to continue and maintain Nineteenth street at grade as a public thoroughfare across the tracks of the respondents, and still compel respondents to construct without compensation a new and different thoroughfare over the same tracks. Both points were determined against the respondents; but the questions we are now called upon to consider were not before that court or passed upon by it. However, the following observations occur in the course of the opinion: "In this case there are four defendants, and if it were left to them to determine the character of the structure to be erected it is not at all probable that any plan would meet with the approval of all. Hence the advisability of having a plan prepared by the city in the first instance; and, in case the plan proposed is found feasible and adequate for the purpose, the erection of the viaduct in accordance therewith may be enforced, provided a reasonable necessity therefor is shown to exist."

By the language quoted, the necessity of a plan is recognized, and the advisability of its being prepared by the city in the first instance suggested; but whether the performance of the work in accordance with a plan so prepared could be compelled is made dependent on the character of the plan. The following, among other, cases are cited with approval in the opinion: *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *State v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 219, 39 N. W. 153. As these cases are relied upon by the Supreme Court, and as they deal with questions which are now presented to us, it will be well to ascertain exactly what they decide. Both were cases in which mandamus was brought to compel the construction by railroad companies of viaducts. The city of Minneapolis asserted its right to the compulsory process sought, by virtue of provisions in the charters of the companies which gave them the right to construct their rail-



roads across any public highway, but coupled the privilege with a requirement, expressed in terms more general than those employed in this ordinance, to put any highway so crossed in such condition as not to impair its usefulness to the public. The tracks of the respondents in both cases crossed the same streets and were approximately parallel with each other; and the suits were brought to compel each to construct bridges across its tracks, so that the work, when completed, should constitute an entire and complete viaduct over both systems of tracks.

In the first case the alternative writ commanded the respondent to construct a viaduct in accordance with plans prepared by the city council. The case went to the Supreme Court by appeal from an order quashing the writ, on the ground that the relator did not state facts sufficient to warrant the issuance of a writ. Speaking concerning the finality of the action of the city, the court said: "Whether respondent has in fact complied with the requirements of its charter is a question which neither it nor the city can determine absolutely without the assent of the other. Like all other matters involving a controversy concerning public duty and private right, it is to be adjusted and settled by judicial inquiry and determination. Hence the decision of the city council is not conclusive upon the questions of the duty of the company to build this viaduct or that it should be built upon the plan proposed. These are matters, if put in issue, for the determination of the court, upon the hearing."

In the second case, no plan appears to have been suggested by any one prior to the commencement of the action. The respondent in the first case was brought into the second, and the two were heard together. Relative to the necessity that the peremptory writ be specific, the court said: "It admits of no question that, in general, mandamus may be resorted to as a means of compelling the performance of a duty such as is claimed by the relator to rest upon this railroad company; and it has been resorted to in this state in cases like that now under consideration. *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *Id.*, 38 Minn. 246, 36 N. W. 870. It is urged by this appellant, as an objection to the writ in this case, that it prescribes particularly the manner in which the alleged duty shall be performed, instead of allowing the respondent to adopt its own plan for restoring the usefulness and safety of these streets. Where, as in this case, it has been in no manner determined, either by the law, by the circumstances of the case, or otherwise, how the alleged duty should be performed, the course suggested by this contention of the respondent would be subject to most obvious objections. It may be assumed that, where it is necessary to resort to compulsory process of the courts in such cases, it is because

there is a disagreement between the public authorities and the respondent as to the duty of the latter to do anything, or as to what its duty requires it to do. Neither of the parties thus opposed in interest can determine these matters of difference. It is for the courts to decide. *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. It is expedient that the thing to be done be effectually determined before a peremptory writ be issued, and that the party upon which the duty may be found to rest be required to do that specific thing, which, when done, must be accepted as the performance of its duty. If the writ were to command generally the performance of the duty of restoring the street to a condition of safety and usefulness for public travel, the respondent being left to select its own plan and means of accomplishing this result, it might be found, after much time and money had been consumed in carrying out the plan adopted by the respondent, that it was not such as to accomplish the public purposes in view. The court might so decide and command the work to be undertaken anew. In *People v. Dutchess & Columbia R. Co.*, 58 N. Y. 152, the writ was made specific; the respondent claiming to have already performed its duty in the premises. The same reasons which suggest the propriety for making a writ specific in such a case are equally applicable in any case where the nature of the thing to be done is uncertain, and can only be determined by the judgment of the court. It was the more clearly necessary in this case that the plan for restoring these streets be judicially determined, and the writ made specific, from the fact that the purposes of the proceeding could only be accomplished by the adoption of one plan for both of these respondents, so that the work of each should be the complement of that of the other; the whole forming complete bridges adapted to the necessities of the public."

In *People v. Dutchess & Columbia R. R. Co.*, referred to above, it was contended by the appellant that the peremptory writ could go no further than, in general terms, to direct a restoration of the highway. The judgment of the court upon the proposition will be found in the following extract from the opinion: "The second point made by the appellant is that the peremptory writ may do no more than in general terms to direct it to restore the highway. It is claimed that there is a discretion reposed in it by the statute as to the manner in which the restoration shall be effected; that it is an engineering question, which the court cannot determine in a particular manner, when there may be other ways equally as good in result. It is true that the party who is to do an act has, in general, the election of the manner of doing it. It is as true that, if he elects a manner that is not effectual, and the act remains substantially undone, he is still under his liability to do it. He has no discretion wheth-

er he will or will not do the act. If he attempts to do it, and does it not, still the court may command that he do it. In this case the appellant was under the duty to restore the highway. It essayed to do that duty in a way that the court below adjudges was not effectual. An alternative mandamus was issued, commanding it to restore the highway, and to take new action effectual to that end. It returned that it had restored the highway before the issuing of the writ. It would be idle to issue a peremptory writ again commanding it to restore the highway, and stopping with the reiteration of the general command only. The court having ascertained, by the proofs of the parties, in what respects the action of the appellant has failed, may properly point out to it how to act so as not to fail again. Though in the first instance there may be a discretion with the appellant, it is not that which is known as judicial. That may not be commanded by mandamus to act in a certain way. The discretion here is a ministerial one. The act of restoration must be done. If the discretion as to mode of doing it is so well exercised as that the restoration is complete, that is well. The object of this action is to test that. The appellant insists that it had well exercised it. The court has determined that it had not. The court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again."

The conclusions we have reached are that a specific plan of the work need not be set forth in the ordinance; that, if a feasible and proper plan be proposed by the city, the construction of the viaduct may be compelled in conformity with it; that in case the court should find the plan unreasonable or impracticable, or in case no plan at all should be submitted, it would be the duty of the court, after sufficient inquiry and investigation, to formulate a plan for itself, and order the performance of the work in accordance with such plan; and that a writ which peremptorily requires the execution of an enterprise involving a complication and variety of detail, without any plan upon which to work, will not be sustained. The writ awarded in each of these cases is no more definite than the ordinance. It does not direct the work to be done in accordance with any specific plan. It commands each respondent to construct a good and sufficient viaduct across its tracks; but what would be good and sufficient is matter of opinion, and individual opinions vary. Nor is the uncertainty of the meaning of this command removed by the particulars which follow it. The viaduct is to be 50 feet in width and 22 feet in height above the tracks. So far as the elevation and dimensions of the structure are concerned, the writ is definite enough; but otherwise it is utterly uncertain. The viaduct is to be constructed entirely of iron or steel cross-beams, and supports set on substantial stone foundations, the longitudinal

joists between the cross-beams are to be iron, steel, or wood, and the floor is to be of wood. It is upon these things which enter into the structure, and the position they occupy, that its goodness and sufficiency depend. The writ gives no directions as to the dimensions of the cross-beams, supports, longitudinal joists, or foundations. The character of the stone to be used in the foundations is not specified. Nothing is said as to the thickness of the floor, or the nature of the wood, whether durable or otherwise, of which it is to be constructed. The same objection applies to the longitudinal joists, if made of wood. There is no reference to distances between supports, or distances between joists. All these matters are important. They have intimate relation to the goodness and sufficiency of the work; and yet with respect to them the respondents are left at sea. In this absence of specification, if they should undertake the work, they could have no assurance that after its completion it would be accepted. They might regard it as good and sufficient, but it might be adjudged insufficient.

For another reason the writ is in this regard fatally defective. Where approaches are impracticable, the several viaducts to be built by the respondents are, when completed, to constitute one continuous viaduct. Each respondent might adopt a different plan, and, while its work might be well done, the whole, when finished, might be a heterogeneous and inconsistent structure. That the purpose of the ordinance may be accomplished, the entire work should be done upon one plan formulated beforehand. *State v. Minneapolis & St. Louis Ry. Co., supra.*

But there is another difficulty in the way of these proceedings which is, if possible, still more serious. The situation, with relation to each other, of the tracks belonging to the different respondents, is, in localities, such that in the construction of the viaduct independent action by any one of the respondents is impracticable. We will illustrate our meaning by a particular instance: Wewatta street crosses Nineteenth at right angles. Extending along Wewatta, and crossing Nineteenth, are three railroad tracks, laid approximately parallel to and in close proximity with each other. The northernmost track belongs to the Burlington & Colorado Railroad Company, the central to the Denver & Rio Grande Railroad Company, and the southernmost to the Union Pacific Railroad Company. As shown by the evidence, these several tracks are so close to each other that there is no room between them for foundations for viaduct supports, and such supports would themselves interfere with the passage of cars. Extending along Nineteenth street, and crossing Wewatta and the several tracks of which we have spoken, is a railroad track belonging to the Colorado & Southern Railway Company. Now each company is commanded to build a viaduct over its railroad tracks which

intersect or extend along Nineteenth street, and, where the distance between its track and the next nearest track of another railroad company crossing the street is not sufficient to permit the prescribed approach to the viaduct, to build the viaduct to a point midway between the tracks. Where there is no room for approaches, the viaduct must rest upon supports. The Denver & Rio Grande Company is thus commanded to build a section of the viaduct over its track, at the crossing of Nineteenth and Wewatta, from a point midway between its track and the track of the Union Pacific on one side, and that of the Burlington & Colorado on the other. But there is not only no room for approaches, but no room for foundations for supports, or for the supports themselves. It must, therefore, unite the section built by it with the sections built over the two other lines of track, crossing Wewatta street in such manner that the several sections shall sustain each other and together constitute a single structure. The owners of the other two lines are, on the sides next its track, in the same situation with it. But conditions are still further complicated by the presence of the track of the Colorado & Southern Railway Company extending along Nineteenth street, and, within the limits of that street, crossing the other three tracks. The mandate in its own case includes the building of a viaduct over those three tracks which shall fill exactly the same space with that to be built by the other companies. But two bodies cannot occupy the same space at the same time. It is manifest that none of these companies can, independently of the others, build the portion of the viaduct required of it. Yet the mandate of the court is that each shall do that very thing. As the cases are distinct, and the judgment in each wholly disconnected from that in the others, the requirement against each respondent that it do independently that which it cannot do independently would alone necessitate reversal of all the judgments. It is evident that a viaduct across Wewatta street, such as that described in each writ, must, if constructed at all, be constructed by all the companies jointly. But co-operation between them cannot be compelled, except in a proceeding to which they are all parties. If their tracks were parallel, or approximately parallel, and sufficiently far apart, the difficulty attending the present situation would not exist. Each party could separately construct its own portion between the proper lines, and there the several portions would join upon each other. A continuous viaduct would thus be obtained, and, in case of refusal of any one of the parties to act, it might be compelled to do so in a proceeding against it alone; but, where the work required must be done jointly and at joint expense, separate suits are inadequate to the accomplishment of the purpose.

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But we do not think the end sought in these actions can be attained by proceedings in mandamus. Mandamus is a purely legal remedy, and the constitution of a court of law disables it from administering the variety of relief demanded by the conditions which are here shown to exist. A court of equity, having all the parties before it, can in a single decree provide for joint action where that is necessary, determining the proportion of the expense to be borne by each of the parties, and for individual action where joint action is not necessary, and so adjust the rights and duties of the parties that each shall bear the burden, and only the burden, justly chargeable to it. To award such relief is beyond the jurisdiction of a court of law. The judgments must be reversed.

Reversed.

#### On Petition for Rehearing.

PER CURIAM. An application for a rehearing of the foregoing causes has been presented, the chief ground of which is that the opinion, in so far as it holds that, to accomplish the purposes of the proceedings, resort must be had to a court of equity, is in conflict with the opinion of the Supreme Court in *People v. U. P. Ry. Co.*, 20 Colo. 186, 37 Pac. 610, to which we have referred. If such be the case we are bound to allow the petition, because the opinions of that court are conclusive on us. But upon a careful re-examination of the opinion in that case, we are unable to discover any variance between the views of the Supreme Court and our own. The only questions considered by it related to the sufficiency of the petitions, and nothing appeared on their face to indicate the situation which the evidence disclosed. For aught shown by them, mandamus was the proper remedy, and the purpose of the proceedings could have been accomplished by separate judgments against the several respondents. But upon the trial a state of facts appeared which rendered independent proceedings inadequate and impracticable for the attainment of the object sought, and from which it appeared that the relief to which the relator was entitled could not be awarded by a court of law. That the Supreme Court was not of the opinion that these actions could be maintained no matter what the situation disclosed by the evidence might be, is, we think, clearly apparent from the following language with which the opinion closes: "When the case is fully presented by proper pleadings and proofs, it will be for the trial court upon the facts and circumstances as they then appear, and the law applicable thereto, to determine whether the city is entitled to the relief sought by these actions."

The application for a rehearing will be disallowed.

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**SOUTH TULE INDEPENDENT DITCH CO.  
v. KING et ux. (Sac. 1,062.)**

(Supreme Court of California. Aug. 18, 1904.)

**DEEDS—MUTUAL MISTAKE—EVIDENCE—LIMITATIONS—DEFENSE OF MISTAKE—ACTION TO ESTABLISH PRIOR RIGHT TO WATER.**

1. That defendant's deed, after conveying to plaintiff a right of way for a water ditch across defendant's land from a point on the river above defendant's ditch, by mutual mistake, or, its equivalent, mistake of defendant which plaintiff at the time knew, also granted the right to take from the river, so far as defendant was concerned, and to conduct through said ditch, 13 cubic feet of water per second, is shown by evidence that defendant then had the right, and was exercising it, to take from the river one-half cubic foot of water per second; that plaintiff was exercising its right, which was subject to defendant's, by diverting at a point below defendant's ditch 13 cubic feet of water per second; that plaintiff negotiated with defendant, and paid him, only for the right of way; and that defendant was illiterate.

2. To an action in effect to determine title to one-half cubic foot per second of water, claimed by plaintiff under a deed, but possession of which defendant has at all times had, defendant's defense of mistake is not barred by Code Civ. Proc. § 338, subd. 4, prescribing a three-years limitation for an action for relief on the ground of mistake, but only by section 318, prescribing a five-years limitation for recovery of real property or the possession thereof.

Commissioners' Decision. Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the South Tule Independent Ditch Company against William King and wife. Judgment for defendants. Plaintiff appeals. Affirmed.

Bradley & Farnsworth, for appellant. Chas. G. Lamberson, for respondents.

COOPER, C. Plaintiff brought this action to establish its prior right, against defendants, to divert and use 13 cubic feet of water per second from Tule river, in Tulare county, and to enjoin defendants from interfering with said diversion, and with plaintiff's dam at the head of its ditch in said river, by means of which it diverts said water. Defendants had judgment, and this appeal is from the judgment on a bill of exceptions. There is no conflict here, except as to the prior right of defendants to divert one-half cubic foot of water per second from said river.

Defendants are husband and wife, and have for many years been riparian owners of lands on said Tule river. About the year 1872 the predecessors in interest and grantors of defendants constructed a ditch leading out of Tule river on the south side thereof at a point on said river above the land of defendants, and below the head of plaintiff's present ditch, which said ditch of defendants diverted, and has ever since diverted, from said river, one-half cubic foot of water per second, which water is and has been at all times used by defendants for purposes of

irrigation, and which ditch is and has been at all times appurtenant to defendants' land. After the construction of defendants' ditch, and the diversion of said one-half cubic foot of water per second through the same to defendants' land, the predecessors of plaintiff constructed a ditch leading out of Tule river on the north side thereof at a point on said river below the said lands of defendants, which said ditch diverted, and from the time of its construction until about May, 1896, did divert, from said river, about 13 cubic feet of water per second, which water was used by plaintiff and its predecessors for beneficial purposes. In May, 1896, the head of the plaintiff's ditch was changed to a point on the north side of Tule river, where it is now located, above the head of defendants' said ditch, and plaintiff has constructed a new ditch leading out of said river from said last-named point of diversion over and across the lands of defendants, under a deed of right of way made by defendants to plaintiff dated January 13, 1896. The question as to what this deed conveyed is the main point in controversy here. At the time of making the deed the defendants owned their ditch and a prior right to divert one-half cubic foot of water per second from said river. This is practically conceded.

It is stated in the brief of appellant that it "bases its right on the deed from King dated January 13, 1896, by which King granted to plaintiff the right, as against King, to divert from Tule river thirteen cubic feet of water per second." The description in the deed is as follows: "A right of way for a water ditch five feet wide on the bottom, in, over and across the east one-half of section nine, in township twenty-two south, range twenty-nine east, Mt. Diablo base and meridian, said right of way to commence at a point on the east line of the said lands far enough north of the point where the old Loup ditch crosses the said east line, to give the said right of way an elevation of about ten feet above the said 'old Loup ditch' and to run thence north-westerly across said land nearly parallel with said 'old Loup ditch,' and also the right to take and divert from the South Tule river, so far as this grantor is concerned, and to conduct the same through the ditch of the grantee to be constructed on the right of way above described thirteen cubic feet per second, and together with the right to enter into and upon the land above described for the purpose of cleaning out said ditch and keeping the same in repair." The defendants in their amended answer by way of defense alleged that the portion of the description in italics was inserted therein by mutual mistake of the parties. The court appears to have carefully considered the evidence, and found that the said portion of the description in italics was inserted therein by mutual mistake, and that the agree-

ment between the parties was that the defendants were to convey to the plaintiff the right of way for its ditch across the land of the defendants, but that defendants "did not agree to grant to plaintiff any right to take any water from Tule river other than the water which the said plaintiff was at such time entitled to take and divert from Tule river."

The burden of plaintiff's argument is that this finding is not supported by the evidence. After a careful examination of all the evidence we are convinced that the finding is correct. The defendant William King testified fully as to the conversations, negotiations, and agreement as to the deed, and that it was all in reference to a right of way. Nothing was ever said to him about selling or conveying his one-half cubic foot of water. In fact, we need only look to plaintiff's testimony for confirmation of that of William King. The witness McCabe, who was a director of the plaintiff at the time of the negotiations, testified: "Mr. Beebe and I went up the river to defendant King's place on Sunday between Christmas and New Year's in December, 1895, for the purpose of talking to Mr. King about getting a right of way through his place. \* \* \* We told him that we came up there to see about a right of way through his land. \* \* \* We knew that Mr. King had a little water ditch. Our ditch, the lower ditch, was carrying water then, and we desired to move the head of our ditch up the stream for the purpose of covering more land of Tule river. \* \* \* I had never had any talk with Mr. King about the right of way before Mr. Beebe and I went up there to see him on that subject. When we were talking the matter over with Mr. King, he pointed out to us where he was willing to have the ditch come out of the river." The witness Beebe, who went with McCabe on behalf of plaintiff to see defendant King about the right of way, testified that he was present with McCabe and heard the conversations about the right of way, and "we finally came away without any definite understanding with him [King] as to whether he would give us the right of way or not. Prior to that time I had told him that the ditch company wanted a deed for a right of way through his land and permission to move their water up above his land—take it out of the river above his land." In cross-examination this witness was asked and gave replies to questions as follows: "Q. Did this corporation plaintiff ever claim the right to take the water that Mr. King had been accustomed to divert into that ditch of his? A. Not to my knowledge. Q. You never had any agreement or understanding with Mr. King that he should deed this corporation any such right, did you? A. Why, my agreement with Mr. King was that he was to give them permission to take their thirteen cubic feet of water above his

land. Q. Was there ever any talk between yourself and Mr. King that this corporation plaintiff should take the water that he had been accustomed to divert by this ditch? A. Not with me. Q. Did you understand, when you were authorized to receive rights of way, you were authorized to receive any conveyance of ditch rights? A. My instructions were to secure rights of way and the permission to move or take the water out of the river at the new point of diversion."

We have not found a syllable of testimony, and none has been pointed out to us, as to any conversation with defendants or either of them as to a conveyance of any water. The consideration paid was for a right of way; the conversations related to moving the ditch to convey plaintiff's water. Defendant William King was illiterate. It does not appear reasonable that he would convey away his valuable water right without consideration and without request from the agents of the plaintiff. Whether the clause in the deed was inserted intentionally by the agents of plaintiff does not appear. If so, it was a mistake on the part of defendants, which the plaintiff knew. Civ. Code, § 3399.

It is urged by the plaintiff that defendants' second amended answer should not have been allowed because the relief therein asked is on the ground of mistake and is barred by the provisions of subdivision 4, § 338, Code Civ. Proc. The section provides that "an action for relief on the ground of fraud or mistake" is barred within three years. Defendants knew of the mistake more than three years before the action was commenced. This is not an action for relief on the ground of mistake, and therefore the section has no application. It is an action in effect to determine the title to one-half cubic foot per second of water claimed by plaintiff. The defendants claim that they have at all times been in possession of the one-half cubic foot, and that they never conveyed it, because of the mistake in the deed. In other words, the question as to the mistake is made by way of defense to an affirmative claim made by plaintiff, and is only incidental to the main question. The water in controversy is real property. Civ. Code, § 638; *Bradley v. Harkness*, 26 Cal. 77; *L. K. R. W. D. Co. v. K. R. & F. C. Co.*, 60 Cal. 410; *Hayes v. Fine*, 91 Cal. 398, 27 Pac. 772.

The court found that defendants' ditch was constructed in 1872, and that it has "ever since its construction been used by defendants and their predecessors and grantors for the purposes aforesaid, openly, continuously, and uninterruptedly, and under a claim of right exclusive of every other right and adversely as against the whole world." This finding is not challenged. It was held in *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409, that the right of a grantor to have his title quieted as to land included in a deed by

mistake, as against the claim asserted by the defendant under the deed, cannot become barred while the grantor remains in the actual possession of the land, claiming to be the owner thereof and the actual owner, as against the defendant, of all interest therein except the mere naked title. Upon the same principle the statute would not run against defendants, who have always been in possession, and claiming the water in controversy.

In the late case of *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820, the principle of the bar of the statute in cases similar to this is fully discussed, and it was held that an action to set aside a conveyance of a tract of land, alleged to have been procured by fraud and undue influence, and to quiet title thereto, was in its nature an action to recover the possession of real property, within the meaning of the five-year statute of limitations prescribed by section 318 of the Code of Civil Procedure, and was not subject to the three-years limitation after discovery of the fraud, under subdivision 4, of section 338 of the same Code. The authorities in this state and in other states are reviewed, and in the opinion it is said: "It seems to be established, therefore, by these cases, that although the main ground of action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if the plaintiff alleges facts which show, as matter of law, that he is entitled to the possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-years limitation contained in section 318. The same rule has been followed in the states of Iowa, Kansas, Missouri, and Texas. *Williams v. Allison*, 33 Iowa, 279; *Reihl v. Likowski*, 33 Kan. 515, 6 Pac. 886; *Dunn v. Miller*, 96 Mo. 338, 9 S. W. 640; *Shepard v. Cummings' Heirs*, 44 Tex. 502." It is therefore plain that the defendants' right to defend the action on the ground of mistake in the deed to plaintiff was not barred by the three-years statute.

Nor was plaintiff entitled to judgment on the findings. True, the court found that plaintiff was entitled to take and divert through its ditch 13 cubic feet of water per second from Tule river, but the finding is modified by the following: "When there is that amount of water flowing in the river at said point, after supplying the defendants with one-half cubic foot of water per second at the head of their ditch as hereinafter found; but the right of plaintiff to divert and take from said river the said quantity of water is not superior to any right that defendants or either of them may have to any of the waters of said river, and that

none of the rights that said defendants or either of them may have in the waters of said river are subject to the rights of plaintiff herein."

We have not overlooked the fact that parties, except in clear cases, should be held to their written contracts, and that deeds or other instruments will not be set aside or held void for light or trivial reasons. But the evidence in this case was clear and convincing to the trial judge, and with his conclusions we agree.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 436

GRISEZA et al. v. TERWILLIGER. (Sac. 1,083.)

(Supreme Court of California. Aug. 18, 1904.)

WATERS AND WATER COURSES—ACTION TO QUIET TITLE—TENANTS IN COMMON—ADVERSE POSSESSION—PROOF OF TITLE—FINDING—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—VERBAL SALE OF WATER RIGHTS—EFFECT.

1. In an action to quiet title to the right to use the water of a certain ditch defendant admitted title in plaintiffs, denying only their sole ownership, and that plaintiffs were tenants in common. Defendant claimed an interest in the ditch and water to the extent of 30 miners' inches through her predecessors and by five years' adverse use. On the trial no issue was raised as to plaintiffs' ownership except as to the 30 inches. Held that, in view of the admissions and the course pursued at the trial, a contention that plaintiffs failed to prove title was untenable.

2. Where no special or other agreement exists among joint users of the waters of a ditch as to their proprietary interests, their rights are governed by the rules of law relating to tenants in common.

3. In an action to quiet title to the right to use the waters of a ditch, where defendant claimed title by five years' adverse use, and the evidence, though conflicting, tended to show that her use was neither uninterrupted, nor continuous, nor open, nor with plaintiffs' acquiescence, and there was proof that during these years the water was frequently shut off from defendant's land by plaintiffs, and she was forbidden to use it, a finding against defendant's contention is supported by the evidence.

4. In an action to quiet title to the right to use the waters of a ditch, where defendant claimed through her husband as grantor, and plaintiffs conceded that defendant's husband had used water from the ditch up to a certain time, when they claimed that he abandoned the right to the ditch and water, evidence that he made a verbal sale to one of the plaintiffs of all his interest in the ditch, and that thereafter he made frequent declarations that he had no interest in the water or ditch, all occurring long before he conveyed to defendant, such declarations continuing up to the time of his death, is admissible to prove the abandonment claimed.

5. A verbal sale and transfer of the water rights of a prior appropriator operates ipso facto as an abandonment thereof.

Commissioners' Decision. Department 2. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Ferdinand Grizeza and others against Phoebe Terwilliger. From a judgment for plaintiffs and order denying a motion for a new trial, defendant appeals. Affirmed.

R. S. Taylor, for appellant. Gillis & Tappcott and James D. Fairchild, for respondents.

CHIPMAN, C. Plaintiffs allege that they are owners in fee as tenants in common of a certain ditch and the right to take water from Little Shasta river, Siskiyou county, the ditch being commonly known as the "Musgrave and Linton ditch," and of capacity of 1,200 miners' inches; that they have for 37 years last past used the water flowing through said ditch to its full capacity when there was abundant water, and at other times 640 miners' inches; that defendant claims an interest therein and adverse to plaintiffs; and that during the year 1900 she wrongfully diverted a portion of said waters from said ditch. Elizabeth J. Rohrer, as executrix of her husband's will, filed a complaint in intervention, alleging that at his death, in 1886, he owned a one-sixth interest in said ditch and water, and that said interest now belongs to his estate. She asked to have the title to this interest quieted against the adverse claims of defendant. There was no demurrer to either complaint, but defendant answered plaintiffs' complaint (which, by stipulation, was taken as an answer to the intervention subsequently filed). She admits that plaintiffs owned some interest in the water ditch and water right described in the complaint; denies that plaintiffs are the sole owners of said ditch or of said water right, and denies that they are owners as tenants in common; denies that she is without right, and alleges an interest to the amount of 30 inches of water in said ditch and water, and claims ownership through her predecessors for 40 years. Further answering, defendant claims ownership in July, 1895, of certain lands commonly known as the "Terwilliger Home Place," since which time she has used 30 inches of the water of Shasta river upon her said lands for irrigating purposes; that said water has been taken and used "by means of certain ditches and flume which taps that certain water ditch described in plaintiffs' complaint"; that such use has been open, notorious, continuous, peaceable, and uninterrupted, and with the knowledge and acquiescence of plaintiffs "for the full period of five years during the irrigating season next before the beginning of this action"; that defendant is the owner and entitled to the use of 30 inches of the waters of said Musgrave and Linton water ditch and water right. Defendant "prays that said action be dismissed, and for her costs herein expended," and asks no further relief.

The court found that plaintiffs (including intervenor) and their predecessors, in conjunction with one Andrew Soule, dug the ditch in question, and diverted the waters of said river through said ditch to its full capacity, to wit, 1,000 inches measured under a 4-inch pressure, about the year 1859; that when there was not an abundance of water in said river they used through said ditch a less amount "down to and not exceeding 150 inches"; that this use has been continuous for irrigating and for stock and domestic purposes, "save some wrongful interruption by defendant during the five years last past," etc.; that "plaintiffs" said intervenor and their predecessors in interest so constructed, appropriated, used and held, and at the time of commencing this action plaintiffs and intervenor so used and held, three-fourths undivided of the said ditch and water right and the waters flowing therein." The foregoing present all the findings which are challenged as unsupported by the evidence.

As conclusions of law the court found plaintiffs and intervenor to be "the owners as tenants in common of three-fourths of the ditch and water right described in the complaint as against defendant and all persons claiming or to claim the same, \* \* \* and that defendant has no right, title, or interest in the said ditch or water right or the waters flowing therein, or to any part of the waters flowing in said ditch"; that plaintiffs and intervenor are entitled to a decree as prayed for, etc. Judgment passed accordingly. It should be observed that the one-fourth interest in the water not disposed of by the findings or judgment belongs without dispute to one Andrew Soule, one of the first appropriators of the water. Plaintiffs and intervenor had the judgment from which and from the order denying her motion for a new trial defendant appeals. Reference to plaintiffs hereafter in the opinion will include the intervenor.

In her answer defendant admits the title of plaintiffs, denying only their sole ownership, and denying that they are tenants in common. She claims an interest in the ditch and water to the extent of 30 miners' inches of water through her predecessors of 40 years, and in her second defense claims this same amount of water by adverse use since 1895. In the trial of the case no issue seems to have been raised as to plaintiffs' ownership except as to this 30 inches of water. In view of the admissions of the answer and the course pursued at the trial, we do not think defendant's point well taken that plaintiffs have failed to prove title. The point that they do not own as tenants in common, because, as is claimed, the evidence shows that each is entitled to a certain proportion of the flow of the water in the ditch, cannot be sustained, conceding its materiality. No special or other agreements having existed among the owners as to their proprietary rights constituting them something else, they

were tenants in common, and their rights are governed by the rules of law regulating tenancy in common. *Bradley v. Harkness*, 26 Cal. 69.

It appears that the Musgrave and Linton ditch was begun by Samuel Musgrave and John Linton, and was completed by them, with the assistance of Andrew Soule and P. S. Terwilliger (defendant's husband), about the year 1861. There is evidence that Terwilliger was to have one-fourth of the water, and plaintiffs concede that he used water from this ditch up to a certain time, when they claim he abandoned all right to the ditch and water. He had an independent water right from the same stream by what was called the "Dorris Ditch," which covered all his land, and there is evidence that he at one time brought water to his home place from this ditch, and that water can now be so brought. Practically the controversy revolves around the fact as to defendant's present right to 30 inches of the water of the Musgrave and Linton ditch for use at this "home place," so called. Terwilliger died about the year 1895, and on July 20, 1895, conveyed the home place to his wife, with appurtenances. She claims through this deed, first, by reason of her husband's original interest in the Musgrave and Linton ditch, and, second, by adverse use for more than five years immediately preceding the commencement of the action. As to the latter claim little need be said, for there is much evidence, though not without conflict, that her use was neither uninterrupted, nor continuous, nor open, nor with plaintiffs' acquiescence. There is evidence that during these years the water was frequently shut off from defendant's land by plaintiffs, and she was forbidden to use it. There is abundant evidence to support the finding of the court against defendant's contention of adverse use.

The remaining question turns upon the admissibility and effect of certain testimony introduced by plaintiffs to which defendant unsuccessfully made objection as incompetent and irrelevant. Plaintiffs were permitted to prove that Terwilliger made a verbal sale to Musgrave, one of the co-tenants, of all his interest in the ditch and water, and that thereafter Terwilliger made frequent declarations that he had no interest in the water or ditch, and that this sale and these declarations were made long before he conveyed the home place to defendant, and his declarations to this effect continued up to the time of his death. Upon this question of abandonment of the use by Terwilliger the evidence is conflicting, but there was testimony from which the following facts appeared: That Terwilliger had some disagreement with his co-tenants about the water, and he determined to "get rid" of his interest, and did so by verbal sale to Musgrave for \$50, which was paid to him; that thereafter Terwilliger stated many times to different persons that he had no interest in the water; that he obtained water

from the Dorris ditch; that he exercised no control over the Musgrave and Linton ditch, took no part in its care or repair; that on some occasions he took water from this ditch; that the original owners and their successors appropriated and used continuously all the water after Terwilliger surrendered his interest in the ditch; that the old ditch was partly filled up, and a new ditch substituted on another line by these owners, and that such water as was afterwards taken to the home place, now owned by defendant, was not taken under claim of right in Terwilliger's lifetime, but by permission of some one of the co-tenants; that Terwilliger made an effort to obtain a permanent right for water to be taken for use on this home place from this ditch, but was denied the privilege; that when he disposed of his interest he intended to and did surrender and abandon all right he ever had. It is not entirely clear when this transfer took place, but by some witnesses it is stated to have been as early as in 1870 or earlier, and was not later than about 1880.

The objection made by defendant is that plaintiffs could not prove title by a parol sale, the interest conveyed being realty. Plaintiffs answer that the evidence was not offered to prove title, but as declarations against interest, and as showing abandonment, to defeat defendant's alleged title; and that the court did not admit the evidence to prove title. Mr. Kinney states the doctrine to be that the right to the use of the water acquired by prior appropriation, and the structure through which the diversion is effected, must be conveyed by a written instrument, as in the case of real property, and that a verbal sale is nugatory; citing cases. The author further says, however, that such a sale works an abandonment, and the vendee takes his right simply as a subsequent appropriator in his regular order with subsequent appropriators. Kinney on Irrigation, §§ 253, 255, 264. Mr. Pomeroy says that abandonment may be express and immediate by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, nonuse of them after completion, and the like. The general doctrine concerning the effect of abandonment is stated to be that the prior appropriator loses all his exclusive rights to take or use the water which he had acquired. "A verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment thereof. Such act shows an unequivocal intent on the part of the appropriator to give up and relinquish all of his interest, and, as it does not effect any transfer thereof to the attempted assignee or vendee, the only possible result is an immediate and complete abandonment." Pomeroy on Water Rights, §§ 96, 97. It is not necessary, we think, to invoke the rule as to an executed parol contract, such as



arose in *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, nor to pass upon the applicability of the principle there enunciated to the present case. The evidence clearly was admissible to show abandonment, and may be restricted to that object, and, thus restricted, fully justifies the findings of the court. It was not admitted to prove title, as clearly appears from the ruling of the court. Defendant claimed through Terwilliger, her husband, and offered evidence in support of her claim. It was competent for plaintiffs to show that long before defendant's deed, and continuously for many years, he had treated his right as abandoned, and his verbal sale was admissible as tending to establish this fact. The sale conferred no title upon Musgrave, but the subsequent use by him and his associates and their successors of all the water was an appropriation of whatever water Terwilliger was entitled to prior to the sale. His share of the water by his own act became publici juris, and was appropriated by others long before he attempted to recapture or again convey it. Plaintiffs' exclusive use of all the water, under claim of right, save only what Terwilliger and defendant used by permission or clandestinely, continued to the beginning of the action, a period of at least 20 years. We think the evidence was sufficient to support the findings.

It is advised that the judgment and order be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 426

FERRIS v. WOOD. (Sac. 1,207.)

(Supreme Court of California. Aug. 17, 1904.)

SUMMONS—DELAY IN SERVING—DISMISSING ACTION—DISCRETION OF COURT.

1. It is an improper exercise of discretion to dismiss an action because of delay in serving summons for two years and a month after the filing of the complaint; the action being on an unpaid judgment, execution on which had been returned nulla bona, and no defense being suggested; and the delay for several months being due to pendency of negotiations for a compromise, and another reason therefor being to see if some property could be discovered that could be attached.

Commissioners' Decision. Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Joseph B. Ferris, administrator of Pauline S. Wood, deceased, against P. F. Wood. From an order dismissing the action, plaintiff appeals. Reversed.

G. W. Zartman, for appellant. C. L. Russell, for respondent.

CHIPMAN, C. The trial court granted defendant's motion to dismiss the action on the ground of unnecessary delay in serving summons. The complaint duly pleaded a former judgment between the same parties in the same court as the cause of action. An execution had been taken out, but was returned nulla bona. The summons in the present action was issued on the day the complaint was filed, and was served two years and one month thereafter. Plaintiff appeals from the judgment of dismissal.

In support of the motion the affidavit of defendant Wood was read, in which he stated that his place of residence was then, and had been for several years, the same as that of plaintiffs' attorney, and that they were well acquainted with each other, and had met frequently during the past five years, and that defendant's place of residence was also well known to plaintiff; that, "during the past two years prior to the service of said summons upon affiant, affiant had conversed with said plaintiff about the matters mentioned in the complaint in this action"; that plaintiff at no time informed affiant of the commencement of this action; and that the summons was not placed in the hands of any officer for service until the day it was served. Defendant also introduced the complaint and summons in the action.

Plaintiff introduced the judgment roll in the original action against defendant, consisting of the complaint, answer, findings, and judgment; also the execution issued on the judgment, and return nulla bona. Plaintiff's attorney was then sworn, and testified that a writ of attachment was sued out at the time summons was issued, and one reason why summons had not been served earlier was that "it was the desire of plaintiff to hold back service and knowledge of suit from defendant, to see if it was possible to discover anything on which a writ of attachment would lie." He further testified: "Shortly after this action was commenced, I received a letter from the plaintiff asking me to withhold service of summons until further orders from him, as the defendant had made a proposition to him to compromise the judgment heretofore rendered against him, and plaintiff did not wish to embarrass the settlement by pushing the litigation. After several months, plaintiff notified me that the compromise had fallen through, and to proceed with the suit, which I did at once." He also testified that the suit was brought upon a judgment obtained in that court, no part of which has ever been paid. The testimony of plaintiff's attorney was not contradicted or denied by defendant, but was corroborated by defendant's affidavit. This judgment imported absolute verity, and, besides, it appeared without conflict that no part of it had been paid.

Before the amendment of section 581, Code Civ. Proc., which now makes it compulsory for the court to dismiss the action if sum-

mons is not issued within one year and served within three years, it was within the discretion of the court to refuse to dismiss the action, no matter how long the summons had remained without service. It is now compulsory on the court to dismiss the action when the summons is not served within three years. In other cases there is no fixed rule as to the dismissal for want of prosecution (*Stanley v. Gillen*, 119 Cal. 176, 51 Pac. 183), and the power to dismiss the action on this ground is still in the discretion of the superior court, subject to reversal for a patent abuse of such discretion (*First National Bank v. Nason*, 115 Cal. 626, 47 Pac. 595).

In the case of *Edridge v. Kay*, 45 Cal. 49, the action was ejectment, and was commenced to save the statute of limitations. The summons was issued in April, 1868, and no service until May, 1871, three years and one month; nothing appearing to obstruct the service, and the defendants living all the time near the plaintiff, and easily found. The delay was said by this court to be "absolutely without excuse." In *Lander v. Fleming*, 47 Cal. 614, the order of dismissal was made on the record without any showing by affidavits. Summons issued in October, 1870, and was served in January, 1873, a delay of two years and two months. The court held that a *prima facie* case of lack of diligence was shown, which cast upon the plaintiff the duty of showing circumstances excusing "his apparent tardiness in pursuing the defendant." Courts have vainly attempted to define the discretion with which they are endowed in such a way as to be found universally applicable. It is exercised in so many different cases and under so many different circumstances as to preclude the possibility of laying down a certain guide for all cases. "Each particular case presents its own features, and no ironclad rule can justly be devised, applicable alike to all." *First National Bank v. Nason*, *supra*. In *Bailey v. Taaffe*, 29 Cal. 423, Mr. Justice Sanderson said: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice." In the case before us the facts are undisputed. It is unlike the case of a motion for a new trial, for example, where the trial judge is, for obvious reasons, better qualified to determine whether a fair trial has been had, and substantial justice done, than the appellate tribunal.

The judgment upon which the action is brought is unpaid. An effort to compromise that judgment was in progress by the parties after the summons issued, and for this reason plaintiff caused the delay in the service. To have served the summons pending these nego-

tiations might, as plaintiff feared, embarrass the settlement. It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of substantial justice.

In the case of *Herman v. Pacific Jute Manufacturing Co.*, 131 Cal. 210, 63 Pac. 344, the court reversed an order dismissing the action on the ground that the defendant admittedly had no defense, and had filed a sham answer. In that case the complaint was filed in 1883, and the motion was made in 1897. Matters alleged by plaintiff in excuse for the delay were not considered. The sole issue raised by the answer in the case was ownership of the note, and was filed for purposes of delay. How far this latter fact influenced the decision does not appear, but it was put upon the ground, also, that defendant admittedly had no defense. In the present case not only was the indebtedness admitted, and no defense to it suggested, but the delay was explained upon the reasonable grounds that the parties were endeavoring to effect a compromise. Some consideration, also, is due to the fact—though in itself insufficient—that plaintiff in the original action recovered judgment for the estate of which he was administrator, and is now seeking to keep that judgment alive for said estate.

In our opinion, the discretion of the court was improperly exercised, and it is therefore advised that the judgment of dismissal be reversed, and the cause remanded.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment of dismissal is reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 430

SIERRA WATER & MINING CO. et al. v. WOLFF et al. (Sac. 1,032.)

(Supreme Court of California. Aug. 17, 1904.)  
COSTS — STATUTES — CONSTRUCTION — APPEAL — JURISDICTION.

1. In all cases where the Supreme Court has appellate jurisdiction of the matter brought in controversy in the lower court, the appealability of an order made before or after final judgment is not controlled or affected by the amount involved.

2. Under Code Civ. Proc. § 1022, providing that costs are allowed of course to the plaintiff on a judgment in his favor in an action for the recovery of real property or involving the title to real estate, it is error, in an action to quiet title to a mining claim, notwithstanding section 1025, providing that in other actions than those mentioned in section 1022 costs may be allowed or not, in the discretion of the court, to strike out plaintiffs' memorandum and disallow plaintiffs' costs, though plaintiffs recovered judgment for only a part of the land in controversy, the defendant having denied plaintiffs' title and ownership as to all of the land.

Commissioners' Decision. Department 1. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by the Sierra Water & Mining Company and others against John G. Wolff and others to quiet title. From an order striking out plaintiffs' memorandum of costs and disallowing costs to plaintiffs, they appeal. Reversed.

G. G. Clough and Frank R. Wehe, for appellants. T. D. Soward, for respondents.

**CHIPMAN, C.** In this case plaintiffs filed a memorandum of costs for \$117.15. The court granted defendants' motion to strike it out, and "disallowed all costs herein to plaintiffs." Plaintiffs appeal from the order. There is an appeal also from the judgment and from the order denying plaintiffs' motion to set aside the judgment and correct the conclusions of law therein on various grounds, and, among others, that the findings of fact required that plaintiffs should have a judgment for their costs. The only questions presented in the briefs relate to the order disallowing plaintiffs' costs.

The complaint is in form an action to quiet title, in which plaintiffs claim to be the owners and possessed of certain mining ground known as the "Last Chance Mining Claim" (particularly described by metes and bounds). It is alleged that defendants, without right, claim an interest in the land adverse to that of the plaintiffs, and they are called upon to set forth the nature of their claim, etc. Defendants, in their answer, deny that plaintiffs own, or ever owned or possessed, any interest in any part of the land described in the complaint, and allege on their behalf the ownership and possession of certain lands known as the "Miners' Home Placer Mine Location" (describing it by metes and bounds), containing 102.09 acres, which it is alleged conflicts with the so-called "Last Chance Mining Claim" to the extent of 99.197 acres (describing the land in conflict). A second defense alleges that the land mentioned in the complaint was forfeited prior to 1892 by failure to perform the required annual labor thereon, and certain facts are set forth showing an alleged conflict of defendants' location with the Last Chance, as originally located and as subsequently modified. Of the land described in the complaint and in the answer the court found defendants to be the owners of tract A of the Miners' Home placer, containing 3.867 acres, and tract B, 83.426 acres, and that plaintiffs were the owners of 83.10 acres in one tract and certain other tracts (acreage not given), and all the land in certain locations "which \* \* \* does not conflict with the Miners' Home placer mine location which is hereinbefore designated." Plaintiffs' title was quieted to all the lands found to belong to them, and so likewise defendants' title was quieted to lands found to belong to them.

1. Respondents make the point that the court has no jurisdiction of the appeal, for the reason, as we understand respondents,

that the amount of costs was less than \$300; citing *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101, and other cases. The rule established by the more recent decisions is that in all cases, legal or equitable, where this court has appellate jurisdiction of the matter brought in controversy in the lower court, the appealability of an order made before or after final judgment is not controlled or affected by the amount involved. *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334; *s. c.* 128 Cal. 303, 60 Pac. 932; *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360.

2. By the provision of section 1022, Code Civ. Proc., "costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases: (1) In an action for the recovery of real property. \* \* \* (5) In an action which involves the title or possession of real estate." Section 1025, Code Civ. Proc., provides as follows: "In other actions than those mentioned in 1022, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court." Respondents claim that the parties are merely nominal plaintiff and defendant, and that the Code sections do not apply; that both parties allege possession and ask equitable relief; and that the case is not one in which a jury could be demanded, and hence costs are in the discretion of the court—citing *Gray v. Dougherty*, 25 Cal. 282; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158. It is stated in the briefs that the court disallowed plaintiffs' costs because in its view the action was equitable, and costs therefore were in the discretion of the court, under section 1025. We do not think the question turns on the form or nature of the action, but depends rather upon the fact whether the case comes within the terms of the statute relating to costs. The cases discussing the right of trial by jury in actions to quiet title (see *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091, and cases reviewed) have no necessary application to the question here, as they depend upon constitutional provisions. In *Kelly v. C. P. R. R. Co.*, 74 Cal. 565, 18 Pac. 390, the action was for specific performance, and the court said: "We are inclined to think that a suit for specific performance 'involves the title' to real estate within the meaning of sections 1022 and 1024 of the Code of Civil Procedure; and that, therefore, upon a judgment in its favor, the defendant was entitled to costs against the plaintiff as matter of right." *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470, was an action to quiet title to a right of way. The court said: "The Code directs that costs are allowed of course to the plaintiff upon a judgment in his favor in an action which involves the title or possession of real estate. Code Civ. Proc. § 1022, subd. 5." The action

in the present case certainly involved the title to real estate. That plaintiffs did not recover judgment as to all the land in controversy does not change the fact that they had a judgment in their favor, any more than if they had sued for \$5,000 damages and recovered but \$1,000. This is true in ejectment (*Havens v. Dale*, 30 Cal. 547), and we see no reason why it is not true in the present case. The defendants here denied plaintiffs' title and ownership as to all the land, and this brings the case precisely within the rule established in the case last cited.

It is advised that the order striking out plaintiffs' memorandum of costs and disallowing plaintiffs' costs be reversed, and that the trial court be directed to amend the judgment by inserting therein the plaintiffs' costs, and, thus amended, to stand approved.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order striking out plaintiffs' memorandum of costs and disallowing plaintiffs' costs is reversed, and the court below is directed to amend the judgment by inserting therein the plaintiffs' costs, and, as thus amended, said judgment shall stand affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

144 Cal. 494

**ESCONDIDO OIL & DEVELOPMENT CO.  
v. GLASER. (L. A. 1,251.)**

(Supreme Court of California. Aug. 22, 1904.)

**ACTIONS—REAL PARTY IN INTEREST—CORPORATIONS—ACTS OF AGENTS—ASSIGNMENTS—PLEADING—SURPLUSAGE—EVIDENCE—LIQUIDATED DAMAGES.**

1. B., while treasurer of plaintiff corporation, obtained an oil lease from the owner of certain lands, obligating B. within six months to commence the drilling and sinking of oil wells, and provided that, if B. should fail to comply with the contract, his rights thereunder should end. Such contract and lease were taken by B. on behalf of plaintiff corporation, who was the real party in interest, which fact was known both to the lessor and to defendant, who contracted with B., after he had assigned his interest under the contract to plaintiff, for a sublease for one-half interest of all of B.'s rights under the lease, on the conditions specified, and under which sublease defendant promised to conduct drilling operations on the land, and, in case of his breach of the contract, to pay B. \$500 as liquidated damages. *Held* that, since plaintiff was the real party in interest in defendant's contract with B., and defendant knew such fact at the time he entered into the same, it was no defense to defendant's liability to plaintiff for breach thereof that B. had no interest in the original lease at the time he made the contract with defendant.

2. Where a contract was made by the agent of a corporation for the corporation's benefit, parol evidence was admissible to show such fact, though the contract bore no such suggestion on its face.

3. Where a corporation was the real party in interest in a contract made by one of its officers in his own name, for the corporation's benefit, an allegation in an action for breach thereof that such officer had assigned the cause of ac-

tion to the corporation was surplusage, and immaterial.

4. In an action by a corporation for breach of contract, an allegation that it made the contract sued on, which on its face is not ultra vires, is sufficient as an averment of such fact, without an allegation that two-thirds of the corporation's capital stock ratified the contract.

5. Where the damages arising from defendant's breach of a sub oil lease were uncertain, it was proper for the parties to agree that in case of breach defendant should be liable for \$500 as liquidated damages, under Civ. Code, § 1671, providing that the parties to a contract may agree on an amount, which shall be presumed to be the damages sustained by a breach thereof, when, from the nature of the case, it would be difficult to fix the actual damage.

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the Escondido Oil & Development Company against C. H. Glaser. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Withington & Carter, for appellant. Collier & Smith, for respondent.

McFARLAND, J. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment went for defendant. Plaintiff appeals from the judgment.

The demurrer was upon several grounds, and the court overruled it as to all the grounds except the general one that it does not state facts sufficient to constitute a cause of action, and, as we think the special grounds are not tenable, we will consider only the question whether the court erred in holding the general demurrer good. The facts alleged in the complaint are substantially these: During the time mentioned in the complaint the plaintiff was and is a corporation, and one W. H. Baldrige was and is its treasurer. On July 16, 1900, said Baldrige, describing himself as treasurer of plaintiff, entered into a written contract, designated as "Exhibit A," with another corporation, called the Pacific Mutual Life Insurance Company of California. By this contract the insurance company, in consideration of \$1 and certain covenants and agreements of Baldrige, leased to Baldrige, his heirs and assigns, the exclusive right of drilling for, developing, and removing petroleum, oil, and other like substances, in and upon certain described lands of the insurance company. By this contract Baldrige agreed that within six months he would commence and diligently prosecute drilling and sinking wells on the lands for the purpose of developing oil. The contract contains many provisions not necessary to be here mentioned in detail. It is sufficient to say that, if Baldrige should prosecute the work in the manner and within the times prescribed, and should find oil in paying quantities, he should retain possession of the land for the purpose of extracting oil for a very long period, and was to give the insurance company certain royalties; but, if he should fail to comply with

the contract, or abandon it, his right under it should end. It was averred that this contract and lease was made by Baldrige "for and in behalf of the said Escondido Oil & Development Company, who was the real party in interest thereto, and this fact was well known to said lessor when said lease was executed." And a few days afterwards—on July 25, 1900—Baldrige, as treasurer, assigned and transferred, by an instrument designated as "Exhibit B," to plaintiff, the said Exhibit A, with all its rights and obligations. Afterwards, on November 3, 1900, the said Baldrige as such treasurer, by the direction of plaintiff, entered into another contract, designated as "Exhibit C," with the defendant herein, C. H. Glaser, which contract is the foundation of this present action. In this contract there is first recited the making of said Exhibit A between Baldrige and the said insurance company. It is then recited that Glaser desired to take a sublease of a one-half interest of all the rights that Baldrige held by said contract between him and the insurance company, upon the conditions thereafter specified. Then Baldrige assigns and subleases to Glaser a one-half interest of all his right under the contract with the insurance company, and "subject to all the terms, conditions, and limitations in such lease from said insurance company to the party of the first part herein set out and appearing, upon the following conditions." Then Glaser promises to put on the land all necessary machinery for boring, etc., and to prosecute the work of boring wells, etc., within certain times, entering into the details of such work, and that he "will comply with the conditions imposed upon the party of the first part by the said lease from said Pacific Mutual Life Insurance Company." Glaser also agreed that for the breach of the contract, or any part thereof, he will pay to the party of the first part \$500 as liquidated damages. It is averred that under this contract Glaser commenced drilling and boring on the land, but that he failed to put on the necessary machinery, and has failed and refuses to prosecute the work as provided in said contract in a diligent manner, or at all, and has notified Baldrige and plaintiff that he has abandoned operations under such contract, and would not complete the same, and that both Baldrige and plaintiff have demanded of him that he comply with the terms of said contract and proceed with the work; but defendant refused to do so, and notified them that "he has abandoned said enterprise, and did not intend to carry out his said contract." It was also averred that on September 21, 1901, Baldrige assigned to plaintiff all his interest in the contract Exhibit C, and any right of action which he might have against defendant for a breach of said contract; and "that the said defendant well knew at the time when said contract marked 'Exhibit C' was made that the plaintiff herein was the party in interest, and that

the same was executed in its behalf by said W. H. Baldrige as treasurer, and that said lease had been assigned to it by said W. H. Baldrige, treasurer."

It very clearly appears from the complaint that defendant has broken his covenants and promises contained in said contract Exhibit C. The main contentions of respondent are that at the time when Exhibit C was made Baldrige had no interest in the land, having previously assigned all his right in Exhibit A to plaintiff, and therefore was a stranger to the title and possession, and could not sublet the same; that there was no contractual relation between defendant and plaintiff; and that the assignment of the cause of action for the breach of the contract was void, because plaintiff had no capacity under its charter to acquire choses in action or causes of action; and we understand that these are the main grounds upon which the demurrer was sustained. We do not think that these positions are tenable. If Baldrige had been the real party to Exhibit C, and had himself brought this action, it is doubtful if defendant could have defended upon the ground that Baldrige had no title to the premises, while no claim was set up by any other person, and there was no disturbance of the defendant's possession, and no hindrance by any one to a performance by him of his part of the contract. See *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320. But the plaintiff was the real party to Exhibit C, and defendant, as is averred, knew that fact, and knew that he was dealing with plaintiff through its agent, and the truth of the avérmont of this fact could be shown by parol evidence. This subject was fully discussed in *S. P. Co. v. Dredge Co.*, 118 Cal. 368, 50 Pac. 650. In the opinion in that case it is said, quoting from another case, that "If, upon the face of the instrument, there are indications suggestive of agency, such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper, parol evidence is competent to show whom the parties intended should be bound or benefited. And even where the contract bears no such suggestion on its face, the rule as now generally received is that parol evidence is competent either in favor of or against the corporation." In the case at bar, under the averments of the complaint, which, as against the demurrer, must be taken to be true, the plaintiff is the real party in interest, and entitled to maintain an action for the breach of the contract. The averment that Baldrige went through the form of also assigning the cause of action is mere surplusage and immaterial. It appears that in the contract, a copy of which is attached to the complaint, after the signatures to Exhibit C, there is a statement that the contract is ratified by the holders of more than two-thirds of the capital stock of plaintiff; but this statement is also surplusage and immaterial. It is true that the board of directors

is, for most purposes, the governing body of a corporation; but the statement in a pleading that certain property or right to property was conveyed or assigned to a corporation, or that it made a contract not on its face *ultra vires*, is sufficient as an averment of such fact.

There are two counts in the complaint. In the first count judgment for \$500 as liquidated damages is prayed for, and in the second count actual damages in a larger amount named. Respondent contends that this is not a case where there could be a valid agreement for liquidated damages under sections 1670 and 1671, Civ. Code; but as there is no special demurrer to the first count on that ground, the complaint, if good for actual damages, is not reached by the demurrer. However, as the case may be hereafter tried on its merits, it is proper to say that in our opinion the agreement for liquidated damages should be upheld. The complaint sufficiently states the character and subject-matter of the contract—"the nature of the case," to use the language of section 1671—to show that upon its breach "it would be impracticable or extremely difficult to fix the actual damages." Fixing the amount for damages sustained in the contracts for digging oil wells very similar to the one here involved was upheld in *Gibson v. Oliver*, 158 Pa. 277, 27 Atl. 961, and cases there cited. And it would seem that damages for breaches of contracts touching future interest in oil wells of unknown value are of such remote and speculative character as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement. In the case at bar the right of plaintiff, under the contract with the insurance company, to test the lands, and to acquire a valuable interest therein if the test prove successful, was limited in time, and that right might be lost by a failure of defendant to comply with his contract; and it was quite apparent that in such event it would be entirely impracticable to show plaintiff's loss, or what otherwise would have been his gain. And the small amount provided in the contract herein involved as liquidated damages is certainly not unconscionable.

There are no other points calling for special notice.

The judgment appealed from is reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: HENSHAW, J.; LORIGAN, J.

144 Cal. 493

MATTESON & WILLIAMSON MFG. CO. v. CONLEY. (L. A. 1,368.)

(Supreme Court of California. Aug. 20, 1904.)

SUPPLEMENTARY PROCEEDINGS—GARNISHMENT—ACTION AGAINST GARNISHEE—COMPLAINT—CREDITORS' BILL—ADEQUATE REMEDY AT LAW.

1. In the absence of proceedings supplementary to execution, as authorized by Code Civ.

Proc. § 714 et seq., an action at law cannot be maintained directly against a garnishee to recover money due to the execution debtor.

2. Where the complaint in an action against a garnishee to recover money due the plaintiff's judgment debtor failed to allege that an execution had been levied against the debtor and had been returned unsatisfied, it could not be sustained as a creditors' bill, since it failed to show that plaintiff had no adequate remedy at law.

Commissioners' Decision. Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Matteson & Williamson Manufacturing Company against O. C. Conley. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. B. Webster and Budd & Thompson, for appellant. C. L. Russell, for respondent.

COOPER, C. Appeal from a judgment for defendant, after a demurrer had been sustained to the plaintiff's amended complaint.

The complaint states that in August, 1897, plaintiff duly recovered a judgment in the superior court of San Joaquin county against one Carlisle for the sum of \$896 and costs, and thereupon execution was issued, directed to the sheriff of Kern county, who served a notice of garnishment upon this defendant, whereby all goods, moneys, and credits in the hands of, or under the control of, defendant were garnished. Defendant answered in writing, admitting the fact that he had been garnished "covering moneys and credits due from me to J. H. Carlisle, on account of wheat crop on lands in Tulare county. It is impossible at this time to make a detailed statement of the exact condition of matters between myself and Carlisle." The sheriff of Kern county returned the writ of execution with the written statement of defendant annexed thereto. No writ of execution was issued to the sheriff of San Joaquin county. The complaint alleges that at the time the said writ was served on defendant he had in his possession 390 tons of wheat belonging to Carlisle, pledged to him as security for \$8,000, and that defendant afterwards sold the wheat for sufficient to pay the indebtedness due to him by Carlisle, and for \$1,300 over, after satisfying the indebtedness of Carlisle. This action is brought to recover of defendant the amount due plaintiff from Carlisle, being less than the \$1,300, which, it is alleged, is in the hands of the defendant. The question is as to whether an action can be maintained directly against a person who has been served with an execution to recover money due from such person to the execution debtor. We think the question must be answered in the negative. The defendant is not indebted to the plaintiff. At common law there is no privity between a judgment creditor and his debtor's debtor. There is no contract relation between them, and we know of no case in which it has been held that such action would lie, in the absence of

a statute authorizing it. In place of a creditors' bill, and as a remedy more direct and certain, we have a chapter on proceedings supplementary to execution. Code Civ. Proc. § 714 et seq. Under the provisions of this chapter a debtor of a judgment debtor may be fully examined as to property, credits, money, or other assets in his possession or under his control. Witnesses may be examined, and the judge may order any property of a judgment debtor not exempt from execution, or due to the judgment debtor, to be applied toward the satisfaction of the judgment. If it appears that the person alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person for the recovery of such interest or debt. In this case the plaintiff did not attempt to comply with the provisions of said chapter concerning proceedings supplementary to execution. Defendant has not been examined concerning any property or moneys due by him to Carlisle. No order has been made as to the application of any assets of Carlisle in the hands of defendant, nor has any order been made authorizing this action. It is therefore evident that the proceedings contemplated by the Code have been entirely ignored. The defendant, without having been examined or ordered to pay any money, has been sued by one to whom he is not indebted. Plaintiff does not claim that defendant is indebted to him. If he would reach property or credits in the hands of defendant for the purpose of satisfying his judgment against Carlisle, he must do so in the manner provided by law. The question has been fully discussed and decided in accordance with what has been said in *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 357, 37 Am. St. Rep. 50. The proceedings supplementary to execution under our Code are a substitute for a creditors' bill. *Adams v. Hackett*, 7 Cal. 201; *Pacific Bank v. Robinson*, 57 Cal. 522, 40 Am. Rep. 120; *Habenicht v. Lissak*, 78 Cal. 357, 20 Pac. 374, 5 L. R. A. 713, 12 Am. St. Rep. 63; *Herrlich v. Kaufmann*, supra. If the statutory proceedings could be ignored, and we were to treat the complaint as a creditors' bill, it would fail to state facts sufficient to constitute a cause of action. The complaint does not show that the remedies at law have been exhausted, or that an execution has been returned unsatisfied. This is necessary, with certain exceptions, of which this is not one. *Freeman on Executions*, § 428, and notes; *Pacific Bank v. Robinson*, 57 Cal. 522, 40 Am. Rep. 120; *Mesmer v. Jenkins*, 61 Cal. 153; *Herrlich v. Kaufmann*, supra. In support of the right to maintain the action appellant cites *Roberts v. Landecker*, 9 Cal. 262, and *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 48 Pac. 332. In the for-

mer case the question was as to the liability of a garnishee on attachment, and the decision was placed upon the ground that the section (section 127, Practice Act [Wood's Digest, 1850-1858, p. 183]) "makes the garnishee liable to the plaintiff in the attachment suit for the amount of such property, unless the same be delivered up or transferred to the sheriff." The latter case followed the former as to the liability of a garnishee on attachment. It expressly refers to *Herrlich v. Kaufmann*, and shows the distinction between the liability of a garnishee under an attachment and under an execution. After referring to the supplementary proceedings under execution, it is said in the opinion: "Nothing of that kind is provided for under the proceedings on attachment in this state. On the contrary, section 544 (Code Civ. Proc.) provides that the garnishee shall be directly liable to the attaching creditor for the amount of such credits, property, or debts until the attachment is discharged, or any judgment recovered by him be satisfied."

The judgment should be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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**FIRST NAT. BANK OF RIVERSIDE v.  
EASTMAN et al. (L. A. 1,234.)**

(Supreme Court of California. Aug. 20, 1904.)

FRAUDULENT CONVEYANCE — NONRESIDENT  
DEBTOR—ACTION—RIGHTS OF GENERAL CRED-  
ITORS—PROCESS—SERVICE OUTSIDE OF STATE  
—EFFECT—STATUTE.

1. Where real estate situated within the jurisdiction of the court is fraudulently transferred by a nonresident, it may be reached at the suit of creditors of the grantor by a constructive service of summons on such nonresident.

2. In an action to set aside an alleged fraudulent conveyance plaintiff cannot question the validity of the conveyance in the absence of allegation and proof that he is a creditor of the grantor.

3. Under the direct provision of Code Civ. Proc. § 413, when publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post office of a newspaper notice to a nonresident defendant.

4. Personal service on a nonresident defendant outside the state, pursuant to Code Civ. Proc. § 413, is insufficient to sustain a judgment in personam against such nonresident.

5. A judgment on personal service outside the state on a nonresident defendant, pursuant to Code Civ. Proc. § 413, is void except as to the disposition of property seized thereunder.

6. A general creditor, without having obtained a judgment, is entitled to maintain an action against his nonresident debtor to set aside a fraudulent conveyance of property within the jurisdiction of the court; the fact of the nonresidence creating an exception to the rule

† 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 324.

that a mere general creditor cannot come into court to have a fraudulent conveyance set aside.

**Commissioners' Decision.** Department 2. Appeal from Superior Court, Riverside County; Lucien Shaw, Judge.

Action by the First National Bank of Riverside against Joseph Eastman and Hugh Lennox. From a judgment in favor of plaintiff, defendant Lennox appeals. Reversed.

W. J. McIntyre and J. S. Chapman, for appellant. A. Aird Adair, for respondent.

COOPER, C. This action was brought to have a certain deed made by defendant Eastman to defendant Lennox set aside as fraudulent, and to have the premises therein described declared to be subject to the lien of an attachment procured by plaintiff against Eastman. The court filed findings upon which judgment was entered in favor of the plaintiff as prayed. Defendant Lennox made a motion for a new trial, which was denied, and this appeal is by Lennox from the judgment and order denying his motion. It is contended by the appellant that the pleadings and evidence do not sustain the findings, and that the findings do not sustain the judgment, and, as this involves the merits of plaintiff's case, we will examine it somewhat in detail.

Without separating the allegations of the complaint from the findings, it is sufficient to state that the facts alleged and found, so far as material to the questions discussed, are substantially as follows: On June 9, 1894, defendant Eastman made and delivered his promissory note to plaintiff's assignor. On November 30, 1895, Eastman was the owner of the lands described in the complaint, and in consideration of certain bonds of the value of \$7,500 he executed a deed of the same to defendant Lennox. On January 1, 1896, the deed so made to Lennox had been delivered and duly recorded in the county in which the lands are situated. On the 17th day of June, 1896, the plaintiff commenced an action in the superior court of Riverside county against Eastman alone to recover judgment upon the said promissory note. Eastman then resided in Chicago, Ill. A summons was issued in said action on the day it was commenced, and on the 18th day of June, 1896, an attachment was issued and levied by the sheriff upon the lands described in the complaint. On December 5, 1896, an affidavit was filed, upon which an order of publication of summons was made. The summons was afterwards personally served upon Eastman in Chicago. On September 25, 1897, a judgment by default was given in said action against Eastman for the amount due upon said promissory note, \$6,727.90 and costs. On October 18, 1897, execution was issued upon the said judgment, and returned by the sheriff with his certificate that after diligent search he could not find any real or personal property of Eastman out of which to make said execution, and hence he returned the

same unsatisfied. Thus ended the proceedings in the former action against Eastman. The land stood on the records in the name of Lennox when the suit was commenced. Lennox was not made a party, and Eastman never appeared.

The case at bar was commenced October 21, 1897. The complaint sets up the facts fully as herein stated as to the former action and judgment against Eastman. It is further alleged that the deed made by Eastman to Lennox was without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Eastman, and particularly this plaintiff, and that Eastman is still the owner of the property. At the time of the commencement of this action both defendants were residents of Chicago, Ill., and an order of publication of summons was made, and said summons duly published. Eastman made default, but defendant Lennox appeared and answered, denying the material allegations of the complaint. There is no doubt but that real estate situated within the state and fraudulently transferred to a nonresident may be reached by constructive service of summons on the nonresident owner for the reason that, as to the creditor, the land is deemed to be the property of the party so transferring it. It is a general principle that the process of the courts may reach and seize the property of nonresidents within their jurisdiction. The property, being under the protection of the courts and laws of the state, must be subject to its rules and regulations, and the payment of the debts of its citizens.

The plaintiff might, under the proper circumstances, maintain an action to set aside a conveyance made by its debtor for the purpose of defrauding it. The conveyance made by Eastman to appellant, although it might be void as to creditors, was good between the parties, and vested the legal title in appellant. It was good as against the grantor, his heirs, executors, administrators, and persons claiming under him. Bump on Fraudulent Conveyances, § 433. Such conveyance was good as to all persons except those who stood in such relation to the property or the parties as to be entitled to question it in a proper proceeding. Bump on Fraudulent Conveyances, § 449, and cases cited; Sexey v. Adkinson, 34 Cal. 350, 91 Am. Dec. 698; Frink v. Roe, 70 Cal. 308, 11 Pac. 820. It was therefore essential for the plaintiff to allege and prove that it was a creditor of Eastman before it will be allowed to question the conveyance to appellant. There is no allegation, evidence, or finding that the plaintiff was such creditor. The allegation, evidence, and finding are that plaintiff procured the judgment against Eastman in the manner as hereinbefore set forth in the suit against Eastman alone. This judgment was against a nonresident of the state by publication of summons. The summons was personally served in Chicago, but this was only equiva-



lent to publication and deposit in the post office. Code Civ. Proc. § 413. It did not give the court any greater jurisdiction as to Eastman than service by publication in compliance with the order would have done.

A judgment in rem may be obtained against property within the jurisdiction of the court belonging to an absent nonresident; or, where the property of such nonresident is seized by the process of attachment, the court may in such suit dispose of the property, but it cannot go farther, and give a personal judgment, except one which can be enforced as to the seized property against such nonresident. In the suit against Eastman the court might have directed a judgment which would justify the sale of the property to satisfy the plaintiff's claim, and the purchaser would have taken the right, title, and interest of Eastman in and to the property. Of course, such proceedings would not have affected the right of appellant, for the reason that he was not a party to the litigation. But the court did not, by its judgment, make any direction as to the property, nor was it attempted to sell it by virtue of the execution. The execution was returned unsatisfied, and hence the proceedings as to the first suit ended. The court had no jurisdiction as to the person of Eastman, and hence no power to order a personal judgment as such against him. The doctrine is thus stated by Mr. Justice Field (in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585): "The law assumes that property is always in the possession of its owner in person or by agent, and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability." It is said by Judge Cooley in his

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work on *Constitutional Limitations* (6th Ed.) p. 498: "The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the state; but the notice cannot be made to stand in the place of process so as to subject the defendant to a valid judgment against him personally. In attachment proceedings the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual." And the courts universally hold that such personal judgment is void as to all matters and things except as to the disposition of the property seized. *Belcher v. Chambers*, 53 Cal. 635; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Brown v. Campbell*, 100 Cal. 641, 35 Pac. 433, 38 Am. St. Rep. 314; *Graham v. Spencer* (C. C.) 14 Fed. 608; *Manchester et al. v. McKee, Ex'r*, 9 Ill. 520. And a judgment so obtained is not evidence as to the personal obligation of the parties. *Jones on Evidence*, § 623; *Black on Judgments*, § 904; note to *Pinney v. Providence Loan & Investment Co.*, 50 L. R. A. 577; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931. In the latter case, in speaking of such judgment, the Supreme Court of the United States said: "The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected by defendant out of any other property than that attached in the suit." In speaking of the judgment in such case, the Supreme Court of Indiana said (*Quarl v. Abbott*, 102 Ind. 240, 1 N. E. 476, 52 Am. Rep. 662): "In such case the court, in ascertaining the amount due, does not proceed against the person, but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case." In *Manchester et al. v. McKee, Ex'r*, supra, the Supreme Court of Illinois said "that a judgment in an attachment suit where the defendant has not been brought into court so as to make it a personal judgment is not evidence of the debt upon another suit brought upon that record." The finding, therefore, "that on the 25th day of September, 1897, a judgment was duly given and made by the said superior court of the county of Riverside, state of California, in an action in favor of plaintiff, the First National Bank of Riverside, and against

the said defendant Eastman," is not supported by the evidence.

A judgment duly given and made imports a judgment which is the final determination of the rights of the parties. Respondent argues that a general creditor cannot come into court to have a fraudulent conveyance set aside, and hence, if the judgment against Eastman is not a valid judgment, the plaintiff would be without a remedy, because he could not get a valid personal judgment against Eastman. It is the general rule that a creditor must reduce his claim to a judgment before he can maintain an action of this character. But to this rule there is a well-established exception. Where the defendant is a nonresident, a personal judgment cannot be obtained against him, and therefore the fact of his being a nonresident creates an exception to the rule, and such action can be maintained without the creditor having obtained a judgment. *Scott v. McMillen* (Ky.) 13 Am. Dec. 239; *Quarl v. Abbett* (Ind.) 1 N. E. 476, 52 Am. Rep. 662, and note, page 673; *Taylor v. Branscombe*, 74 Iowa, 534, 38 N. W. 400; *Klipper v. Glancey*, 2 Blackf. (Ind.) 356; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Pendleton v. Perkins*, 49 Mo. 565. In *Quarl v. Abbett* the court said, in speaking of the rule: "Doubtless the general rule was as stated by counsel. Whether it prevails under the reform system of procedure is quite another question, but, without stopping just now to decide that question, and for the present granting that the rule does prevail, still it never did govern such a case as this—manifestly it could not apply—for against a nonresident the creditor could not possibly obtain a personal judgment. It is hardly necessary to cite authorities to prove that two notable exceptions to the rule were where the debtor was dead or 'beyond seas.'" In this case, if the plaintiff, under proper pleadings, establishes the fact that it was a creditor of Eastman at the time of the transfer, and that the transfer was of the character alleged, it would seem to be entitled to relief as to the parties to this suit.

It follows that the judgment and order should be reversed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

MATTHEWS v. BELFAST MFG. CO.  
(Supreme Court of Washington. Sept. 21, 1904.)

WATER COURSES—FLOATING LOGS—USE OF  
STREAM—DAMS—ARTIFICIAL FRESHETS  
—RIGHTS OF PROPRIETORS.

1. A private corporation has no power to exercise the right of eminent domain to acquire

the right to float logs in a stream by means of dams at times when it was not navigable for the purpose of floating logs in its ordinary state.

2. Where a stream was navigable for the purpose of floating logs only at certain seasons of the year, a riparian proprietor had no right to erect dams and float logs in the stream during the nonnavigable season by means of artificial freshets.

3. Where plaintiff, a lower riparian proprietor, who had erected a dam in a stream for the purpose of floating logs, brought suit against an upper proprietor to restrain him from maintaining a dam and floating logs in the stream by means of freshets caused by the operation of such dam, and plaintiff testified that he had constructed gates in his dam through which logs and other timber products could pass whenever the stream was capable of floating them, and defendant's evidence that logs could not be floated down the stream without making use of plaintiff's dam referred only to times when logs were floated by means of freshets, and not when the stream was capable of conveying them in its natural state, the evidence was insufficient to warrant the court in declaring that plaintiff's dam was a nuisance and ordering its removal.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Woodman Matthews against the Belfast Manufacturing Company to restrain defendant from using complainant's land for the purpose of floating logs and from floating logs in a stream across complainant's property by means of artificial freshets, etc. From a decree in favor of complainant, defendant appeals. Affirmed.

Millim & Houser, for appellant. Smith & Brawley and Carr & Preston, for respondent.

FULLERTON, J. The appellant and respondent each own timber lands in Skagit county, through which the East Fork of the Samish river flows; the lands of the appellant being higher up the stream than those of the respondent, although the lands abut upon each other. The Samish river is an unmeandered stream, having an average width between banks of some 50 feet, and during the wet season of the year is capable of floating such mill timber as grows upon its banks and in its immediate vicinity. In the dry season it is not navigable without artificial aids, having at such time a depth of less than 2 feet in many places. The respondent, some years prior to the commencement of this action, had been engaged in logging on his own premises, and had constructed a dam across the river on his own lands some distance below the lands of the appellant. This dam he has kept up ever since, maintaining therein, as he says, suitable gates through which logs pass unobstructed during the time of the year when the stream is high enough to float them. In the summer of 1903 the appellant began logging off of its own lands. To facilitate the work it constructed a dam across the river about 1½ miles above the respondent's dam. This dam it used, not only to retain logs until they were ready to be sent down the river, but also to create a storage basin for water, by means of which it could cause splashes or

artificial freshets in the stream, and thus drive logs down the same after it became too shallow to float them in its natural state. The appellant operated in this manner: It would put into the bed of the river as many logs as could be readily driven. Then it would open the gates of its own dam and drive the logs down the stream as far as the dam of the respondent. From there, by repeated splashes from both dams, it would drive them to the deep waters of Bellingham Bay, into which the Samish river flows. In these operations the appellant found it necessary to use the respondent's dam, and it took possession of the same against the consent and over the protest of the respondent, and used it as if it were its own property. The appellant also, without the consent and against the will of the respondent, made such use of the respondent's land bordering the stream as it found necessary and convenient in order to drive its logs. The artificial freshets or splashes created by means of the dams drove the logs down the stream in lots or jams, which tore down and washed away the river's banks, forming a river bed out of what was before tillable land.

The respondent instituted this action to enjoin the appellant from using his property in the manner stated, and from floating logs down the stream across his property by means of artificial freshets and splashes, alleging, in his complaint, substantially the foregoing facts. To the complaint the appellant answered, denying all its material allegations, and by way of cross-complaint alleged that it had gone to great expense to prepare for logging its premises, and that if stopped by the court would suffer irreparable injury; further alleging that it had instituted condemnation proceedings against the respondent for the purpose of acquiring the right to use the stream by means of splash dams therein where necessary. It also alleged that the dam of respondent was an obstruction to navigation in the stream, and therefore a nuisance. It prayed for relief appropriate to matters set up in its answer. The new matter in the answer was put in issue by a reply, and a trial had before the court, resulting in a permanent injunction against the appellant, enjoining it from operating either of the splash dams mentioned, and from in any manner interfering with the possession or use of the respondent's land. There was a claim for damages made by the respondent for injuries already accrued; but the amount of the damages, if any, the court expressly refused to find, leaving the question as to the amount open to a determination by a jury in an action to be brought for that purpose. This appeal is from that judgment.

The first contention on the part of the appellant, namely, that it has the right to condemn a right of way along the stream over the respondent's land for a logging way, is determined against it by the case of Healy

Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820. It was there held that the statute attempting to confer upon the owner of timber lands the power to condemn a right of way for a logging road and lumbering purposes was in contravention of the state Constitution, and therefore void. As there is no such right independent of the Constitution and statute, it is plain that the appellant's action to condemn can avail it nothing, and its plea that it has brought such an action does not require the court to await its result before restraining it from making an unlawful use of the respondent's property. It is true this court has upheld the statute relating to the organization of boom companies, which had for its object the improvement of streams, such as the one in question, so as to make them floatable for logs at all seasons of the year; but that statute does not aid the appellant. The appellant is not organized as a boom company. It does not purpose improving the stream for the use of the public, and engage in the business of transporting logs down it for the public, but seeks to acquire the right for its own private benefit, to the exclusion of every one else. This it cannot do by the exercise of the right of eminent domain. It has no power to exercise such a right. *Healy Lumber Co. v. Morris*, *supra*.

The next contention is that the court erred in enjoining the appellant from floating logs down the stream by means of artificial freshets and splashes. The argument is that the stream is a navigable one, and that it has the right to use it for the purpose of floating logs, and is liable only for a misuse or abuse of the privilege, and that the evidence fails to show that there was any abuse or misuse in the present case. The stream in question is undoubtedly navigable for floating logs for a part of the year, and during that time the appellant, as well as others, may use it for that purpose. But that is not the case before us. The appellant was not attempting to float logs during the navigable season of the year, but was attempting to do so when the stream in its natural state would not float them. It sought to remedy this by creating unnatural conditions, by the creation of artificial freshets, which conditions damaged and destroyed the respondent's property. This was an abuse of the right of navigation, and for that an injunction would properly lie. *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245.

It is next said that the injunction is too sweeping, in that it prohibits the appellant from operating its dam for any purpose; but a reading of the context of the judgment clearly shows that all that was meant was that the appellant should not operate it to float logs down the stream by means of artificial freshets and splashes, and not that it could not use it for such other purposes as it might find convenient in the conduct of its business.

It is further contended that the respondent is not entitled to relief because his dam is an obstruction to navigation, and he ought not to be allowed to complain of the appellant so long as he was making a misuse of the stream. But, if this were a sufficient reason for denying the respondent the right to relief, we fail to find that the contention is supported by the evidence. An officer of the appellant did testify that logs could not be floated down the stream without making use of the respondent's dam; but he was speaking of floating logs by means of freshets and splashes, and not of floating when the stream would convey them in its natural state. On the other hand, the respondent testified that his dam did not obstruct the river; that he had constructed in it gates, through which logs and other timber products could pass whenever the stream was capable of floating them. We think, therefore, that the evidence was insufficient to warrant the court in declaring the dam a nuisance and ordering its removal. In order to successfully market logs by the use of a stream of this character, dams and booms are necessary; in fact, such streams can hardly be used for navigating logs without them. Being necessary, their use is lawful when reasonably exercised, and it is only when the right is misused or abused that other navigators can complain of them as obstructions. We do not wish, however, to be understood as foreclosing the appellant's right to complain, should the dam prove to be an obstruction when an actual test under normal conditions is made. Should it then prove to be a nuisance, the appellant, or any one injured by it, may have it corrected by an action brought for that purpose.

As we find no substantial error in the record, the judgment appealed from will stand affirmed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

#### BYRKETT et al. v. GARDNER.

(Supreme Court of Washington. Sept. 21, 1904.)

FORCIBLE ENTRY AND DETAINER—LEASES—COVENANTS—FAILURE TO PERFORM—NON-PAYMENT OF RENT—WASTE—NOTICE.

1. Ballinger's Ann. Codes & St. § 5527, subd. 4, provides that a tenant is guilty of unlawful detainer when he continues in possession after failure to perform any condition of the lease other than to pay rent, etc., after notice in writing requiring in the alternative the performance of such condition or the surrender of the property, provided they shall remain uncompensated with for 10 days after service thereof. *Held*, that a notice served on a tenant under a lease requiring the performance of a large number of covenants with reference to the management and tillage of the leased premises, containing a mere general recital of the conditions of the lease and claiming that a breach had been made in the performance of each and every condition, but which did not point out any par-

ticular act which the lessee could perform within the specified time, was insufficient to entitle the lessor to maintain forcible entry and detainer under such section.

2. Ballinger's Ann. Codes & St. § 5527, authorizes the maintenance of forcible entry and detainer against a tenant (subdivision 3) when he continues in possession after a default in payment of rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served as provided in behalf of the person entitled to the land on the person owing the same, which shall have remained uncompensated with for a period of three days after service thereof. *Held*, that a notice from which it was impossible to determine how much the lessors claimed to be due, so as to enable the lessee to save a forfeiture by payment within the time allowed, is insufficient.

3. A failure to farm lands leased in a good and husbandlike manner, or to keep in repair fences thereon, is not waste, within Ballinger's Ann. Codes & St. § 5527, subd. 5, authorizing a recovery of possession by the landlord for waste committed by the tenant, though the acts of the tenant tended to lessen the income derived from the land.

Appeal from Superior Court, Kittitas County; A. L. Miller, Judge.

Forcible entry and detainer by A. R. Byrket and another against James E. Gardner. From a judgment dismissing the action: plaintiffs appeal. Affirmed.

Huntington & Wilson, for appellants. R. A. Jayne and Bennett & Sinnott, for respondent.

FULLERTON, C. J. In January, 1901, the appellants leased to the respondent a portion of their ranch, situated in Klickitat county, for a term of four years commencing on the 1st day of February, 1901. Among the conditions of the lease to be kept and performed on the part of the respondent were the following: "(1) To cultivate all of said premises in a good and husbandlike manner, in such crops, fruits, and vegetables as may be mutually agreed upon. (2) To provide feed for, and feed, milk, and care for in all respects, all the milk cows, and to provide feed for, feed, and care for all the stock now on said ranch, and the increase thereof, and at the expiration of the first year of this lease return them to the parties of the first part in good condition. To put in repair and keep in repair all tools, farming implements, machinery, and dairy supplies, and at the expiration of the first year of this lease return them to the parties of the first part in good condition, natural wear excepted. To make butter from said cows, and to deliver to the parties of the first part one-half thereof, wrapped in two-pound rolls with the brand paper of said ranch. To deliver in the barns upon said ranch, or other buildings thereon, one-half of all crops grown upon said premises over and above that necessary for feed for the stock thereon, baled when hay and in proper packages for shipment. When crops raised on the premises included in the one-year term of this lease require sacks for shipping, each party is to furnish his own

one-half of said sacks. To repair all fences and build all new ones necessary for the protection of crops on said premises out of materials provided by parties of the first part. To haul out and distribute all manure upon said ranch. To furnish one-half the labor for laying drain pipes, tiles, etc., for drainage and irrigation of lands, included in the four-years term of this lease. To furnish one-half the hogs kept upon said premises, provide feed for them, butcher and market them, and pay the first parties one-half of the price they bring. To take said cattle to Trout Lake about May 1st, and keep them there until about October 1st. (3) To plant, cultivate, pick, pack, box, and ship all berries raised upon said premises, and, after deducting the cost of the boxes and of picking and packing, to divide the residue of the proceeds of the sale thereof equally with the first-named parties. (4) To plant, cultivate, pick, pack, box, crate, or otherwise provide for shipment, and ship, all melons, vegetables, etc., grown upon the lands covered by the four-years term of this lease, and pay over to the parties of the first part one-third of the gross proceeds of the sale thereof. (5) To at the earliest date possible set out the ground heretofore farmed to strawberries in strawberries, and also so much of the peach orchard as may be pulled out for that purpose, and to keep all of said lands and the lands now set to strawberries in strawberries during the continuance of this lease. To replant said lands in strawberries at the expiration of three years of life and bearing. To can, jelly, jam, or make into wine all berries and vegetables, when it is found advantageous to both parties hereto."

On the 21st day of May, 1903, the lessors served on the lessee a notice which, after reciting the execution of the lease above mentioned, proceeded as follows: "To James E. Gardner: In and by the lease above mentioned you covenanted and agreed, among other things: 'To cultivate all of said premises in a good and husbandlike manner in such crops, fruits, and vegetables as may be mutually agreed upon. To repair all fences and build all new ones necessary for the protection of crops on said premises out of material provided by the parties of the first part. To plant, cultivate, pick, pack, box, and ship all berries raised upon said premises, and, after deducting the cost of the boxes and of picking and packing, to divide the residue of the proceeds of the sale thereof equally with the first-named parties. To plant, cultivate, pick, pack, box, crate, or otherwise provide for shipment, and ship, all melons, vegetables, etc., grown upon the lands covered by the four-years term of this lease, and pay over to the parties of the first part one-third of the gross proceeds of the sale thereof. To at the earliest date possible set out the ground heretofore farmed to strawberries in strawberries, and also so much of the peach orchard as may be pulled out for that pur-

pose, and to keep all of said lands and the lands now set to strawberries in strawberries during the continuance of this lease. To replant said lands in strawberries at the expiration of three years of life and bearing. That, in case any controversies arise as to the meaning of this lease, or as to the faithful performance thereof by either party, S. C. Ziegler shall be the arbitrator between us to settle said controversies, whose decision shall be final.' Immediately upon the execution of said lease it was mutually agreed by you and by us, the said A. R. Byrnett and Clara Byrnett, that you should cultivate to melons and other vegetables all of said land so leased for the term of four years, except such as had been and was to be cultivated to strawberries and blackberries. Subsequently to the execution of the written agreement of lease it was further mutually agreed by you and by us, the said A. R. Byrnett and Clara Byrnett, that the proceeds of all crops sold outside of the state of Washington, and which were raised upon said lands leased to you for the term of four years, as aforesaid, should be deposited in the Bank of Butler & Company of Hood River, Oregon, to the credit of Byrnett and Gardner. You are hereby notified that we, the said A. R. Byrnett and Clara Byrnett, are now, and at all times since the execution of said lease have been, prepared, ready, and willing to provide, and have provided, material for the fences necessary for the protection of crops grown upon said leased premises. You have failed to keep and perform each and all of the covenants and agreements hereinbefore mentioned. You are hereby notified to keep and perform each and all of the agreements and covenants contained in said written lease and said subsequent agreements hereinbefore specifically mentioned, or surrender the possession of said property. And if you fail so to keep and perform said covenants and agreements or surrender possession of said premises within ten days after the service of this notice upon you, we, the said A. R. Byrnett and Clara Byrnett, will commence an action against you for the unlawful detainer of said premises."

Later on, the precise date not being shown by the transcript, the appellants began an action of unlawful detainer. In their complaint for a first cause of action they set forth the lease above mentioned and alleged that the respondent had failed to keep and perform its conditions, specifying certain acts and omissions of the respondent as constituting breaches thereof. They further alleged the service of the notice above recited on the respondent, his failure to comply with the terms of the lease after such notice, and his failure to quit and surrender possession of the premises within 10 days from the date of such service. For a second cause of action the appellants repeated the allegations of their first cause, and added an allegation as to the rental value of the premises, alleging

that the rental value thereof was \$2,000 per annum. The demand of the complaint was for a forfeiture of the lease, the restitution of the premises to the appellants, and for the rental value of the premises from February 1, 1901, at the rate of \$2,000 per annum. The respondent interposed a general demurrer to each of the causes of action set out in the complaint, which the trial court sustained. The appellants thereupon refused to plead further, whereupon the court entered a judgment dismissing their action. This appeal is from that judgment.

The statute of forcible entry and detainer (section 5527, Ballinger's Ann. Codes & St.) provides that a tenant of real property is guilty of unlawful detainer: "(3) When he continues in possession in person or by subtenant after a default in the payment of any rent, and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this chapter provided) in behalf of the person entitled to the rent upon the person owing the same, shall have remained uncompiled with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due. Or (4) when he continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in the manner provided in this chapter) upon him, and if there be a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncompiled with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant, and thereby save the lease from such forfeiture. Or (5) when he commits or permits waste upon the demised premises, or when he sets up or carries on therein or thereon any unlawful business, or when he erects, suffers, permits, or maintains on or about said premises any nuisance, and remains in possession after service (in manner in this chapter provided) of three days' notice to quit upon him."

When the nature of the case is considered, it is at once apparent that, in so far as the action is founded on the fourth subdivision of the statute quoted, the case turns on the sufficiency of the notice to quit. If the breaches of the conditions of the lease upon which the lessors rely to work its forfeiture are recited in the notice in terms too general or too indefinite and uncertain to inform the lessee of the acts or omissions constitut-

ing the breach, so that he can have no opportunity to correct the acts or supply the omissions, it is plain that no sufficient complaint of unlawful detainer can be founded thereon. The notice cannot be aided by particularity in the complaint. The lessee is given by the statute the alternative of complying with the conditions and covenants of the lease or quitting the premises, and in order to give him the opportunity to exercise his right of choice the notice must specify with particularity the conditions and covenants which he has failed to keep or perform. A general recital of the conditions and covenants of the lease, followed by the statement that the lessee has failed to keep "each and all" of such conditions and covenants, cannot be sufficient. Tested by these rules, the notice served on the respondent will not support an action of unlawful detainer under the fourth subdivision cited. It specifies no particular default. It does not point out any act which the lessee could perform within the specified time and thus prevent a forfeiture. It is, indeed, but a general recital of the conditions of the lease, and a claim that a breach has been made in the performance of each and every condition. As it is elsewhere in the complaint made clearly to appear, the appellants are not complaining so much of the failure to perform any particular condition, as they are complaining that the general performance of the conditions did not reach the standard of excellence that, in their opinions, it ought to have reached. Inasmuch as the lessee agreed to perform the several conditions of the lease in a good and husbandlike manner, doubtless a failure to so perform would be such a breach of the conditions and covenants of the lease as to authorize this form of remedy. But a notice reciting that fact generally is not sufficient to put in motion the machinery of the statute. The notice must point out the defects with such particularity that the court can say there is reasonable ground for believing there has been a breach of the conditions of the lease. The facts constituting the breach must be stated. The lessor cannot be both suitor and judge.

Considered, therefore, with reference to the causes for declaring a forfeiture of a lease provided for in the fourth subdivision of the statute above quoted, the notice is, as we say, insufficient upon which to found the action of unlawful detainer. The appellants, however, contend that the notice shows both a nonpayment of rent and the commission of waste on the demised premises on the part of the lessee, and that the notice is good under the third and fifth subdivisions of the statute above quoted. It may, we think, be doubtful whether the failure to perform conditions such as those mentioned in the lease can be said to be paying rent, as that term is used in the statute; but, conceding it to be so, there is the same indefiniteness with reference to that clause that there is with

reference to the others. It cannot be ascertained how much the lessors claimed to be due, whether it was \$10 or \$10,000, and there was no possible chance for the lessee to save a forfeiture by the payment of the rent within the three days allowed by the statute. To claim a breach for the nonpayment of rent, the notice must specify the amount claimed to be due, so that it can be paid and a forfeiture abated, if the party owing the rent so desires it. The option is with the lessee, and the notice must be sufficiently definite to enable him to avail himself of it.

The acts recited in the notice do not constitute waste. Waste is some act which tends to the destruction of the tenement. To fail to farm lands in a good and husbandlike manner, or to keep in repair fences thereon, is not waste, however much it may lessen the income derived from the land.

The judgment appealed from is affirmed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

#### EASTHAM v. WESTERN CONST. CO.

(Supreme Court of Washington. Sept. 21, 1904.)

##### CLEARING LAND—CONTRACTS—CONSTRUCTION—ENGINEER'S CERTIFICATE—CONCLUSIVENESS.

1. Where a contract for railroad construction provided that on the certificate of the chief engineer that the work had been completed agreeably to the contract, together with his estimate of the quantity of the various kinds of work done thereunder, which estimate should be conclusive between the parties, defendant would pay the contractor certain compensation fixed, and the engineer certified that he had accepted "clearing on main line extension" between specified stations, comprising a certain number of acres, such certificate was conclusive that he had accepted the clearing which had been done under the contract, as modified by subsequent agreement, though the certificate was not in the language of the contract, that the contractor had "fully completed and finished agreeably to the various stipulations and specifications of the agreement."

2. Where a contract for the clearing of land, preparatory to the building of a railroad, required the contractor to do the clearing specified, and after stating the price per acre for "clearing right of way," it contained the words "cutting cord wood, 2 ft. long, not to exceed 1,000 cords, \* \* \* as required by chief engineer, \$1.50," the contractor was not thereby bound to cut 1,000 cords of wood, but was only limited to that amount.

Appeal from Superior Court, Clarke County; A. L. Miller, Judge.

Action by A. B. Eastham against the Western Construction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Long & Sweek and James P. Stapleton, for appellant. W. W. McCredie, for respondent.

MOUNT, J. Appellant entered into a written contract with one William Laughlin wherein said Laughlin agreed to clear that portion of the line of the Portland, Van-

couver & Yakima Railway Company beginning at Station 796, and continuing to Station 1063½, a distance of about five miles. Among other things, the contract provided that the said Laughlin should execute the said work in a substantial and "workman-like manner, and to the satisfaction and acceptance of the chief engineer of the Portland, Vancouver & Yakima Railway Company." The contract provided: "That upon the certificate of the chief engineer that the work contemplated under this contract has been fully completed and finished, agreeably to the various stipulations and specifications of this agreement, together with his estimate of the quantity of the various kinds of work done by said party under this agreement, which estimate shall be final and conclusive between the parties hereto," the appellant should pay to the said Laughlin, within 30 days after the delivery of said certificate, \$39.50 per acre. Inserted in the contract were these words: "Cutting cord wood, 2 ft. long, not to exceed 1,000 cords, ricked along roadbed, as directed by Chf. Engineer, \$1.50. After the clearing had been done, and after Laughlin had cut 101½ cords of wood, the chief engineer issued a certificate as follows: "Western Construction Company, City: This is to certify that I have accepted clearing on main line extension between Sta's 796 plus 30 and 851 plus 20: 864 plus 50 & 884; 896 & 1066. Comprising 47.84 acres. F. M. Kettenring, Chief Engineer." Thereafter Laughlin assigned his claim to respondent, who brought this action against appellant, claiming a balance due thereunder amounting to \$782.78 for clearing, and \$20.30 for wood cut. The complaint alleged a modification of the contract by the omission of certain clearing included therein, and a substitution of clearing not included in the contract, and a full compliance with the modified contract. It also alleged that a certificate of the engineer was given, as required by the contract, and the failure of the appellant to pay for the work done. The answer admitted the original contract, but denied any modification thereof, and also denied that plaintiff had performed his contract, and, by way of affirmative defense, alleged that Laughlin was, by the terms of the contract, required to cut 1,000 cords of wood, and that he had refused to cut more than 101½ cords, and that appellant had thereby been damaged \$449.25 in excess of the amount due on the contract. Plaintiff denied the new matter in the answer. Upon the issues thus made the cause was tried to a jury, which returned a verdict in favor of the plaintiff. From a judgment rendered thereon, the defendant appeals.

Appellant for a reversal of the judgment presents two questions on this appeal, as follows: (1) That the engineer's certificate does not show that Laughlin complied with the contract; (2) that the contract required Laughlin to cut 1,000 cords of wood. The

certificate of the engineer shows conclusively that he accepted the clearing which was to be done under the modified contract. It is true that the certificate does not state in the language of the agreement that the contract "has been fully completed and finished, agreeably to the various stipulations and specifications of the agreement," yet that must necessarily follow when the engineer certifies that he has accepted the work.

We also think the lower court properly held that the contract did not require Mr. Laughlin to cut 1,000 cords of wood. The contract was essentially one to clear the timber and brush from the right of way. After stating the price per acre for "clearing right of way," it contained these words: "Cutting cord wood, 2 ft. long, not to exceed 1,000 cords, ricked along roadbed, as required by Chf. Engineer, \$1.50." There was no other provision in the contract referring to cord wood, and respondent nowhere therein agreed to cut any certain number of cords, unless the words stated are held to amount to such an agreement. We think the contract upon its face clearly shows that the parties intended that wood should be cut, at the option of Mr. Laughlin, in any amount not to exceed 1,000 cords. This was the maximum he was at liberty to cut under the terms of the agreement. A number of cases are cited by the appellant to the effect that, where one party makes a contract to furnish to another all the goods that may be ordered within a certain time, not to exceed a certain amount, then the contract will not be satisfied with less than the limit named. There is no doubt about this rule. But it seems clear to us that Mr. Laughlin is the party who should fix the number of cords of wood which shall be cut within the limit of 1,000. He was at liberty to cut cord wood from the clearing in any amount not to exceed the limit, and was entitled to pay therefor at the rate of \$1.50 per cord. The construction company authorized him to cut no more than that amount.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

BEEBE et ux. v. REDWARD et al.  
(Supreme Court of Washington. Sept. 21, 1904.)

BUILDING CONTRACTS—BREACH—WAIVER—RIGHTS OF OWNER—BONDS—ACTIONS—LIMITATION—RIGHTS OF SURETY—EVIDENCE—HEARSAY—RECEIPTS—VERDICT—CONCLUSIVENESS—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

1. Where certain receipts were objected to at the trial, on the ground that they did not show payment of certain judgments, to prove which they were offered in evidence, defendants were limited to such objection on appeal.

2. Ballinger's Ann. Codes & St. § 6048, provides that if either party before trial allow the other an inspection of any writing material to the action, whether mentioned in the pleadings

or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial, it may be read without proof of genuineness or proof of execution, unless denied by affidavit before the commencement of the trial. Held, that such section was intended merely to obviate the necessity of proving the genuineness of instruments at the trial, and did not make it necessary that a writing material as evidence be offered to the other party for inspection, or be served on him by copy, prior to the trial, in order to authorize its admission.

3. Where a receipt was received in evidence against a third person as proof of the payment of a judgment, and was not objected to as hearsay, it was sufficient to support a finding based thereon.

4. Where the evidence with reference to certain extras furnished by a contractor in the erection of a building was not of a conclusive nature, and was disputed, the jury's finding allowing only a part of plaintiff's claim therefor was conclusive on appeal.

5. Where an owner of a building elected to waive the contractor's default in failing to complete the same within the time prescribed, the contractor's surety was not entitled to claim the benefit of such default for the purpose of setting in operation a provision of the bond requiring any action brought thereon to be commenced within six months after default, in the absence of a showing that the surety was prejudiced by the contractor's failure to perform within the time fixed.

6. Where a contractor bound himself to complete a building by a certain date, subject to certain contingencies enumerated, evidence that the building was not completed on the date specified, without evidence that the contingencies specified did not happen, was insufficient to show that the delay constituted a breach of contract.

7. Since the owner of a house against which mechanics' liens had been filed was entitled to wait until the contractor and the lien claimants litigated the questions between them and a judgment was rendered against the contractor, before declaring such judgment a breach of the contractor's bond and contract to complete the building, a provision in the bond requiring suits thereon to be brought within six months after the happening of a breach of the contract did not begin to run until the rendition of judgments against the contractor; the owner having waived the apparent breach growing out of the mere filing of the lien.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by Clifford D. Beebe and wife against John C. Redward and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

E. H. Gule, for appellants Redward, James B. Murphy, for appellant United States Fidelity & Guaranty Co. H. R. Clise, for respondents.

FULLERTON, C. J. On May 24, 1901, the respondent Clifford D. Beebe entered into a contract with the appellant John C. Redward, by the terms of which Redward undertook to furnish all the necessary labor and materials and erect for the respondent a building according to plans and specifications referred to in the contract for the agreed price of \$25,022. Shortly after the execution of the contract, the appellant Redward, as principal, and his co-appellant, the United States Fidelity & Guaranty Company,



as surety, executed and delivered to the respondent a bond in the sum of \$6,000, conditioned, among other things, that the contractor would well, truly, and faithfully comply with all the terms, covenants, and conditions of the contract on his part to be kept and performed according to its tenor and effect. After the execution of the contract and bond, Redward entered upon the work of constructing the building, substantially completing it about December 1, 1901, some three months later than the time fixed in the contract for its completion. On the date last named, N. Clark & Sons filed a lien on the building to secure themselves for materials sold the contractor, and used in the construction of the building. Later on, two certain other liens were filed, one by the Robinson Manufacturing Company, and the other by the Seattle Lumber Company, each claiming balances due from Redward for materials furnished him for use in the construction of the building. Foreclosure actions were thereafter begun on the several liens, against which the respondents and the appellants Redward unsuccessfully defended; the several claimants recovering judgment of foreclosure against the property for the amount claimed by them, with costs of suit and attorney's fees added, which judgments the respondents paid in full. The judgment in favor of N. Clark & Sons was for the sum of \$1,840.89, was entered June 30, 1902, and was paid on July 2, 1902. The judgment in favor of the Robinson Manufacturing Company was for the sum of \$1,150, was entered on the 6th of November, 1902, and was paid on December 5, 1902. The judgment in favor of the Seattle Lumber Company was for the sum of \$1,038.38, was entered on the 8th of October, 1902, and was paid December 10, 1902. In addition to these sums, the respondents paid in each case the statutory appearance fee of \$2, and \$50 to the attorneys employed by them to defend the actions. At the time of the filing of the first lien, the respondents had paid to the contractor all of the original contract price except the sum of \$280. There was, however, an amount owing for extra work and material. This amount was in dispute between the respondents and the contractor, but it was conceded by the respondents that the amount aggregated at least \$663.50. This action was begun on December 16, 1902. In their complaint the respondents alleged that there was due them, by reason of the matters above set forth, the sum of \$3,270.19; being the difference between the amount paid on account of the construction of the building and the contract price plus the value of the conceded extras. To the complaint the appellants answered separately. They put in issue the rendition and payment of the lien judgments set out in the complaint, and set up several affirmative defenses. Of those set up by the appellants Redward was the claim that the contractor, Redward, had performed extra labor

upon, and furnished extra material used in the construction of, the building to an amount aggregating \$1,670.50, which had not been paid or allowed to him by the respondents. The other appellant set up the same defense, contending, however, that the reasonable value of the extra work and material put on the building by the contractor more than exceeded the difference between the contract price and the amount actually paid to his account, and the further defense that the action had not been begun within the time prescribed by the terms of the bond. Replies were filed, putting in issue the new matter of the answers, and a trial had before the court and a jury, resulting in a verdict and judgment in favor of the respondents for the sum of \$2,812.75 and the costs of the action.

The appellants Redward first assign that the court erred in refusing to grant their motion for nonsuit made at the close of the plaintiffs' case. The motion was based on the ground that the respondents had failed to prove payment by them of the judgments obtained by the lien claimants. The proofs on this point consisted of a transcript of the judgment roll, showing the commencement and prosecution of the several actions, the judgments entered therein, and a signed receipt from each of the judgment creditors, acknowledging payment to them of the amounts of their respective judgments. It is objected that these receipts were incompetent to prove payment, because no proof was made of their authenticity or execution, and that they were not before the trial submitted to the appellants for inspection, nor were the appellants before the trial served with a copy of the instruments, or with notice that the respondents intended to read them in evidence, as required by the statute. But the receipts were objected to in the court below because they did not show payment, and not on the grounds here suggested, and we think the appellants cannot now urge these objections. By failing to object on the ground that the instruments were not duly authenticated, or shown to have been executed by the judgment creditors, the appellants admitted their genuineness, and they were properly admitted in evidence if competent for any purpose. So, likewise, the failure to object on the ground that the writings were not submitted to inspection before the trial is a waiver of that objection. This objection is also unsound for the reason that the statute cited (section 6048, Ballinger's Ann. Codes & St.) does not make it necessary that a writing material as evidence be offered to the other party for inspection, and be served on him by copy prior to the trial before it can be admitted in evidence. This section of the statute was intended to enable a party to ascertain in advance of the trial whether or not it will be necessary for him to prove the genuineness of his written evidence at the trial. If he offers the writings for the inspection of the

other party, and delivers him a copy thereof, with notice that he intends to read the same in evidence at the trial, they may be so read without proof of their genuineness or execution, unless the other party before the commencement of the trial denies their genuineness by affidavit. But the statute was intended to afford an additional remedy. It was not intended as a denial of the right to put in evidence a writing in the manner prescribed by the general rules of evidence. It was proper, therefore, for the plaintiffs to offer these writings in evidence at the trial in the manner they did offer them, and the court did not err in admitting them over the objections urged. It may be well to say here, however, that we do not intend to assert that a receipt acknowledging payment of money is generally admissible as evidence of such payment as against strangers thereto. As to them, of course, it is but the hearsay declaration of the party who signed it. But where a receipt is admitted in evidence against such a stranger without objection on that ground, it is, like other hearsay evidence so admitted, sufficient to support a finding based thereon. The motion for nonsuit was properly denied.

The next contention of these appellants is that the verdict of the jury disallowing certain extras claimed by them is not supported by the evidence. The appellants, as we have stated, claimed extras to the amount of \$1,676.50. The respondents, in part in their pleadings and in part at the time of the trial, admitted of this claim the sum of \$827.50. The jury found that the appellants were entitled to something over \$200 more than the amount admitted, but did not allow the full amount of the claim. The contention is that the full amount claimed should have been allowed, and that the verdict should be set aside because the jury did not so find. But while there was doubtless evidence sufficient to sustain the finding of the jury had they found for the appellants for the full amount claimed, the evidence was not of a conclusive nature; neither was it undisputed. It was therefore for the jury to find whether the claims were supported as a whole or in part only, and, as they found the claims supported only in part, the finding is binding upon this court.

Passing to the assignments of error made by the appellant the United States Fidelity & Guaranty Company, we will notice first the contention that the action was not begun within the time fixed by the bond. The bond provided, among other things, "that any suits at law or proceedings in equity brought against this bond to recover any claim hereunder must be instituted within six months after the first breach of said contract." It is first contended that there was a breach of this provision of the bond in that the appellant Redward failed to complete the building before December 31, 1901, whereas the contract called for its com-

pletion on August 31, 1901; and, second, if there was not a breach because of this, there was such a breach when the appellant Redward suffered materialmen furnishing material used in the construction of this building to file liens thereon to secure payment for the material so furnished, and that as one such lien was filed as early as December, 1901, the action, to have been in time, should have been commenced not later than six months from that date. Concerning the first of these contentions, if it were true that there was a breach of the contract in the respect mentioned, it could not in this action be availed of by the appellants. The respondents make no complaint because of this breach. They have accepted completion of the building on December 31, 1901, as performance of the contract, and cannot now claim a default because of the delay, even though they were injured by it. The bond was given for the benefit of the respondents. Its purpose was to secure to them the faithful performance of the contract on the part of the contractor, and whatever they choose to accept as performance is performance as between themselves on the one side, and the contractor and surety on the other. The surety, therefore, cannot complain of any breach of the contract which the owner waives that does not operate to his prejudice. If the breach increases his liability, or causes him a loss in any manner, he can, of course, defend against such increased liability, and recoup such losses, and it may be that breaches of the contract having this effect would relieve him from his liability entirely; but he cannot escape liability by the mere showing that there has been a departure in the performance from the strict terms of the contract. To relieve on this ground there must be a showing, not only of departure from the terms of the contract, but that the position of the surety has been so changed thereby as to result in prejudice to him. In the case at bar there is no showing that the surety has been prejudiced by the failure to complete the building at the time stipulated in the contract, and as the owners, for whose benefit the stipulation was insisted, make no complaint because thereof, the surety cannot plead it as a bar to the right of the owners to recover for subsequent losses.

What we have said has been on the assumption that a breach of the contract in the regard mentioned had been shown by the proofs, but we think it may be questioned whether enough was proven to show a breach of the contract. It was made to appear that the time fixed in the contract for the completion of the building was August 31, 1901, and that the building was not completed until November 30, 1901; but the obligation of the contractor to complete on the day named was subject to several contingencies expressly enumerated in the contract, and it was not shown that these

contingencies did not happen. It would seem that it would be necessary to show that none of the conditions happened which would authorize the delay before it could be said that the delay constituted a breach.

Concerning the second contention, we have held in another case that where an owner let a contract for the erection of a building, by the terms of which the contractor undertook to furnish all the labor and material required for its construction, and gave a bond with sureties for the faithful performance of the contract, that the owner might treat the filing of a lien on the property by a materialman as a breach of the covenants of the bond, and sue at once thereon. But we said he was not obligated to do so; that by so doing he took upon himself the burden of establishing, not only the technical sufficiency of the lien to create a charge upon his property, but the amount due thereon as well; whereas he could properly wait until the parties, who had personal knowledge of the facts, litigated these questions between themselves, and the sufficiency of the lien and the amount thereof became settled by the judgment of a court of competent jurisdiction, and could treat the rendition of the judgment as the breach of the covenant of the bond. The question last suggested was not strictly before the court in the case referred to, but it seems to us now, after the further consideration, that the conclusion was a just one. There may seem to be, as a first impression, some inconsistency in saying that the same act may or may not be a breach of a written covenant, as the party affected by it wills it, but the explanation rests in the fact that the owner may waive such breaches of the covenants of the contract on the part of the contractor as he chooses. A mechanic's or materialman's lien, although duly executed and recorded, does not prove itself. It is at most only a tentative charge against the property it purports to bind, and is liable to be defeated for lack of technical sufficiency, as well as by showing that the indebtedness, or some considerable part thereof, is not owing. The owner may therefore waive the apparent breach of the contract caused by the mere filing of the lien, and insist that a covenant such as the one now before us is broken only when the lien is made a fixed and determinate charge against his property by the judgment of a court of competent jurisdiction. The present action was begun within six months after the time the earliest of the liens here in question was put into judgment, and we hold it to have been commenced in time to comply with the terms of the bond.

In the course of the trial, the appellant sought to show other acts which it claimed to be breaches of the contract on the part of the contractor, but against which the owner made no complaint either against the contractor or the surety. It was denied the

right, and complains of such denial. What we said above applies here. The surety cannot insist that anything constitutes a breach which the owner does not insist upon, unless he shows that the breach operated in some manner to his prejudice. As to the matters here complained of, there is no pretense that they operated in any manner to the prejudice of the surety, and hence they cannot avail it as a defense.

There is no error in the record, and the judgment will stand affirmed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

### WILCOX v. HENRY.

(Supreme Court of Washington. Sept. 21, 1904.)

PUBLIC NUISANCE — SLAUGHTERHOUSE — INJUNCTION — INDIVIDUAL LANDOWNER — SPECIAL INJURY — RIGHT TO SUE — DEFENSES — EVIDENCE — DECREE.

1. The erection and maintenance of a slaughterhouse and rendering plant, from which foul odors were emitted, and putrid matter thrown into the sea, which was thereafter washed upon the shore, so that dwelling houses in a thickly settled neighborhood of a city were rendered uninhabitable, constituted a public nuisance, within Ballinger's Ann. Codes & St. § 3084, defining a public nuisance as one which affects equally the rights of an entire community or neighborhood, though the extent of the damage is unequal, and enumerating as a public nuisance (subdivision 7) the erection or use of any building or place for any manufacture, which, by occasioning noxious exhalations, etc., is offensive or dangerous to the health of individuals or the public.

2. Where, in a suit to enjoin a public nuisance, it appeared that defendant's pens used in connection with the slaughterhouse, etc., and the offal and refuse matter therefrom, caused offensive smells, corrupting the atmosphere and food in and about plaintiff's dwelling, so that such dwelling was unfit for habitation, and the value of plaintiff's property was caused thereby to depreciate, plaintiff sustained a special injury, so as to entitle him to an injunction against the maintenance of the nuisance, though public in character.

3. Where, in a suit to enjoin a public nuisance, the injury to plaintiff was the result of defendant's negligence in the management of his property, it was no defense that the nuisance complained of was intermittent in character.

4. In a suit to restrain a public nuisance consisting of the operation of a slaughterhouse and rendering plant, from which nauseating odors were emitted, evidence reviewed, and held to justify a decree in favor of complainant.

5. Where defendant so operated a slaughterhouse and rendering plant that nauseating odors were emitted therefrom, which greatly injured the inhabitants of surrounding property, and the evidence showed that the odors resulted from the management of the plant as a whole, and were not limited to a particular portion of the business, a decree restraining defendant from conducting the business, and from permitting others to conduct the same, "to the injury of the plaintiff and other residents" of surrounding property, was not objectionable as in effect suppressing defendant's entire business, since it did not prevent the operation of defendant's

¶ 3. See Nuisance, vol. 37, Cent. Dig. § 28.

plant in such a manner as not to injure or annoy complainant.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Charles R. Wilcox against James Henry. From a decree in favor of plaintiff defendant appeals. Affirmed.

James B. Murphy, for appellant. R. E. Ferree, J. L. Waller, and R. W. Emmons, for respondent.

MOUNT, J. Respondent brought this action to restrain appellant from maintaining a nuisance. The nuisance complained of consisted of a slaughterhouse, rendering tanks, and stockpens, located in the city of Seattle, about a quarter of a mile distant from respondent's residence. On the trial of the case the court made findings of fact in substance as follows: That respondent is the owner of certain lots, and a dwelling house thereon, located on what is commonly known as "Beacon Hill," in the city of Seattle; that appellant is in possession of certain tide-land lots of Elliott Bay, lying immediately west of Beacon Hill, at the foot thereof, and about 1,500 feet in a southerly direction from respondent's dwelling; that appellant, at the time the action was begun, and for a long time before, was, and is now, operating and maintaining upon said tide-land lots a slaughterhouse, stockpens, furnaces, vats, and other appliances for the manufacture of lard and tallow, and for slaughtering large numbers of cattle, hogs, and sheep; that the said slaughterhouse and stockpens are kept in an unclean and filthy condition, and the appellant suffers and allows the offal, filth, and animal refuse matter to be collected, deposited, and remain in and about the said premises until the said matter becomes putrid and decayed, and fills the air with noxious and offensive odors; that appellant also throws and deposits offal, filth, and animal matter in the waters of Elliott Bay, which said offal, filth, and animal matter are by the action of the winds and tides cast upon the shores, and there decompose and cause nauseating and offensive smells and odors; that these nauseating, unwholesome, and offensive smells and odors so taint the air and food in and about respondent's said dwelling house that respondent's rest and that of his family is disturbed at night, and his said dwelling house is thereby rendered unfit for habitation; that, by means of the various acts and things done as above found, and by reason of the location of said slaughterhouse and stockyards with reference to the said Beacon Hill, appellant pollutes and corrupts the atmosphere in and about the homes of the people living on Beacon Hill, and thereby deprives each and every of such homes and residents of pure air; that thereby the comfort and peace of every resident of said Beacon Hill is destroyed, and said homes rendered less enjoyable, and the market

value of the property on said hill is and has been greatly depreciated; that said Beacon Hill rises from 150 to 200 feet above the said slaughterhouse and stockpens of appellant, is a beautiful place in which to live, is covered with homes, and is thickly populated. The court concluded that the said slaughterhouse and stockpens were a public nuisance; that respondent suffered special injury therefrom, and has no adequate remedy at law therefor; and that respondent was entitled to an order restraining the appellant from operating said slaughterhouse, and from slaughtering animals, rendering offal, lard or tallow, or depositing the offal or animal refuse matter in the waters of Elliott Bay, to the injury of appellant; and a decree was entered accordingly. From this decree, defendant appeals.

It is first insisted by the appellant that the complaint, upon its face, shows that the nuisance, if any exists, is a public nuisance, and does not show that the respondent is specially injured thereby; and, second, that, if respondent was disturbed by noxious smells, such disturbance was intermittent, and therefore not a cause for equitable relief. The findings of fact, as above stated, follow very closely the allegations of the complaint, and are in substance the same. For that reason, it is not necessary to set out the complaint in more detail in this opinion. Section 3084, Ballinger's Ann. Codes & St., defines a public nuisance as follows: "A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." And the next section, in enumerating such nuisances, provides that "it is a public nuisance \* \* \* (7) to erect, continue, or use any building, or other place, for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells or otherwise is offensive or dangerous to the health of individuals or of the public." Section 3087 provides that "every nuisance not included in the definition of section 3084 is private." Section 3093 provides: "A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise." There can be no doubt that the nuisance alleged in the complaint and shown by the evidence is a public nuisance. The right of the respondent to restrain it therefore depends upon whether the allegations of the complaint and the facts proven show that respondent is specially injured thereby. The substance of the allegations of the complaint upon this point is that the filthy pens, the offal, and the refuse matter made by appellant in the conduct of his business cause obnoxious, nauseating, and offensive smells, which taint and corrupt the atmosphere and food in and about respondent's dwelling, so that said dwelling house is thereby rendered unfit for habitation, and the value of the property on Beacon Hill depreciated. These allegations, it seems

to us, bring the case clearly within the rule of special injury. The rule upon this question is stated in *Wood on Nuisances* (3d Ed.), at sections 668 and 669, as follows: "The general doctrine is, and may be regarded as the well-settled rule in courts of law and equity both in this country and England, that, for damages arising from a purely public nuisance—that is, one whose effects are common to all, producing no special or particular damage to one, as distinguished from the rest of the public—there can be no redress, except by indictment or information in equity at the suit of the attorney general or other proper public officer. By common injury is meant an injury of the same kind and character, and such as naturally and necessarily arises from a given cause, but not necessarily similar in degree or equal in amount. If the injury is the same in kind to all, it is a common injury although one may actually be injured or damaged more than another. To illustrate, we will take the case of a slaughterhouse erected upon a public street. To all who come within the sphere of its operation or effects, it is a nuisance and offends the senses by its noxious smells. It is a common nuisance in such locality, and in its general effects produces a common injury. But to those living upon the street and within its immediate sphere it is both a common and a private nuisance—common in its general effects, but private in its special effects upon those living there. To the public generally it produces no injury except such as is common to all; but to those owning property in its neighborhood, or residing there, it produces a special injury, in that it detracts from the enjoyment of their habitations, produces intolerable physical discomfort, and diminishes the value of their premises for the purposes to which they have been devoted." See, also, *Ross v. Butler*, 19 N. J. Eq. 204, 97 Am. Dec. 654. In the case of *Ingersoll v. Rousseau* (Wash.) 76 Pac. 513, which was a case where the nuisance complained of was a bawdyhouse located on a lot adjacent to plaintiff's residence, in discussing the question of special injury this court said: "The respondents suffer not only all the inconveniences the general public suffer because of the maintenance of the nuisance, but, in addition thereto, they are compelled to become witnesses to the indecent conduct of the inmates of the houses, and listeners to the loud, boisterous, and indecent noises made by them and their dissolute companions. The injury caused the respondents by these conditions is clearly special, and different in kind from that suffered by the general public, who are not compelled to be either such witnesses or listeners." We also held in that case that a private party may enjoin a public nuisance by suit in equity, where such party suffers a special injury. The legal principles involved in that case are the same as those involved here, and must

control. The complaint, we think, stated a cause of action.

To the point that the nuisance complained of was intermittent, and therefore not a cause for equitable relief, appellant makes no argument, but cites the case of *Farrell v. New York Steam Co.* (Sup.) 53 N. Y. Supp. 55. That case does not support the appellant. It was there held that the things complained of did not arise from the negligence of the defendants, and did not amount to a nuisance, and for that reason it was held that equity would not restrain the operation of defendants' steam plant. In the case at bar the injury to respondent is caused by a nuisance, the result of negligence and carelessness on the part of the appellant. "The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. *Campbell v. Seaman*, 63 N. Y. 568, 583, 20 Am. Rep. 567.

The other questions presented by the appellant are to the effect that the findings, conclusions, and decree of the court are not in accordance with the evidence. This has necessitated a careful examination of all the testimony in the case, and we are satisfied therefrom that the findings, conclusions, and decree are justified, and are in accord with the preponderance of the evidence, the great weight of which is to the effect that the appellant's stockpens are permitted to become and remain in a filthy condition; that they are not cleaned regularly when in use, and emit noxious odors continually; that offal was frequently cast into the bay, and floated to shore, or was deposited on the tide flats, and there became putrid. The appellant himself testified that offal was thrown into an open vat, and frequently remained there, sometimes for two or three days, until the vat was full enough, when it was finally cooked. It clearly appears that, when this stuff was cooking in this open vat, it emitted nauseating odors, which could be detected more than a quarter of a mile away; that this odor was so great and offensive that respondent's dwelling was unfit for habitation. It is true that there was evidence to the effect that these noxious odors might be dispensed with by cleanliness, and by the installation of deodorizing machines and appliances. During the progress of the trial, when this evidence was being introduced, the court continued the trial of the cause for six months, to allow the appellant to install such machinery or appliances to render his slaughterhouse, etc., inoffensive. When the trial was resumed at the end of this period, it was shown that effective deodorizers had not been installed; that there was little or no abatement of the nuisance, and the filth was allowed to accumulate and give off its offensive odors as before. In fact, the appellant manifested little regard for the rights of those living near his slaughterhouse.

Appellant also complains that the decree suppresses appellant's entire business, while the testimony shows that the offensive odors were emitted from an open tank in which offal was kept and cooked, and that the suppression of the use of this tank alone is all that was justified. It is true that the evidence shows that the most offensive odor, and the one most readily traced, was emitted from this tank when materials were being cooked in it. But the evidence also shows that there were other odors, such as those arising from heads and hides of animals which were permitted to become putrid, and from offal which was kept on hand for a time, and from the filthy stockpens and tallow-rendering vats, and from refuse matter which was thrown into the bay. All these contributed to aggravate the nuisance. The evidence, we think, fairly shows that by the installation of proper appliances, and by constant care and cleanliness, all these odors may be obviated; but, until the appellant can and does suppress all these noxious odors, he certainly should not be permitted to operate his plant in that locality. The decree does not necessarily abolish appellant's business. It does restrain appellant from conducting the business, and from permitting others to conduct it, "to the injury of the plaintiff and other residents." If the appellant obviates all the noxious odors complained of, and thereby so conducts the business as not to injure or annoy the respondent, he is permitted under the decree to do so; otherwise the business should be suppressed.

The judgment appealed from accords with our views, and is affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

HALVERSON v. SEATTLE ELECTRIC CO.  
(Supreme Court of Washington. Sept. 21, 1904.)

WRONGFUL DEATH—CARRIERS—STREET RAILROADS—PASSENGERS—OPERATION OF CARS—CROWDING—RIDING ON FRONT PLATFORM—CONTRIBUTORY NEGLIGENCE—DUTY OF CARRIERS—PROVIDING SEATS—EVIDENCE—WITNESSES—EXPERTS—INSTRUCTIONS—DAMAGES—EXCESSIVENESS.

1. Where a passenger on a street car was killed by being thrown from the front platform, on which he was standing, as the car was alleged to have rounded a curve at a high rate of speed, a witness, who had been a motorman over the same line for six or seven months, was familiar with the speed of cars, and the road throughout its entire length, and was acquainted with the particular curve, and who stated that, in his judgment, the car was running through the curve at the time of the accident at between seven and eight miles an hour, was competent to state at what rate of speed the car ought to have been run into the curve in order to be operated with safety to passengers thereon, and whether a speed of six or eight miles an hour was safe.

2. Where, in an action for death of plaintiff's husband, plaintiff had been associated with him

in the business and kept the books, she was entitled to testify as to her husband's earnings in his business, independent of the books so kept.

3. In an action for death, evidence as to decedent's earnings immediately prior to his death was admissible as tending to show his earning capacity.

4. In an action for death of a passenger by being thrown from a street car as it rounded a curve, evidence as to the experiments subsequently made with the same car, running through the same curve, was incompetent, where the conditions were not similar to those existing at the time of the accident, though more favorable to decedent's case.

5. Where evidence offered as to the results of experiments was excluded, remarks of the court with reference thereto, stating the reason why he thought the same inadmissible, were harmless.

6. An objection that remarks of the court on the exclusion of evidence were objectionable cannot be reviewed on appeal in the absence of an exception thereto taken at the trial.

7. While it is not negligence per se for a street car company to fail to furnish a seat for each of its passengers, where seats are not furnished, and passengers are permitted or required to stand on cars, greater care is required in the operation thereof than where all of the passengers are provided with seats.

8. It is not negligence per se for a passenger on a street car to ride or stand on the platform.

9. Where, at the time deceased boarded a street car from which he was subsequently thrown, there was but little standing room inside the car, and a seat in the front vestibule, which was seven feet nine inches long, was occupied by four persons, two of whom nearest deceased being ladies, and two or three other passengers were standing on the front platform. It was not error, in the instructions, to assume that there was evidence that deceased was compelled to stand on the car or on the platform.

10. Where, in an action for death of a passenger by being thrown from the front platform of a street car, plaintiff alleged negligence, in that the car was run at a high and dangerous rate of speed through a curve, and that defendant failed to provide railings or gates to prevent passengers from falling or being thrown from the cars, it was not error to refuse to charge that the company was not bound to provide gates, and, if deceased entered the car on the front platform, the fact that there was no gate closed behind him would not constitute negligence, and to charge that if deceased was permitted to ride on the platform, and defendant negligently failed to provide any gate, railing, or other protection, and thereby the car was rendered unsafe, and defendant permitted the car to become overcrowded, and permitted deceased to be crowded by other passengers on the platform, and the car ran into a curve at the place of the accident at a high rate of speed, without warning to deceased, causing him to be thrown therefrom, plaintiff was entitled to recover.

11. In an action for death of plaintiff's husband, it appeared that deceased had been in the photograph business for 10 years, during which time his accumulations consisted of a small building on leased land, used as a photograph gallery, in which plaintiff and deceased lived, together with a photographer's equipment and supplies. Plaintiff and her husband had no children, and plaintiff had been with her husband in the business, which earned a net annual income of \$2,000. Plaintiff continued the business after her husband's death, but her earnings therefrom were not shown. *Held*, that a verdict of \$20,000 for the death of her husband was excessive, and should be reduced to \$10,000.

¶ 8. See Carriers, vol. 9, Cent. Dig. § 1378.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Alexia Halverson against the Seattle Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed on condition.

Struve, Hughes & McMicken, for appellant. Walter S. Fulton, Vince H. Faben, and T. D. Page, for respondent.

MOUNT, J. Plaintiff brought this action against defendant to recover damages for the death of her husband, N. P. Halverson. She avers in her complaint that on the 26th day of December, 1902, the said N. P. Halverson became a passenger on one of defendant's cars running from the city of Seattle to Ballard, that the defendant failed and neglected to provide a gate or railing around the platform of said car, and that defendant negligently permitted the said car to become overcrowded with passengers, so that the said N. P. Halverson was prevented from obtaining a seat, and was compelled to stand on the platform of said car. She makes the following allegation of negligence: "That at Stewart street and Western avenue, in the city of Seattle, on the line of defendant's road leading to Ballard, there is a sharp curve and turn; that when said car reached said point, to wit, at about 5:15 p. m. on said day, the motorman in charge of and propelling the same negligently and carelessly failed and neglected to slacken the speed of said car, and negligently and carelessly turned on a heavy current of electricity, without warning or notice to the said N. P. Halverson, and while the said N. P. Halverson was in all things exercising due care, thus negligently and carelessly causing said car to start forward violently, and to run around said bend and curve rapidly and with a lurch and jerk, thereby throwing said N. P. Halverson from said car to the ground, and inflicting upon the said N. P. Halverson mortal wounds, from which said mortal wounds the said N. P. Halverson languished, and languishing died, in the city of Seattle, Washington, on the 27th day of December, 1902." She further avers that the deceased was a photographer, having an established business in the town of Ballard, and was able to earn, and was earning, in the prosecution of his business, the sum of \$2,000 per year. Defendant, by its answer, put in issue the allegations of negligence, and those in relation to the earning capacity of the said deceased and the damages suffered by plaintiff, and pleaded the following affirmative defense, to wit: "That on the 26th day of December, 1902, the said N. P. Halverson boarded one of defendant's cars on Western avenue at or near its intersection with Pike street, which said car was bound to the town of Ballard; that said N. P. Halverson entered said car in the front vestibule thereof, and remained standing near the step of said car; that he failed and re-

fused to occupy a seat vacant in said vestibule, but carelessly and negligently stood near the step of said car, smoking a cigar, and without holding to any of the bars or rods placed there for that purpose, and, while said car was proceeding along one of the curves in the track, rendered necessary by the irregularity of the street, said N. P. Halverson fell from said car to the street, and received injuries from which he subsequently died; and this defendant avers that the injuries and damage, if any, sustained by the plaintiff, were caused and contributed to by the aforesaid negligent acts of the said N. P. Halverson." The foregoing affirmative defense was put in issue by the reply. The undisputed facts developed on the trial of the cause are as follows: The plaintiff's husband, N. P. Halverson, had for about three years been engaged with his wife in conducting a photograph gallery in the town of Ballard. Defendant owned and operated a street railway line between the city of Seattle and Ballard, which line, as it leaves the city, runs along Western avenue; starting at the foot of Columbia street, and extending northward toward Ballard. After reaching Pike street there is a grade of about 6 per cent. to Stewart street; the hill terminating at Virginia street, about one block further on. About 5:15 o'clock p. m. on the 26th day of December, 1902, the said N. P. Halverson offered himself as a passenger on one of defendant's cars at the intersection of Pike street with Western avenue. At this time the seats within the body of the car were filled, and persons were standing in the car, although there was standing room therein for more. Said Halverson was smoking, and boarded the front platform or vestibule of the car. There is no evidence showing the motive of said Halverson in entering the vestibule, except as above stated. The car was about 42 feet long, and had a vestibule at each end. These vestibules were exactly alike. They were entirely cut off from the body of the car by a partition running from side to side. Immediately in front of this partition was a seat running crosswise the entire width of the car, and facing the front. This seat was 7 feet 9 inches long, and capable of holding five or six persons. Within the vestibule and in the extreme front of the car were the motor box and brake, between which stood the motorman. The vestibule was entered at the opening on either side thereof. Halverson entered the front vestibule at the entrance or opening on the east side, the car facing north. At the time he entered, four persons were sitting on the seat in the vestibule—two women and two men; the women being on the end where Halverson entered. Two or three men were also standing in the vestibule. Halverson stood at the entrance where he boarded the car, with his back to the street, and facing the vestibule. He remained in that position until he fell from the car. He had a package

in one arm, and was smoking a cigar. From Pike street to Stewart street the distance is a little more than a block. At the intersection of Stewart street, Western avenue, along which the car was running, changes its direction northerly, and at this point the tracks of defendant's line curve to conform to the direction of the avenue. This requires a double or compound curve, both being curves of large radius. After leaving Pike street, the car proceeded up the hill to Stewart street, and while passing through the curves the said Halverson, at the further curve, fell from the car to the street, striking his head and receiving injuries from which he died the following day. The photograph business conducted by plaintiff and her husband yielded an income of about \$2,000 a year. Halverson had been in the photograph business for about ten years, in Chicago, Seattle, and Ballard, which covered the period of his married life; and the accumulations of those years consisted of a small building on leased land, used as a photograph gallery (in which they also lived), together with the photographer's equipment and supplies. Plaintiff and her husband had no children. At the close of all the testimony the defendant challenged the sufficiency of the evidence to entitle the plaintiff to recover. This challenge was denied, and exception taken. The case was then submitted to a jury, which returned a verdict in favor of plaintiff for \$20,000. A motion for new trial was denied, and judgment entered upon the verdict. Defendant appeals.

Appellant first insists that the court erred in overruling objection to questions propounded by respondent to the witness J. R. Dickson, as follows: "Q. At what rate of speed, in your opinion and judgment, ought a car to be run into that curve, in order to be operated with safety to passengers on it, basing your answer upon your experience as a motorman upon that road?" "Q. You may state whether, in your judgment and opinion, based upon your experience as a motorman upon that road, a car, with safety to passengers, can be run into that curve at a rate of speed at from six to eight miles per hour." These questions were objected to upon the ground that the witness had not shown himself competent to testify. The witness had testified that he was familiar with the road throughout its entire length, and knew the curve; that he had been a motorman over this same line for six or seven months; that he was familiar with the speed of cars; and that, in his judgment, the car was running through the curves at the time of the accident at between seven and eight miles per hour. We think this evidence qualified the witness to answer the questions. There seems to be no well-defined rule by which to measure the qualifications of an expert witness, and it rests largely in the discretion of the trial court to determine them. 12 Am.

& Eng. Enc. of Law (2d Ed.) p. 427; *Traver v. Spokane Street Railway Co.*, 25 Wash. 225, 65 Pac. 284. Appellant argues other grounds for the exclusion of these questions, but they were not raised by the objection made at the time, and for that reason we shall not consider them. *Gustin v. Jose*, 11 Wash. 348, 39 Pac. 687.

Appellant next contends that the court erred in permitting Mrs. Halverson to testify over defendant's objection in respect to the income from their business, without producing the books. After Mrs. Halverson had testified that she was associated with her husband, had helped him in the business, and was familiar with the amount of business he was doing, and knew what he was earning prior to his death, she stated the amount at "about \$2,000 per year." She thereupon testified as follows: "Q. What did you base your estimates upon? A. On the books. Q. And the amount of business that you took in? A. Yes, sir. Q. And the receipts that you derived from it—revenue? A. I kept the books." Upon cross-examination she testified as follows: "Q. Well, do you know what your total income was? I suppose your books would show it, would they not? A. My books will show. They will show it just to a penny. Q. That is what I thought would probably be the case. But you don't know yourself just how much you did take in—how much was the gross receipts of your business? A. No, sir." While the witness stated that she based her estimate upon the books, yet it is clear from her whole testimony that she meant she could not state the exact amount of earnings of the business, but that the books would show exactly. It is further clear that she based her estimate upon her knowledge of the business derived from her association therewith, and from the fact that she kept the books. The books, of course, are the best evidence of their contents, but the contents of the books kept by the witness are not necessarily the best evidence of the income of the business. The witness might be heard to say that she had not entered every item of income thereon, or that entries were incorrect in certain particulars. In other words, the books, being private memoranda, are secondary evidence; and for that reason the bookkeeper, or any other person with knowledge of the income of the business, could be heard to state the facts independent of the books. *Cowdery v. McChesney* (Cal.) 57 Pac. 221; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089. It was therefore not error for the court to refuse to strike the evidence of the witness. Appellant also contends that the evidence in regard to the earnings of the deceased prior to his death was incompetent. But under the rule in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, and *Turner v. Great Northern Ry. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, this evidence which



tended to show his earning capacity and income immediately prior to his death, was competent.

Appellant next contends that the court erred in refusing to permit certain witnesses to testify to the results of experiments made by them in running the same car upon which the accident occurred, through the same curve. The witnesses showed that these experiments were made under different conditions from those existing at the time of the accident. They were made at a different time of day, when the electric current would have less load, and therefore more power. The experiments were also made with no load upon the car, and upon a dry rail, while the car at the time of the accident was heavily loaded with passengers, and the rails were wet. It is argued by appellant that the conditions existing when the experiments were made were more favorable to the respondent than the conditions existing at the time of the accident, and that the court therefore should have permitted the results to be shown, notwithstanding the dissimilar conditions. The general rule as laid down by Mr. Freeman in his note on page 375 to Chicago, etc., R. Co. v. Champion, reported in 53 Am. St. Rep., at page 357, is as follows: "There has been, until within recent years, some hesitation in receiving evidence of experiments or demonstrations; but the rule is now established that evidence of the results of tests or experiments is admissible, if based upon conditions similar to those existing in the case on trial. In all cases of this sort, very much must necessarily be left to the discretion of the trial court, but the exercise of its discretion will not be interfered with where it has not been abused. From the liability to misconception and error, there can be no doubt that it is essential that the experiments or demonstrations should be made under similar conditions and like circumstances. When this is shown as a foundation for the introduction of experiments as evidence, they ought to be admitted, and the court's exercise of discretion in admitting them ought not to be interfered with." We have no doubt that this is the correct rule. The fact that the conditions are more favorable to the test, or less favorable, ought not to change the rule that the experiments must be made under similar conditions and like circumstances. The similarity of the circumstances and conditions must be left to the sound discretion of the trial court, and determined by him subject to review only for abuse. Where the conditions and circumstances are so different or dissimilar as to probably bring about different results, as they evidently were in this case, it is not an abuse of discretion to exclude the results of the experiments.

In passing upon the question of the admissibility of the evidence above referred to, the court said to counsel: "I think that it already appears from the evidence that the

amount of power upon these cars during the time of climbing the hill depends upon the number of cars that are climbing other hills, and the number on the road. It seems to me that any tests that might be made would on that account be dissimilar from the conditions that prevailed at the time, and I do not think it is within the knowledge of any person to know where they were located—whether upon grades or off grades—so that any test at any other time would be of very little value, if any, in determining the operation of cars at one time or another." Appellant now insists that this was a comment upon the evidence. The evidence of tests was excluded, and the statement of the court was made as his reason for excluding it. If the evidence had been admitted, and the court had then made the statement, it would, no doubt, have been a comment upon the weight of the evidence; but, where the evidence was excluded, the remarks of the court were harmless. Furthermore, no exception was taken upon the ground that the remarks of the court were a comment upon the evidence, and for that reason the point cannot be now made here for the first time. 8 Enc. Pl. & Pr. p. 272.

Appellant also insists that the court erred in giving instructions Nos. 6 and 8. No. 6 is as follows: "You are instructed that it is the duty and obligation of common carriers for hire to furnish passengers with seats for their accommodation, and, if you believe from the evidence in this case that the defendant received the said N. P. Halverson as a passenger, the said N. P. Halverson thereby became entitled to a seat; and, if he was prevented from obtaining a seat by reason of the car being overcrowded, you are instructed that it was not negligence for said N. P. Halverson to stand or be upon the platform of said car, providing you believe that in standing upon said platform the said N. P. Halverson was exercising ordinary care and prudence, and would have been safe from injury if said car had been run in a careful manner." The substance of the above instruction is repeated in instruction No. 8. It is first argued that there is no obligation to furnish passengers with seats upon ordinary street cars, and that the same rule does not apply to street cars as applies to steam railways; and, second, that the instruction assumes that there is evidence from which the jury might find that, owing to the crowded condition of the car, the deceased was compelled to stand upon the platform. We cannot agree with either of these contentions of appellant. The obligation of street car companies to furnish seats for their passengers rests upon the same principle as that of steam railways, viz., the accommodation and safety of their passengers. No doubt, swiftly moving steam railway trains are more dangerous to standing passengers than electric or other motor cars, running less swiftly, and for that reason greater care is

necessary upon steam railway trains. But the principle is the same in both cases. Both must care for the safety of their passengers. It would not be negligence per se for a street car company to fail to furnish a seat to each of its passengers; but, where seats are not furnished, and passengers are permitted or required to stand upon cars, greater care is required in the operation of its cars than where all are provided with seats. Nor is it negligence per se for a passenger to ride or stand upon the platform of a car. *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; *Railway Co. v. Boudrou* (Pa.) 37 Am. Rep. 707; *Cattano v. Metropolitan St. Ry. Co.* (N. Y.) 66 N. E. 563. We do not think the instructions are subject to the criticism that they assume that there was evidence from which the jury might find that the deceased was compelled to stand upon the car or the platform. But if they may be said to assume such fact, the assumption was correct, because it appears that there was but little standing room inside the car, and that the seat in front, which was seven feet nine inches long, was occupied by four persons, and two or three other passengers were standing on the platform; and, when deceased boarded the car, two women were on the end of the seat next to where the deceased was, and he made a remark, in substance, that he "did not want to climb over ladies."

Appellant next contends that the court erred in giving the following instruction: "You are instructed that if you believe from a preponderance of the evidence that the deceased, N. P. Halverson, was permitted to ride by the defendant upon the platform of defendant's car; that the defendant carelessly and negligently failed and neglected to provide and have on said car a gate, railing, or other protection around the platform thereof, and that thereby said car was rendered an unsafe and dangerous conveyance, in that passengers on said platform were unprotected and liable to be thrown therefrom; and you further believe that defendant permitted said car to become overcrowded with passengers, and failed to provide said Halverson with a seat on said car, but permitted him to be crowded and jostled by other passengers likewise upon said platform; and if you further believe that said car ran into said curve at a high rate of speed, without warning or notice to said Halverson; that thereby said car was caused to lurch and jerk as it went around said curve, causing said Halverson to be thrown therefrom, and to receive injuries of which he died—then your verdict will be for plaintiff," etc. And in refusing to give the following instruction requested by appellant: "You are further instructed that there being no statute or law of this state requiring street car companies to provide gates, and have them closed, on the front platform of its cars, the fact, if you should so find, that

at the place where the said N. P. Halverson entered said car upon the front platform there was no gate closed behind him, would not constitute negligence upon the part of the defendant company." This latter instruction is, no doubt, correct, when applied to a case where such is the only or principal negligence complained of. But in this case there were other elements of negligence, the principal one of which was running the car at a high rate of speed into a curve where passengers were permitted to stand and were standing, and had no means of knowing the danger, and were not warned to protect themselves against the danger of being thrown from the car. It may not be negligence of railway companies to fail to provide railings or gates to prevent passengers from falling or being thrown from the cars, where they are run at the usual rate of speed upon straight or even tracks, where no such protections are usually required; but when an unusual or high rate of speed is maintained around curves, or over rough and uneven roads, then ordinary diligence requires such safeguards, even if they are not required by positive statute. For this reason, we think the instruction requested would have been misleading, as applied to the facts in this case, and we also think the instruction given fairly stated the law applicable to the facts. Instruction No. 10 requested by appellant, in reference to contributory negligence, was given in substance, and it was therefore not error to refuse the one requested.

The next error complained of is that the court erred in overruling defendant's challenge to the sufficiency of the evidence. We have gone carefully over the whole of the evidence, and, without extending this opinion by a discussion thereof, it is sufficient to say that there was enough in the case to warrant the jury in finding a verdict for the plaintiff.

Appellant contends further that the verdict of the jury is excessive. In this we agree. In cases of this kind the plaintiff is entitled only to actual damages, as nearly as the same can be measured in money. It is difficult, of course, to measure in money the damages which the respondent sustained by the loss of her husband. She lost his society and comfort, and the means of support which he provided. Society and comfort are largely sentimental and incapable of accurate valuation. There were no children left for the respondent to provide for. The means of support which the deceased provided were not large. The evidence shows that the only source of revenue was from their photograph business, conducted by both of them, the net income of which was \$2,000 per year. Respondent continues the business, earning sufficient for her needs, but with what actual returns does not appear. For all the damages which respondent has suffered, we are satisfied that \$10,000 is ample to reward her, and that \$20,000 is so out of proportion to the actual damages as to show, upon its face,

prejudice of the jury. For this reason the judgment is reversed and remanded, unless within 30 days from the date of the filing of this opinion the respondent remits the excess of \$10,000, in which event the judgment will stand affirmed. Appellant to recover costs of this appeal.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

# NORTHWESTERN LUMBER CO. v. CITY OF ABERDEEN.

(Supreme Court of Washington. Sept. 21, 1904.)

## MUNICIPAL CORPORATIONS — WARRANTS—PAYMENT—SPECIAL FUNDS—DIVERSION—PLEADING—DEMURREER.

1. Limitations do not begin to run against an action against a city for the wrongful diversion of a special fund designated for the payment of improvement warrants until the holder of the warrants had notice or knowledge of such wrongful diversion to its prejudice.

2. Where, in an action for the alleged wrongful diversion of a special fund designated for the payment of city improvements, which, after issuance, had been marked, "Not paid for want of funds," the complaint alleged that money sufficient to pay the warrants had been paid into the fund, and had been paid out on other junior warrants against the same fund, but failed to allege that there was sufficient money in the fund diverted to have paid and satisfied warrants against the funds issued in their regular order, and prior in dates and numbers to those warrants held by plaintiff, it was demurrable.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the Northwestern Lumber Company against the city of Aberdeen. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Greene & Griffiths and Sidney Moor Heath, for appellant. E. H. Fox, for respondent.

PER CURIAM. This is an action brought in the superior court of Chehalis county by the Northwestern Lumber Company, plaintiff, against the city of Aberdeen, defendant, to recover on certain street improvement warrants described in the complaint. The defendant city demurred to such complaint on two statutory grounds: "(1) That said amended complaint does not state facts sufficient to constitute a cause of action; (2) that the action has not been commenced within the time limited by law." This demurrer was sustained by order of the lower court. The plaintiff refused to further plead, elected to stand on its said complaint, and the action was thereupon dismissed. Plaintiff appeals.

The transcript shows that the complaint was filed in the clerk's office of the court below on February 24, 1903. Appellant alleges therein a contract to improve certain streets in the city of Aberdeen in the year 1891, respondent's agreement without neglect or

delay to collect each of the warrants drawn on the special funds in the order and number of its issuance, the performance of the work, and the issuance of appellant's and other warrants upon such special funds—some of them in April, some in May, and others in July, 1891; that such warrants were presented for payment about these several dates, and indorsed by the treasurer of the city of Aberdeen, "Not paid for want of funds;" that thereafter the respondent city collected large sums of money for the benefit of these special funds. It is further alleged that respondent wrongfully paid, contrary to the city ordinance and the law in that regard, numerous other warrants subsequently issued and numbered on the same funds, instead of using such money to pay appellant's warrants then due; that ever since such payments there has been and is no money or fund except the city general fund with which to pay any of appellant's warrants; that all sources of payment from the property of the several assessment districts in said city have been exhausted, and the land situated therein is released from any and all liability on account of such special assessments. Other allegations are thus stated in appellant's brief: "In the complaint three causes of action are set forth, each relating to a different fund, and the number, amount, and date of wrongful payment of the subsequent warrants are respectively mentioned, and the prayer is for judgment upon each cause of action for a sum not exceeding the amount diverted by defendant for the payment of such subsequent warrants. \* \* \* More particularly, the irregular payments are as follows: In the first cause of action, plaintiff's warrant dated April 16, 1891, is No. 524, for \$75 and interest. Defendant paid Nos. 527, 528, on November 7, 1891, and No. 526, September 28, 1891, each for \$75, and No. 529 September 10, 1892, and No. 530 June 1, 1892. In the second cause of action plaintiff's warrant dated May 14, 1891, is No. 569, for \$470 and interest. Defendant paid warrant No. 571 November 18, 1891, for \$116, but No. 570 was paid March 21, 1895, for \$15. In third cause of action, plaintiff's fourteen warrants, ranging from \$30 to \$108 in amounts, were dated July 9, 1891, and are numbered 729, 730, 732, 734, 735, 741, 742, 743, 747, 754, 755, 764, 767, and 772. Defendant paid warrant No. 731 July 31st; and Nos. 733, 736, 737, and 738, in December, 1891. But 739 was paid in November; 740 and 744 in September; 748 was paid November 7th; but 750, November 3d; and 751 and 752 September 30th; while 753 was paid August 31st; and 756, 757, 758, 759, and 760 were paid July 31st; 761 was paid November 3d; 762 and 763, November 7th; while warrant 765 was paid September 30th; 766, July 31st; 770, November 7th; and 773, September 25th—all in 1891, and in amounts ranging from \$25 to \$100 per warrant." It is further alleged: "That thereafter defend-

ant collected a large amount of money from the owners of the land in said assessment district abutting upon said B street, improved as aforesaid, to wit, more than the sum of three hundred and seventy-eight dollars, and while said funds collected as aforesaid were in the city treasury, and said warrant No. 524, held and owned as aforesaid by plaintiff, was due and payable in the order of its issuance, said defendant, instead of paying plaintiff's said warrant in the order of its issuance, as required by the ordinances of said city and the laws of the state of Washington, wrongfully and without authority paid out of said moneys other warrants issued against the same fund, and numbered subsequently." Then follows a description of warrants subsequently paid as above noted with regard to the allegations appearing in the first cause of action. The second and third causes of action respectively contain, in substance, similar allegations, except as to the dates, the amounts collected and paid, the description of the warrants, and the special funds on which they were drawn. The appellant alleged that it had no knowledge nor information of the collection and payment of this money out of its regular order until November 25, 1902.

Considering the above grounds of demurrer in the inverse order as designated in the statute, and also as presented by the demurrer filed by respondent, we are of the opinion that, under the allegations with reference to the time when appellant first discovered or had knowledge of the alleged grievances of which he complains, this action was not barred at the time of its commencement by virtue of the three-year statute of limitations, under the ruling of this court as announced in the case of *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194. This court held in that case that the cause of action did not accrue until the holder of the warrant drawn against and payable out of a special fund designated by the appellant city had notice or knowledge of the wrongful diversion of such fund to its prejudice.

2. The proposition whether there are alleged in the complaint sufficient facts to constitute a cause of action presents the vital question in the case. This proposition is scarcely alluded to in the arguments of respective counsel in their briefs. Their arguments are chiefly directed towards the one question regarding the bar of the statute of limitations above mentioned. The complaint alleges a wrongful diversion of the special street improvement funds of respondent, and the payment without authority of moneys belonging to said funds on warrants which were issued against the same and subsequently numbered. But it fails to allege that there was sufficient money belonging to any of these special funds diverted therefrom to have paid and satisfied the other warrants against the same funds issued in their regu-

lar order, and prior in dates and numbers to these warrants held by appellant, or that appellant at the times of the alleged diversion of such funds was rightfully entitled to have such money, or any part thereof, applied towards the payment and liquidation of its warrants described in the complaint. In other words, the appellant was required to allege sufficient facts to show that it was prejudiced by the payment of those subsequent warrants out of their regular order, and that it had the lawful right to insist that this money, or some portion thereof, should have been applied towards the payment of the warrants in question. For aught that appears from the complaint, this money was insufficient in amount to have paid such prior outstanding paper and the accrued interest thereon. If such were the case, appellant has no just or legal cause of complaint in the present controversy. The allegation that the city wrongfully and without authority paid out said moneys on warrants subsequently issued and numbered against the same fund is a mere conclusion of the pleader. It does not alter the logical deductions naturally flowing from other specific and controlling allegations appearing in the complaint. Phillips, Code Pleading, § 346. In the case of *New York Security & Trust Company v. Tacoma*, supra, the only question considered by this court was that regarding the statute of limitations. On examination of the record therein, we find that it fully appeared that there had been sufficient money paid into the special fund to satisfy all warrants issued prior to the one held by respondent company, in the regular order in which they were issued against the same fund; that the money collected and paid by the city of Tacoma on the warrants issued subsequently to the one owned by such respondent was properly and legally applicable to the payment of its warrant. In this case this fact does not appear.

The judgment of the lower court is clearly right, and must therefore be affirmed.

#### FRAZIER v. WILSON et al.

(Supreme Court of Washington. Sept. 21, 1904.)

#### OYSTER LAND — PURCHASE FROM STATE — FORFEITURE — ACTS OF LAND COMMISSIONERS — EFFECT.

1. Where a contract by the state for the sale of oyster land provided that, if the payments of principal and interest were not made as provided, the contract should be forfeited, and plaintiff was in default in payment of such principal and interest for a year and nine months before the contract was forfeited, it was subject to summary cancellation after notice by the State Land Commissioner, without action brought by the state for such purpose.

2. Where plaintiff, a purchaser of oyster land from the state, had been in default in her payments thereon for more than six months when notice of forfeiture was given, and thereafter there was a contest pending between plaintiff

and a subsequent applicant for the land, in which plaintiff claimed under a subsequent application, a decision by the State Board of Land Commissioners in favor of the contestant, and stamping the word "Canceled" on plaintiff's contract on file in the Land Office, constituted a sufficient forfeiture of plaintiff's rights, without a formal declaration by the board that the contract was canceled, since, if plaintiff had any rights under her original application, they should have been set up in such contest.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Catherine A. Frazier against J. J. Wilson and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. W. Robinson, for appellant. Troy & Falknor, for respondents.

**PER CURIAM.** This action was brought for the purpose of having a deed held by Wilson, one of the respondents, to certain oyster land, declared to be in trust for the benefit of appellant, Mrs. Frazier. The complaint alleges collusion and fraud on the part of said Wilson and the officers and clerks in the office of Robert Bridges, former State Land Commissioner, to defraud this plaintiff out of the land and give it to Wilson; that the said officers had an interest in Wilson's application; that the original contract of Mrs. Frazier had never been legally canceled, and was still in full force and effect. Each of the defendants demurred to the complaint, which demurrers were sustained. The plaintiff elected to stand upon her complaint as to the Land Commissioner, and in due time filed an amended complaint as to defendants Wilson and wife. The defendants Wilson answered, denying the material allegations of the complaint, and setting up various affirmative defenses which we deem it unnecessary to discuss. The case went to trial, and the evidence disclosed that on the 13th of February, 1896, the state of Washington, through the office of the Commissioner of Public Lands, issued to appellant a contract for the sale of certain oyster or tide lands in Thurston county, containing about 12 acres, in consideration of the payment of the following sums: \$3.95 on the day of the execution of the contract, the receipt whereof was duly acknowledged; \$3.95 principal and 7 cents interest on March 1, 1896; \$3.95 principal and 64 cents interest on March 1, 1897; \$3.95 principal and 32 cents interest on March 1, 1898. It was further provided in said contract as follows: "And the said second party covenants and agrees to pay said principal sum and interest as above specified at the rate of eight per cent. per annum in gold coin of the United States at the office of the State Treasurer at the capital of said state, and that she will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises, and that if said second party shall fail to pay any of the sums above specified, either of

principal, interest, taxes or assessments, when the same shall become due and for six months thereafter, she will, on demand of the Board of State Land Commissioners or other authorized officer of the state, quietly and peaceably surrender the possession of the above described land and premises and every part thereof; and upon failure to pay as above specified, all rights of said purchaser under this contract may, at the election of said Board of State Land Commissioners acting for the state of Washington, and without notice to said purchaser, be declared forfeited and when so declared forfeited, and thereupon the state shall be released from all obligation to convey said land; and all payments theretofore made on this contract, and any and all improvements made on said land, or any part thereof, shall thereupon be forfeited to and belong to said state of Washington." It is admitted in appellant's brief that none of the deferred payments were made. On September 1, 1897, the Land Department sent a notice to Mrs. Frazier, notifying her of her delinquency. No response was received by the Land Department, and on November 17, 1897, the contract was marked "Canceled" with a rubber stamp, but the minutes of the board of State Land Commissioners fail to disclose an order canceling said contract. On or about the 1st of December, 1898, Mrs. Frazier tendered to the State Land Commissioner the amount due under her contract and demanded a deed, whereupon the officer in charge informed her that he could not receive her money, for the reason that her contract had been canceled; that she could make a new application; and that there was no other application on file—and gave her blanks to fill out. She took the blanks home, and claims to have returned a couple of days thereafter and filed them. These files appear to have disappeared completely. However, the number given would indicate the filing to have been in February, 1899. On December 31, 1898, James J. Wilson made application to purchase the tide or oyster lands covered by Mrs. Frazier's contract, together with other lands. On February 19, 1900, appellant made a reaplication to purchase, solely for the purpose of contesting Wilson's claim. The application of Wilson, covering about 32 acres, was referred to the Board of Oyster Land Commissioners, with a request to answer the following questions: "(1) Is the land, or any portion thereof, a natural oyster bed? (2) If the land, or any part of it, is a natural oyster bed, is it necessary, in order to secure adequate protection to it, to retain it, or any part of it, in the public domain? (3) Whether the land, or any portion thereof, having been a natural oyster bed within ten years past, may reasonably be expected to again become such within ten years in the future." All these questions seem to have been answered by the commission in the affirmative. Indorsed upon the report is the following: "Upon pro-

test being made, and upon an investigation had, it appears to me the proper answer to these questions is, No; this applies to all three questions. Upon the matter being called to the attention of the board of oyster land commissioners they admitted they might have made an error. Robert Bridges, Commissioner." Subsequently the Board of State Land Commissioners awarded the land to Wilson, and dismissed Mrs. Frazier's contest. From this decision she appealed to the superior court, but, before the appeal was perfected, a deed was issued to Wilson, which, as appellant claims, rendered it necessary to dismiss the appeal. The testimony is not very complimentary to the administration of the Land Commissioner's office as it was conducted at that time, but there is no evidence to show that Wilson had any knowledge of any fraud, if fraud there was, committed in his behalf. On the contrary, the record showed on its face that the land was open to entry, and, although some evidence was introduced to the effect that certain officers in the Land Department had claimed to have an interest in the claim, Wilson himself was put upon the stand by the appellant, and testified that no one other than himself had any interest in the land. A motion for nonsuit was sustained at the close of plaintiff's testimony, and plaintiff appeals.

It will doubtless be conceded that, whenever the Board of Land Commissioners orders a contract for the purchase of land canceled, it is the duty of the Land Commissioner to make a record of the action of the board. In this instance the only record seems to be the rubber stamp, "Canceled," upon the book of contracts. The presumption of law is that the officer did his duty. The appellant had been in default for about a year and nine months, and the contract was undoubtedly forfeitable. The appellant cites *State v. Frost*, 25 Wash. 134, 64 Pac. 902, and *Washington Ironworks v. King County*, 20 Wash. 150, 54 Pac. 1004, in support of the theory that the contract created a vested right in the appellant, which could not be taken from her except by due process of law. An examination of those cases will disclose the fact that they were cases involving the right of the state to tax lands held under a contract of purchase from the state, and in no sense of the word involved the point contended for here. In fact, we should hesitate a long time before announcing a rule that would so seriously handicap the Land Department of the state in the administration of the affairs of that office as to require an action by the state to be brought to cancel such contracts. At the time Wilson made his application to purchase, the records of the office showed that Mrs. Frazier's contract had been canceled on November 17, 1897, over a year previous, after she had been delinquent for almost a year and nine months. Section 18, p. 242, c. 89, Laws 1897, provides: "The Commissioner

of Public Lands shall notify the purchaser of the land in each instance when payment on his contract is overdue, and that he is liable to forfeiture if payment is not made within six months from the time the same became due, unless the time be extended by the Commissioner on a satisfactory showing as above provided." The appellant admits that she received some sort of notice from the Land Commissioner with reference to her delinquency on or about September 1, 1897, and we think it is reasonable to assume that the notice she received is the notice provided for by the above section. It is not necessary that the board should formally declare a contract canceled. It seems to us that it is a sufficient declaration in that respect, after a person has been in default for more than six months, and where there is a contest pending between the original and a subsequent applicant, for the board to decide in favor of the subsequent applicant. Although in this instance Mrs. Frazier was not contesting Wilson's claim by virtue of her original application, if she had had any rights under her original contract they ought to have been set up at that time, and the board given an opportunity to repudiate the so-called cancellation, if it had, as a matter of fact, been fraudulently made.

Under the circumstances, we think the judgment should be affirmed.

#### LOUDIN & BERGMAN FIRE CLAY MIN. & MFG. CO. v. COLE.

(Supreme Court of Washington. Sept. 21, 1904.)

#### RECEIVERS—FINAL ACCOUNT—ATTORNEYS' FEES —SERVICES—EXPENDITURES—ALLOWANCE.

1. Where it was stipulated that the court should fix the amount to be allowed the attorney for a receiver, without expert evidence as to the value of the services rendered, whereupon the attorney made a general statement of the services rendered, showing that he had rendered services extending over a considerable period of time, and the receiver was in constant need of, and constantly sought and obtained, his advice, an allowance of \$150 for such services was proper.

2. Where a receiver was appointed for a pottery manufacturing concern, which required a man skilled in the business as manager, and, such men being unavailable, the receiver employed one of the parties to the suit, who was an expert, and the increased production of the plant while under his supervision more than justified his employment at the salary paid, the amount so paid was properly allowed in the receiver's account.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Judicial accounting by George E. Cole, as receiver of the Loudin & Bergman Fire Clay Mining & Manufacturing Company. From an order overruling certain exceptions to the receiver's report, and allowing the same, the corporation appeals. Affirmed.

W. J. Thayer, for appellant. P. F. Quinn, for respondent.

**PER CURIAM.** In the year 1900 Martin L. Bergman and others, as plaintiffs, began an action against Charles P. Oudin and others, as defendants, and asked, among other things, for the appointment of a receiver over the business and property of the appellant, a corporation. Pursuant to the request the court appointed as such receiver one A. P. Curry, who served until his death, which occurred about June 1, 1901. On June 10th following, the respondent George E. Cole was appointed to succeed him. Cole acted as receiver from that date until March 3, 1903, when he was discharged by the court after the termination of the action between Bergman and Oudin, above mentioned. In his final account as such receiver he showed that he had employed Bergman from about May 15, 1902, until the close of the receivership as a sort of general manager over the work of manufacturing pottery at a salary of \$5 per day. This item the court allowed at the hearing. The court also allowed the receiver for his services as such the sum of \$1,000, and for his attorney the sum of \$150. Exceptions were taken to the allowance of the items allowed Bergman and the attorney, which exceptions the court overruled after a hearing had thereon. This appeal is from the order of allowance.

The first contention of the appellant is that the receiver maintained himself in office by a corrupt agreement with Bergman. It contends that the receiver employed Bergman at an exorbitant salary, in order to induce him not to settle his differences with Oudin, so that the receivership, and his consequent appointment as receiver, might be prolonged indefinitely, and for that reason neither he nor Bergman ought to be allowed anything for their services. A further objection to the account of Bergman is that it is at least double the amount usually paid for like services. The objection to the claim of the attorney was that there was no evidence that he had performed any service.

Taking up the objection in the reverse order from that stated, it appears that it was stipulated that the court should fix the amount to be allowed the attorney without calling expert evidence as to the value of the services rendered; that the attorney thereupon made a general statement of the services he had rendered, and the court allowed the amount he claimed. It is true this statement did not go into particulars, but the record of the receiver's doings was before the court, and was a proper matter to be examined in connection with the statement of the attorney. When these are examined, the allowance does not seem unreasonable. The services extended over a considerable period of time, and the receiver was in constant need of, and as constantly sought, the advice of his counsel.

The allowance to Bergman is supported by

the receiver's statement to the effect that Bergman was an expert in the line of work that he was required to perform, and that the increased production of the plant when under his supervision more than justified his employment at the wages allowed him. The business in which the corporation was engaged—that of manufacturing pottery—required a man as manager who was skilled in the business. Such men, the receiver states, were not plentiful, and the necessities of the occasion required the payment of high wages. On the whole record, we think the court properly allowed this item.

On the question whether or not there was a corrupt agreement between the receiver and Bergman, we are content also to accept the conclusion of the trial court. While the evidence on the question was conflicting, we cannot say, after a careful perusal of the record, that the trial court did not decide in favor of its preponderance.

The judgment should be affirmed, and it is so ordered.

#### WASHINGTON STATE BANK OF ELLENSBURG v. DICKSON et al.

(Supreme Court of Washington. Sept. 21, 1904.)

VENDOR AND PURCHASER—CONTRACTS—SPECIFIC PERFORMANCE—INTEREST OF VENDOR—EVIDENCE—COMMUNITY PROPERTY—SALE—CONSENT OF WIFE—CORPORATIONS—ACTS OF AGENT—RATIFICATION.

1. In an action to compel specific performance of a contract to convey a half interest in certain real estate, evidence held to support a finding that the vendor had such interest in the property in question.

2. The trustees of a bank, without any formal order, directed its cashier to purchase certain real estate for the use of the bank; and he, acting under such directions, contracted with C. for his interest therein. The bank at once took the benefits and assumed the burdens of the contract, paying the first installment of the price; and thereafter the board of trustees, by a formal order recorded in their minutes, ratified all the acts of the cashier. Held that, though such ratification did not occur until after an action to compel the specific performance of the contract after the vendor had refused to complete the same, it was sufficient to render the acts of the cashier the acts of the corporation from the beginning.

3. Where a contract for the sale of community property, when made by the husband, had the sanction and approval of the wife, and was subsequently ratified by her by the execution of a deed, it was not necessary to the validity of the contract that she should have joined her husband therein.

Appeal from Superior Court, Kittitas County; Frank H. Rudkin, Judge.

Action by the Washington State Bank of Ellensburg against George E. Dickson and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Eugene E. Wager, for appellant Dickson. Kauffman & Frost, for appellant McCandless. Graves & Englehart, for respondent.

FULLERTON, C. J. The respondent (plaintiff below) brought this action against the appellants to compel them to convey to it an undivided one-half interest in certain real property situated in the city of Ellensburg. The property was known as the "Snipes Bank Building." The facts out of which the controversy arises are, in substance, these: On November 4, 1889, the property belonged to the estate of Ben. E. Snipes & Co., an insolvent co-partnership, which was then in the hands of a receiver appointed by the superior court of Kittitas county. The property had theretofore been ordered sold by the superior court, and the receiver had advertised it for sale, to take place on the day above named. In anticipation of the sale, the appellants George E. Dickson and Frank N. McCandless, together with one E. E. Wager and one C. V. Warner, entered into an agreement for the purchase of the property. While the terms of the agreement are not very clear, it seems that Dickson was to bid the property in at the sale in his own name, and that each of the others was to have a one-fourth interest therein on the payment of one-fourth of the purchase price. Pursuant to the agreement, Dickson bid on the property at the sale under the title of "G. E. Dickson, Agent," and the same was struck off to him for the sum of \$10,350. The sale was confirmed by the court on the 24th of November, at which time the court made an order directing the receiver to issue a deed to the property to "G. E. Dickson, trustee." The deed was made by the receiver in due time, but was held by him without delivery, pending the payment of the purchase price, for a period of nearly three years thereafter; the final payment being made and the deed delivered to Dickson after this controversy arose. Such portion of the purchase price of the property as was paid at the time of the sale was paid by Dickson and McCandless; the former paying \$2,000, and the latter \$2,707.26. Neither Wager nor Warner paid any part of the purchase price, and they subsequently withdrew from the agreement with the consent, or at least without objection on the part, of the other parties. Dickson and McCandless continued thereafter to claim the property in equal shares, leasing the same to the respondent after its incorporation in 1902 by a joint lease executed by themselves and their wives. On September 25, 1902, one C. W. Johnson, acting on behalf of the respondent and for its benefit, entered into an agreement with McCandless for the purchase of his undivided half interest in the property. The purchase price agreed upon was \$6,750, of which \$1,000 was paid at the time, and the balance agreed to be paid on the delivery of a deed to the premises showing perfect title, which was not to be delivered later than October 5, 1902. At the time the agreement was entered into, a memorandum thereof was made in writing by McCandless, and

delivered to Johnson, to the following effect, namely: "Ellensburg, Wash., Sept. 25, 1902. Received of C. W. Johnson One Thousand Dollars (\$1,000.00) part payment on one undivided one-half interest in and to the bank building known as 'The Snipes Bank Building,' situated on the corner of Pearl and Fourth Streets, in Ellensburg, Wash. The full purchase price of said one undivided half interest being \$6,750.00, the remaining \$5,750.00 to be paid by said C. W. Johnson to Frank N. McCandless or order, on delivery to said C. W. Johnson or order, of a good and sufficient deed of Warranty, showing perfect title to said property. Said deed to be executed and delivered by not later than October 5, 1902. [Signed] Frank N. McCandless." Some months later the appellants McCandless and wife executed a deed to the respondent for an undivided one-half interest in the property, but, pending the proceedings had to procure the delivery of the deed from the receiver to Dickson, the appellant Frank N. McCandless refused to proceed further with the matter, and announced that he would not deliver the deed he and his wife had executed, or permit a conveyance of his interests in the property to be made to the respondent by the holder of the legal title. Dickson, also, pending the negotiations, refused to recognize the claim of McCandless to a one-half interest in its property; claiming that McCandless had, at most, nothing more than a one-fourth interest therein. The respondent thereupon instituted this action. In its complaint it set up substantially the foregoing facts, and prayed that it be declared to be the owner of an undivided one-half interest in the property in question, and that the appellants be compelled to convey such interest to it. To the complaint the appellants answered separately; such answers consisting of a denial of the allegations of the complaint, and a separate defense to the effect that the contract was not enforceable because of the statute of frauds. The court adjudged the respondent to have a valid contract for the conveyance to it of an undivided one-half interest in the property, and entered a decree accordingly. The parties appealed separately, and filed separate briefs. The questions suggested, however, are in the main the same, and will be discussed without reference to the party raising the question.

It is first contended that the court erred in finding that the appellants McCandless had an undivided one-half interest in the property in question, but the evidence supporting the finding, it seems to us, does not leave the question in doubt. It is true, Dickson testified that the original agreement for the purchase of the property entered into by the four persons above named, by which each was to acquire only a quarter interest in the property, was to become effective only in case the property was purchased for \$8,000 or less, and that it was to belong to a Mr.



Treman if it cost more than that sum; yet this statement is not borne out by any of the other parties to the contract, and one of them testified that he had never before heard of it. Against this are his admissions, shown by unimpeached witnesses, made prior to the commencement of this action, and when it was evidently not in contemplation, to the effect that McCandless did have an undivided one-half interest in it. In the lease of the property made to the respondent, as we stated before, both Dickson and McCandless joined as if equal owners, and it was then assumed by all of the parties that they owned equal interests. Moreover, it was because of these statements on the part of Dickson and McCandless that the respondents were induced to enter into the contract for the purchase of McCandless' interest, and good faith would hardly permit them now to successfully deny that he had such an interest.

It is next said that the respondent failed to show that Johnsonsone was authorized to make a contract in its behalf for the purchase of the property at the time he contracted for the interest of the McCandlesses. The evidence on this point shows that the respondent was a banking concern, and that Johnsonsone was its cashier; that the trustees of the corporation, although they had made no formal order to that effect which was spread upon the minutes of their meetings, had directed Johnsonsone to procure the property for the use of the bank, and that he was acting pursuant to such directions when he made the contract with McCandless; and that the bank at once took the benefits and assumed the burdens of the contract, by assuming ownership of the interest acquired by the contract, and by paying the installment of the purchase price. Moreover, it was further shown that the board of trustees, by a formal order which was duly recorded in their minutes, subsequently ratified all of the acts of the cashier, had in the matter pursuant to their informal directions. The formal ratification was had, it is true, after the appellants had repudiated the contract, and after the commencement of this action; but we think it was, nevertheless, when taken in connection with what had preceded it, sufficient to show that the contract was the contract of the bank. Unauthorized acts of a person purporting to act on behalf of a corporation become binding upon the corporation whenever they are duly ratified by it. Such a ratification is equivalent to a precedent authorization, and cures any defect in the original appointment. In other words, it makes the acts of the purported agent the acts of the corporation from the beginning. 10 Cyc. 474d, and cases cited. This being true, the bank could, of course, maintain this action.

Lastly it is said that the interest of Frank N. McCandless acquired in the property by his purchase was the community property of himself and wife, and that the contract

sought to be enforced is void because it was not signed by the wife. But it is not the rule in this state that a contract for the sale of community real property must be signed by the wife, in order to be binding upon her. We have held it enough if the contract when made by the husband had the sanction and approval of the wife, or if it was subsequently ratified by her. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Payne v. Still*, 10 Wash. 433, 38 Pac. 994; *Boston Clothing Co. v. Solberg*, 28 Wash. 263, 68 Pac. 715. Here there was both a previous authorization and a subsequent ratification. McCandless himself testified that he had talked the matter over with his wife prior to entering into the contract, and that it was entered into with her knowledge and full consent; and it will be remembered that she joined with her husband in a deed of the premises to the respondent. This was sufficient to bind her interest, under the authorities above cited.

The judgment is affirmed.

MOUNT, DUNBAR, and ANDERS, JJ.,  
concur.

#### CHASE v. SMITH.

(Supreme Court of Washington. Sept. 21, 1904.)

##### CONTRACTS—BREACH—DAMAGES.

1. Where plaintiff, after having performed a part of a contract to paint certain buildings, was prevented by defendant from finishing the contract, the measure of his damages was the contract price of the work performed, and the profit, if any, which he would have made on the balance of the work, had he been allowed to complete it.

Appeal from Superior Court, King County; A. E. Griffin, Judge.

Action by F. L. Chase against C. J. Smith. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Peters & Powell, for appellant. Hawley & Huntley, for respondent.

PER CURIAM. Action for breach of contract brought by F. L. Chase, plaintiff, against C. J. Smith, defendant, in the superior court of King county. The cause was tried to a jury, and verdict rendered in favor of plaintiff for \$302. The defendant in due time made and filed his motion for a new trial, which was overruled, and judgment was entered on the verdict in the court below, from which defendant appeals.

On the 29th day of January, 1902, respondent, who was a painter, entered into a written agreement with appellant to paint 22 dwelling houses in the city of Seattle then owned by the appellant. By the terms of the contract, the owner was to furnish a part of the necessary material to do the

¶ 1. See *Damages*, vol. 15, Cent. Dig. §§ 331-333, 338.

work; the same being described in a written, itemized statement attached to the contract. The work was to be begun on or before February 1, provided the premises were turned over at that time, and to be completed on or before April 10, 1902. Respondent was to receive for this labor \$1,210, payable at certain specified times as the work progressed. He started to work on the property March 31, 1902. On April 4, 1902, appellant refused to permit respondent to continue at work thereon any longer, and thereupon advertised for further bids for such painting, and let a contract to complete the same to a painter named A. A. Smith, who performed the work at an additional cost of \$1,643 for labor, and \$260 additional for material, making a total of \$1,903. In the autumn of 1902 the respondent brought the present action to recover for a breach of the original agreement. He alleged in his complaint, among other things, that he was prevented by appellant from performing such contract; claiming \$370 damages for the wrongful discharge, and also \$250 for delay in turning over to respondent the premises on which he was to commence work. This latter item was eliminated from the case by the ruling of the trial court. The answer admitted the contract, and that appellant discharged respondent from said work on April 4, 1902, but denied that respondent suffered any damage.

In our opinion, the vital question arising on this record is whether the trial court erred in giving certain instructions to the jury with regard to the measure of damages. The instruction of which appellant particularly complains is as follows: "If you find from a fair preponderance of the evidence in this case—that is, the greater weight of evidence—that the plaintiff would have made a profit, provided he had been permitted by the defendant to carry out the contract in strict accordance with the plans and specifications and terms of the contract, then it is your duty to find in favor of the plaintiff and against the defendant for the amount of profit, if you so find, together with the value of the work which you find was done by the plaintiff under the contract. If the plaintiff has failed to prove to you by a fair preponderance of the evidence that he would have made a profit, had he been permitted to carry out the terms of the contract, then it is your duty to return a verdict for the plaintiff only for the sum which you find—for the reasonable value of the work which you find was performed by the plaintiff under the contract. In other words, you cannot return a verdict for the plaintiff for profit unless you find from a fair preponderance of the evidence that, had the plaintiff carried out the contract in accordance with its terms and the specifications, that he would have made a profit." The trial judge then proceeded to further instruct the jury "that in any event, in this case, you must re-

turn a verdict in favor of plaintiff for the value of the work done and performed by him under the contract." Counsel for respondent here said: "May I just suggest another one in this last \* \* \* instruction, which I assume was on the theory that the sum of these two should constitute their verdict, if they should find such?" And the court continued its instructions as follows: "In any case, if you find there was a profit, then the amount of profit, together with the work done, will constitute the verdict." After the jury had retired to deliberate upon their verdict, they were recalled and given the following additional instructions: "Gentlemen, I wish to withdraw my instructions that I gave you which went to the effect that your verdict, in any event, must be for the plaintiff for the reasonable value of the work done. I don't think that is a proper measure of damages. Your verdict must be for the plaintiff, in any event, for the value of work done, in a proportion which that work stands—completed work at the contract price, and not what the reasonable value of that work is. The other instructions in regard to finding for the plaintiff for the profits will remain as I gave them to you. The other instructions in regard to the finding for the plaintiff for the work done— The rule is that the plaintiff in this case would be entitled to recover for the work in proportion which work bears to the completed work, that recovery being in proportion to the work done—that which the work bears to the contract price, and which is \$1,210. You may retire."

We think that the learned trial court erred in giving the foregoing instruction regarding the measure of damages in actions of this kind; that the attempted correction on the part of the court failed to eliminate or correct the erroneous features thereof. Waiving the point as to all verbal criticisms which may be urged relative to the language used in such charge, we conceive this charge to be misleading and erroneous in substance. It gave the jury to understand that they could, if they believed respondent's evidence and adopted his theory in the present controversy, find the value of the work already performed at the contract price, and also the profits that would have accrued to him (respondent) on the entire job, under the contract, if appellant had not interfered and prevented performance as alleged. This is not the rule. The contractor was entitled to recover for the work performed at the contract rate, and such profit, if any, as he would have made on the balance of the work, had he been allowed to complete it. The respondent is to be placed in the same condition that he would have been placed in, had he been permitted to proceed without interference. 2 Sedgwick on Damages (8th Ed.) § 618; Tennessee & Coosa R. R. Co. v. Danforth, 112 Ala. 80, 20 South. 502; Masterton v. Mayor of Brooklyn, 7 Hill (N. Y.)

61, 42 Am. Dec. 38. The case of *Noyes v. Pugin*, 2 Wash. St. 655, 27 Pac. 548, was an action upon a quantum meruit for services rendered. The language employed in the opinion must be considered in connection with the facts of the case decided. Moreover, it is stated in that opinion that "it is difficult to perceive why the respondent in this case should receive more compensation for the labor actually performed by him than he would have received for the same services had the contract not been broken by appellant." There is nothing in that opinion which conflicts with the propositions of law advanced by Mr. Sedgwick *supra*. While it may be conceded that, under the instructions as corrected by the trial judge, the value of respondent's labor already performed should be determined according to the contract price, in the proportion that the same as it then stood bears to the entire work which respondent undertook to perform under the original agreement, it was manifest error to give the jury to understand that they might also allow profits on the entire contract. A recovery at the contract rate for the labor performed must necessarily include the profit made by such labor, and it was only for profits on the uncompleted portion of the work that he was entitled to recover in addition, and then only after a showing that he would have made such a profit. *Tenn. & C. R. Co. v. Danforth*, *supra*. Owing to the contradictory testimony appearing in the record, especially regarding the matter of profits, we are unable to find any data by which we can segregate the legitimate from the unlawful damages, so that we can give the respondent the choice to accept a definite sum, or submit to a retrial of the issues.

The judgment of the superior court is reversed, and the cause remanded for a new trial.

(36 Wash. 1)

**SUKSDORF v. HUMPHREY et al.**

(Supreme Court of Washington. Sept. 21, 1904.)

**EJECTMENT—LIMITATIONS—ADVERSE POSSESSION—INTENT—HOLDING BY MISTAKE—EXHIBITS—ATTACHMENT TO CASE ON APPEAL.**

1. Where certain exhibits were introduced in evidence, and thereafter attached to the statement on appeal, the date of their physical annexation to the statement was not material; they having been sufficiently indorsed and marked for identification.

2. Defendant's grantor entered on certain government land adjoining land belonging to plaintiff's grantor before section lines had been fixed by government survey. Defendant's grantor erected a fence on what she supposed was the boundary line, and thereafter, in 1897, the line was fixed by United States survey; showing that the fence included a certain strip to which plaintiff's grantor was entitled. She thereupon disclaimed title, but, because she was unable to remove the fence herself, was permitted to let it remain there until she sold the land to defendant. *Held*, that limitations did not be-

gin to run against an action by plaintiff to recover the land until the line was established by the survey.

3. Land having been inclosed by defendant's grantor by mistake, and she never having claimed the land between the section line and the fence after the survey, her possession was not adverse to plaintiff's grantor.

Appeal from Superior Court, Spokane County; Geo. W. Belt, Judge.

Action by F. W. Suksdorf against Joseph Humphrey and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

John M. Gleeson and James Dawson, for appellant. Alfred E. Barnes, Geo. A. Latimer, and Alfred M. Craven, for respondents.

**PER CURIAM.** Respondents have made a motion to strike the statement of facts "for the reason that the same does not contain all of the material evidence adduced at the trial," and in their argument mention a number of exhibits as not being attached to the statement. The exhibits are attached to the statement, and the court's certificate seems to be in proper form. The exhibits became a part of the record when they were introduced and received as evidence in the case, and the date of their physical annexation to the statement is not material, so long as they are sufficiently indorsed and marked for identification. Motion denied.

This was an action in ejectment commenced by the appellant against the respondents to recover possession of a certain strip of land, containing about 4.3 acres, along the east line of section 1, township 25 N., range 45 E., W. M. Section 6, township 25 N., range 46, and section 1, Tp. 25 N., range 45, situate in Spokane county, are coterminous. The west line of section 6 is the east line of section 1, and this line is also the northern part of the township line between townships 25 and 26. The east half of section 1 is surveyed in subdivisions, designated as lots 1, 2, 7, and 8, and the southeast quarter. Section 6 is a fractional section, consisting of about 150 acres, and is divided into lots 1, 2, 3, 4, and 5. Section 1 was railroad land. The record title to lot 8 and the southeast quarter and other parts of the section was acquired by the appellant from the Northern Pacific Railway Company in 1902, by a deed issued in compliance with a contract executed in 1897. In the year 1884 one Anna Boehrig and her husband settled upon section 6, with a view to acquiring it under the homestead laws, but at that time the line between section 6 and section 1 had not been established by the United States, and, in building their house and making their other improvements, the testimony shows that it was their intention to build the house and make the improvements on said section 6; that subsequently, in 1897, when said boundary line between section 1 and section 6 was estab-

¶ 1. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 270, 276, 278.

lished by the United States, it was found that their fence ran over the line, and inclosed 4.3 acres in section 1, being the land in dispute. The house was partly in section 1 and partly in section 6. A number of fruit trees also fell upon the tract in question. Some time prior to 1902 the said Anna Boehrig—her husband having previously died—made proof upon her homestead in section 6, and that year sold the same to respondents. Respondents, in their answer, deny the material allegations of the complaint, and, as an equitable defense, claim title by reason of open, notorious, adverse possession, under a claim of right, in themselves and their grantor, for more than 10 years. It was stipulated that the property described in the deed from Mrs. Boehrig to the respondents was lots 2, 3, 4, and 5 of section 6. The testimony clearly shows that, when the Boehrigs settled there, they intended to, and thought they had, put their improvements all east of where the line would ultimately be established between sections 1 and 6; that they did not intend to claim any part of section 1; that the plaintiff and Mrs. Boehrig were old friends; that at the time the survey was made by the government, in 1897, Mrs. Boehrig had become a widow; that the plaintiff had talked to Mrs. Boehrig about moving the fence back to the line, but that Mrs. Boehrig had explained that she was unable to do it herself, and that her children were too small to be of any assistance; that the plaintiff consented that the fence remain temporarily where it was; that Mrs. Boehrig had moved to Spokane before selling the property; that there is a conflict in the testimony as to whether Mr. Humphrey knew where the lines were when he bought the property, Mrs. Boehrig having testified that she told Mr. Humphrey that she did not own the strip in section 1, and could not sell it to him, and Mr. Humphrey having testified that she did not so inform him until some two weeks after he purchased the land. The lower court found, as a conclusion of law, that Anna Boehrig became and was the owner in fee of said strip of land by adverse possession long prior to the commencement of the action, and rendered judgment dismissing the action.

The only question involved in this action is as to whether the possession by Anna Boehrig of the land in question constituted open, notorious, adverse possession under a claim of right. In *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744, this court said: "All the authorities hold that the question of adverse possession is a question of fact, and it must be a possession that is known to the owner of the legal title." For the purposes of this case, it might be assumed that the land in question was prior to 1897, when the township line was surveyed by the gov-

ernment, unsurveyed government land, and, there being no question of acquiescence in a division line, the possession of respondents' grantor was that of a mere squatter, and that the statute of limitations did not commence to run against the appellant at least until the line was established in 1897. The statute commenced to run on the date that the right of action accrued to the appellant or his grantor. In *Sedgwick & Wait on Trial of Title to Land* (2d Ed.), at page 50, it is said: "The party who seeks to change the possession by ejectment must first establish a legal title to it." No doubt, the legal title to all of the surveyed land was in the Northern Pacific Railroad Company when the map of definite location was filed, in 1880, and an action in ejectment might have been maintained against any person subsequently taking possession thereof; but not so with reference to the unsurveyed land. The government was inviting her citizens to settle upon the unsurveyed public domain, and it is hardly necessary to cite authorities to the effect that an action in ejectment will not lie until the plaintiff can locate the boundaries of his land with some degree of certainty. For the same reason, possession in a defendant cannot be adverse to the true owner, especially when the intention to claim adversely is wanting. In the case of *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936—a case remarkable for its similarity to the case at bar, the only difference being that the land in that case had been surveyed—the court quotes with approval the following rule with reference to title by adverse possession: "If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure; but if, ignorant of the boundary line, he makes a mistake in laying his fence—making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained—and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse." In the *Bowers v. Ledgerwood* Case, *supra*, the court decided in favor of the party claiming by adverse possession. The land being surveyed, the owner must be presumed to know where his lines are, and, if his rights are encroached upon, his right of action would accrue at once. In the case at bar Mrs. Boehrig, no doubt, claimed the land up to the fence prior to the time it was surveyed, solely upon the supposition that it was in section 6, but she did not claim it afterwards; and we cannot indorse the doctrine that a person may be held to be the owner of land by reason of adverse possession, when such person did not intend to hold the land against all the world under any and all circumstances.

Judgment reversed.

## McCLEARY v. WILLIS.

(Supreme Court of Washington. Sept. 21, 1904.)

BROKERS—COMMISSIONS—DIVISION — PURCHASER—NAME—DUTY TO DISCLOSE—PLEADING—DEFICIENCY—TRIAL AMENDMENT—EVIDENCE—INSTRUCTIONS—APPEAL.

1. In an action between brokers for a division of commissions on the sale of real estate plaintiff alleged that he was a real estate broker, and that defendant was agent of a certain corporation for the sale of the land described; that defendant agreed that, if plaintiff would assist him in finding a purchaser for the land, defendant would pay plaintiff one-half the commissions; that plaintiff, relying on such agreement, assisted defendant in procuring a purchaser, specified, who purchased the premises; and that defendant received certain commissions on the sale, and had refused to pay plaintiff any part thereof. *Held*, that under Ballinger's Ann. Codes & St. § 4931, requiring pleadings to be liberally construed with a view to substantial justice, the complaint stated sufficient facts to show a liability of defendant to pay for the services rendered by plaintiff as alleged.

2. Where, in an action on a contract for division of brokers' commissions, there was evidence that defendant sold the property to the purchaser procured by plaintiff, in accordance with the contract between them for a division of commissions, and that at the time of the sale defendant knew that plaintiff had procured a purchaser, it was immaterial that plaintiff failed to impart to defendant, prior to the sale, the name of the person with whom plaintiff had been negotiating, and to whom the property was subsequently sold.

3. Where, in an action for a division of brokers' commissions, defendant agreed to pay plaintiff one-half of the commissions earned on the sale, and defendant admitted receiving \$237.50, it was proper for the court to assess plaintiff's damages at one-half of such sum.

4. In an action for a division of brokers' commissions it was proper to permit plaintiff to amend his complaint at the trial by inserting an allegation that defendant was the agent of a certain corporation within certain years covering the transaction in question, which was the owner of the property sold, under Ballinger's Ann. Codes & St. § 4953, authorizing the court to permit the amendment of pleadings in the furtherance of justice.

5. Where, in an action for a division of brokers' commissions, the contract between the parties provided that if plaintiff would "assist" in obtaining a purchaser he should be entitled to one-half the commissions earned, an instruction that, unless the person claiming the commission finds such purchaser, and communicates the fact to the other party at the time, he cannot recover, was properly refused.

6. Where error does not affirmatively appear in the taxation of costs, it will be presumed on appeal that the costs were properly taxed.

Appeal from Superior Court, Lewis County; Mason Irwin, Judge.

Action by Thomas H. McCleary against J. E. Willis. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. E. Willis and Millett & Harmon, for appellant. Forney & Ponder, for respondent.

PER CURIAM. Action to recover compensation for services rendered as a broker,

brought by Thomas H. McCleary, plaintiff, against J. E. Willis, defendant, in the superior court of Lewis county. The cause came on for trial before the lower court and a jury. A verdict was rendered in plaintiff's favor for \$150. The defendant in due time filed his motion for a new trial on statutory grounds. This motion was overruled "upon condition that plaintiff remit the amount of said verdict in excess of \$143.75." Plaintiff consenting, judgment for the amount last named, with interest from said date and costs, was entered on the 5th day of December, 1902. Defendant appeals from this judgment.

The complaint, omitting title of cause, is as follows:

"The plaintiff complains of the defendant, and for cause of action alleges:

"(1) That the plaintiff now is, and at all times herein mentioned was, engaged in the real estate business in Centalla, Lewis county, Washington.

"(2) That defendant during the years 1900, 1901, and 1902 was the agent for the United Trust, Limited, for the sale of a tract of land known as the 'Hoss Place,' near Centalla, Lewis county, Washington, being the north half of the Sidney S. Ford donation land claim. That defendant, on or about the month of September, 1900, agreed with the plaintiff that if plaintiff would assist defendant in finding a purchaser for said tract of land he (defendant) would pay to plaintiff one-half of the commissions he would receive from making a sale of said premises.

"(3) That the plaintiff, relying upon said agreement, did thereupon assist the defendant in procuring a purchaser for said land, to wit, one C. A. Ives and his wife, Katie Ives, who, on, to wit, the 22d day of May, 1902, purchased the premises aforesaid.

"(4) Plaintiff avers, according to his best knowledge, information, and belief, that defendant, on, to wit, the 22d day of May, 1902, received a large sum of money as commission for said sale of said land, to wit, the sum of seven hundred and fifty dollars. That defendant neglects and refuses to pay to plaintiff one-half of said commission, or any sum, and there is now due and owing plaintiff from the defendant by reason of said agreement the sum of three hundred and seventy-five dollars, with interest thereon from and after May 22, 1902.

"Wherefore plaintiff prays for judgment against the defendant for the sum of three hundred and seventy-five dollars, with interest thereon at the legal rate from and after May 22, 1902, and for his costs herein."

Appellant made his motion in the lower court to require respondent to make paragraph 2 of the above complaint more definite and certain, in order "to show the time and place of making the agreement alleged to have taken place between the plaintiff and defendant," and to show whether said agree-

¶ 6. See Appeal and Error, vol. 3, Cent. Dig. § 3787.  
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ment was a "verbal agreement or in writing." This motion was overruled, and appellant excepted. The amended answer of appellant denies each and every allegation in paragraphs 2 and 3 of the complaint, "except that he admits that said C. A. Ives and his wife, Katie Ives, have entered into a contract to purchase the premises described in paragraph 2 of plaintiff's complaint; that said defendant further admits and alleges that since the service upon plaintiff of the original answer in this cause, to wit, on the 29th day of July, 1902, the United Trust, Limited, a corporation, has conveyed by deed the lands and premises referred to and described in plaintiff's complaint at said paragraph 2 to the said C. A. Ives, and his wife, Katie Ives." This answer further denies each and every allegation in paragraph 4 of the above complaint, except appellant admits that he received \$287.50 commission in negotiating such sale, that he refuses to pay respondent any part thereof, and denies all indebtedness to him on account of the aforesaid transaction. There is certain matter alleged in what purports to be appellant's further defense, which relates to his version of the above transaction. This matter is evidentiary in character, and pertinent to appellant's denials of the allegations in the complaint. The reply puts in issue the allegations of affirmative matter contained in this answer.

The real estate mentioned in the complaint is situated a few miles from Centralia, in Lewis county. Appellant is an attorney at law, and was located at the above times at Chehalis. Some time prior to the alleged transactions in the complaint, appellant, as the attorney of the United Trust, Limited, foreclosed a mortgage on this realty, and obtained the title thereto for this company. Appellant, having been called as a witness for respondent, testified: "I only had this land for sale in this way: When I got a purchaser, I was to submit the offer. I could not make any contract." Respondent's testimony tended to show that some time during the summer of 1900 appellant and respondent had their first conversation with reference to the sale of the above realty, using this language: "Well, first I met Mr. Willis in Chehalis; I think on the street. I told him I thought I could assist him in finding a purchaser for the old Hoss place. Mr. Willis said if I would he would divide the commissions with me. I told him all right, I would do it, and after some further talk about the matter we parted." He further testified that Willis fixed the price at \$5,400; that witness took several parties out to see this place at different times; that some time in November, 1901, Allen Ives, father of C. A. Ives, came to witness' house, told respondent that his son, Charley, who was then living in California, intended to come to Lewis county, and "he wanted me to be on the lookout for a place for him.

I then told him about the Hoss place being the best place I knew of for the money. I told him his son could buy it for \$5,400." Thereafter Allen Ives came to the office of respondent several different times to talk about this place. He wanted witness to show the son this property when he arrived. When the son, C. A. Ives, arrived, respondent procured a rig, with which he took young Ives and a companion out to see this realty. Ives said he liked the place better than any that he had yet seen, and that he thought he would take it at the price of \$5,400, if he could get satisfactory terms on payments. Respondent also testified that he told Mr. Ives that the attorney in Chehalis would fix such terms, and that he would go and see him; "that respondent thought he told Ives the name of the attorney was Mr. Willis." In continuation of respondent's testimony he said: "Well, we started on back, and Mr. Ives said: 'I have seen a place advertised in the newspaper, near Seattle, that looks cheap on paper. I will go up and see that, and in the meantime you go to Chehalis, and get the best terms on that place. You may say to him that I will make a substantial payment on the place and secure the rest.' I told him all right. \* \* \* I came right to Chehalis to see Mr. Willis. I told him about having a buyer for the Hoss place, and I thought surely we would be able to make a sale. Q. Did you tell Mr. Willis who the buyer was? A. I think not. I don't remember that anything was said about that." Willis picked up a letter, which he said was from McMaster & Birrell of Portland, to the effect that the price of this land had been raised to \$5,500 net to the owner, "and that we would have to sell it for \$5,800, or possibly for \$5,750, so that we could make a commission of \$300, or anyway \$250, out of the sale. \* \* \* I told Mr. Willis that I was sorry that the raise had been made in the price of the land, as it might knock out the sale, but that I would go back, and do everything I could, and Mr. Willis said all right." I told Allen Ives the next morning about the raise in the price of the land. Did not see C. A. Ives till after he bought the land. He came to Chehalis the next day, "I think with his father, and bought the place from Mr. Willis." This was about February 12, 1902. It was admitted at the trial that at or about this date C. A. and Katie Ives entered into a written contract to purchase this land of the United Trust, Limited, for the consideration of \$5,750. Appellant admitted that he received \$287.50 commission for negotiating this sale, as alleged in the answer. Respondent, on being recalled in his own behalf, swore that at the time of the above conversation with Willis, when he learned about the raise in the price of the land, Willis said "that if we made \$300 he would divide it with me, and I should get \$150 and be the same; or, if

we made \$250, then we would get \$125 each." The foregoing statement comprises substantially respondent's version of the transaction as the same appears in the record. At the trial, when respondent rested, appellant demurred to the complaint and the evidence, and moved to dismiss the action for the following reasons: "(1) Because it appears upon the face of the plaintiff's complaint that the complaint does not state facts sufficient to constitute a cause of action, inasmuch as it does not appear that the plaintiff communicated to the defendant knowledge of his negotiations for the sale of the premises. (2) That the defendant challenges the sufficiency of the evidence adduced by plaintiff at the time plaintiff rested his cause, inasmuch as the plaintiff has failed to prove that defendant at any time mentioned in the complaint, or at all, was the agent of the United Trust, Limited, and because said evidence does not show that plaintiff in any manner assisted defendant in making a sale of the premises described in plaintiff's complaint." The lower court overruled the demurrer and motion to dismiss, and appellant excepted. On nearly all of the material points involved, the testimony of appellant and his witnesses is in direct conflict with the evidence adduced in behalf of respondent. It is admitted, however, that Allen Ives and his son's attention was first directed to this land by respondent. Both of these parties testified that respondent represented himself as the sole agent for the sale of this land; that they first learned through Assessor Guin that Mr. Willis had the handling of it. Appellant testified that during the summer of 1900 and about January, 1902, respondent asked appellant what there would be in it, or words to that effect, if he found a purchaser for this Hoss place; that appellant answered, if respondent would bring a purchaser to his office who made an acceptable offer, appellant "would do the fair thing" by him. Mr. Allen Ives testified concerning the alleged conversation between respondent and himself while his son was in Seattle, as follows: "I went to his office, and was told he had gone to Chehalis, and would not be back until night; and I went to his house again the next morning, and asked him what he had done. He said he hadn't done anything, but that he had gone to Chehalis, and while there had telephoned to Portland to these parties, and that they had risen on their price to \$5,800, and 7 per cent. on back payment instead of 6 per cent. And I said, 'I will throw the whole thing aside.'" Respondent denied in rebuttal that he told either Allen or O. A. Ives that he telegraphed or telephoned to Portland while in Chehalis. During the progress of the trial the court below allowed respondent on his verbal motion to amend his complaint so that it might appear by allegation that appellant was the agent of the United Trust

in the year 1900, as well as during the years 1901 and 1902, as this pleading originally stood. Appellant excepted. After hearing the evidence and arguments of counsel, the cause was submitted to the jury under instructions of the trial court, and a verdict returned as above mentioned.

1. It is assigned that the lower court erred in overruling appellant's demurrer to the complaint and the evidence and in refusing to dismiss the action. In support of the contention that the complaint does not state facts sufficient to constitute a cause of action, appellant's counsel in their brief make the following quotation from the opinion delivered by this court in *Penter v. Staight & Beavers*, 1 Wash. St. 365, 25 Pac. 469: "This was an action for a real estate agent's commission, and the complaint alleged that certain property was placed in the hands of plaintiffs by defendant for sale at a certain price, and the plaintiffs undertook to use their best efforts to find a purchaser at the price named, for which, they being successful, they were to receive the usual commission, alleged to be five per cent.; and to charge the defendant the complaint also alleged that plaintiffs had found a purchaser at the price named, and completed the bargain with the purchaser for the sale of the same. But there was no allegation that the plaintiffs had ever communicated knowledge of their action to the defendant, or that he had carried out the arrangement they had made for the sale, or had refused to carry it out after notice of the arrangement; and in these particulars, at least, it was fatally wanting." Section 401, *Pierce's Code*, section 4931, *Ballinger's Ann. Codes & St.*, provides that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." It is significant to note in this connection that appellant's objections to the complaint were first urged at the trial; that while he did, in the lower court, make a motion to require respondent to make his complaint more definite and certain as to whether the alleged contract of employment was a verbal or written agreement in that behalf, no such motion was interposed by appellant to require respondent to state the terms of such employment more definitely than they were stated in the complaint in the first instance. The dissimilarity between the allegations found in the complaint in the case of *Penter v. Staight & Beavers*, *supra*, and the complaint in the present controversy is significant. In the *Penter* Case the action in fact was founded upon a contract to pay a commission to plaintiffs as brokers for making a sale of the owner's real estate at the instance of the latter party. The complaint therein was not only defective for failure to allege want of knowledge on the part of the owner regarding the brokers' acts in the premises, but there were

no substantive allegations in the pleading showing that defendant had carried out the arrangement the brokers had made for the sale of the real estate involved in such controversy, "or had refused to carry it out after notice of the arrangement." We think, under favor of this rule of liberal interpretation, that the complaint states sufficient facts to show a liability on the part of appellant to respondent in consideration of services rendered by McCleary to Willis; that under such contract of employment as alleged the respondent was to assist appellant in procuring a purchaser for the above real estate; that, having rendered such assistance to appellant, respondent was entitled to remuneration for his services.

The vital question in this whole controversy is whether there was competent evidence appearing in the record to sustain the verdict of the jury. In this connection we make the following quotation from appellant's brief: "To be frank, it is upon the testimony of the respondent himself, not upon the testimony of any other witness, that we ask this court to reverse the judgment of the court below. Certainly the respondent's own evidence does not show that he 'produced' a buyer 'ready and willing' to buy the property. Nor does it show that he 'communicated' to appellant 'knowledge' of his dealings with Ives." In the case of *Bertelson v. Hoffman*, 77 Pac. 801, which was an action to recover a broker's commission from the owner of the real estate, wherein the sale was not consummated because the owner refused to comply with his part of the contract made with his broker, this court held that the mere withholding of the intended purchaser's name from the owner on the part of the broker did not prejudice the plaintiff in that action, as the owner did not request that the identity of the purchaser be made known to him; and that it did not appear that the owner suffered any damage or injury by reason of such concealment. *Butler v. Kennard*, 23 Neb. 357, 36 N. W. 579, was an action brought by the broker, Butler, against Kennard, the owner, to recover a commission where the sale was completed between the owner and purchaser. The following language occurs in the opinion of the court: "It is a well-established rule in this as well as other states that where a broker is employed to sell real estate it is not necessary that the whole contract should be completed alone by him in order to entitle him to his commission. But if, through his instrumentality, the purchaser and owner are brought in contact, and a sale is made through the instrumentality of the agent, he is entitled to his compensation; and this without reference to whether the owner, at the time the sale was perfected, had knowledge of the fact that he was making the sale through such instrumentality." The question in such cases is whether the broker was the procuring cause in bringing about the

sale between the owner and customer. *Lloyd v. Matthews*, 51 N. Y. 124; *Lunney v. Healey* (Neb.) 76 N. W. 558, 44 L. R. A. 503, and note. It must be borne in mind that under respondent's allegations and proofs he did not undertake to procure a purchaser for the sale of this realty, but only to assist in so doing; that this action at bar is based on a special contract of employment entered into between an agent or a representative of the owner (the trust company) and this respondent, who is only suing the agent, Willis, for one-half of the commission received by him from the United Trust. In its essence this is a controversy between brokers or agents over a division of commissions received by one of these parties to this transaction. The jury evidently, by its verdict, affirmed that Mr. McCleary was the procuring cause in producing a purchaser for this land, and that he assisted in finding a purchaser or purchasers therefor. We believe there is competent evidence in the record to sustain such finding, and that the appellant, having received the fruits of respondent's labors, should respond in accordance with the contract as alleged. It does not lie with appellant to deny that he was the authorized agent or representative of the United Trust for the purposes of selling this land. The company, by contracting with and conveying this real estate to Ives, ratified all the acts of appellant as its agent in the above transaction. The fact that appellant communicated with certain financial agents of this company in Portland, Or., is a matter of no significance as far as the rights of respondent are concerned in this controversy. The Iveses could not arbitrarily have put an end to respondent's contract of employment, and then go ahead and make an agreement for the purchase of this land with appellant to the prejudice of respondent, whose acts at that time had become and were an integral part of the foregoing transaction. Both father and son swore that Assessor Guin told the elder Ives about appellant having this realty for sale as agent, which was the first time that either the father or son had ever heard the name of Mr. Willis mentioned in connection with this real estate. If this be true, in the light of the testimony in respondent's behalf, we think that there was sufficient evidence to show that respondent did assist appellant in making a sale of such land, and therefore was entitled to recover under the contract of employment set forth in the complaint.

2. The trial court committed no error in assessing amount of respondent's recovery. It was consistent with his proofs.

3. The granting of leave to amend the complaint at the trial, to which we have heretofore referred, was perfectly proper under section 4953, Ballinger's Ann. Codes & St.

4. The appellant contends that the lower court erred in giving certain instructions to the jury, and in refusing to instruct as re-



quested by appellant. The instructions given, of which appellant complains, are in accord with our conclusions heretofore declared with regard to the sufficiency of respondent's allegations and the evidence adduced in support thereof. The request refused was properly denied. That part embraced in the language following: "And unless the person claiming the commission finds such a purchaser, and communicates the fact to the other party at the time, he cannot recover," is objectionable, and contrary to the legal principles heretofore enunciated in this opinion.

5. Appellant further complains that the lower court erred in allowing two items in respondent's cost bill to be taxed against him—\$4.80 for attendance and mileage of D. B. Rees, witness for respondent, subpoenaed, but not called upon to testify at the trial; and \$3 for copies of documents. Error will not be presumed; it must appear affirmatively. From the meager showing appearing in the transcript, we are not prepared to hold that appellant suffered any prejudice by reason of such ruling with respect to the taxation of these items of costs. *Ivill v. Willis*, 17 Wash. 647, 50 Pac. 467; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 137, 47 Pac. 237.

No reversible error appearing in the record, the judgment of the superior court must be affirmed, and it is so ordered.

#### COEY v. LOW et al.

(Supreme Court of Washington. Sept. 21, 1904.)

INDIAN LANDS—LEASES—INVALIDITY—RATIFICATION BY INDIAN DEPARTMENT—ENFORCEMENT — CROPS — REPLEVIN—PLEADING—DEFENSES.

1. Where in replevin of wheat grown on Indian land leased to plaintiff, and by him subleased to the persons by whom the wheat was grown on shares, plaintiff did not set up the agreement under which the land was leased or the wheat was grown in his complaint, defendants were not precluded from defending on the ground that the lease was void by their failure to specially plead such invalidity, but could prove the same under a general denial.

2. Where a lease of Indian lands on which certain wheat sued for was grown was invalid, the court would not lend its aid to the enforcement thereof, whether it was *malum in se* or *malum prohibitum*.

3. A lease of Indian lands to a white man without the consent of the Indian agent and the Commissioner of Indian affairs, and without authorization by act of Congress or treaty regulation, was void.

4. Where corn was grown on certain allotted Indian lands by plaintiff's sublessees, and plaintiff was not in possession either of the land or the crop at the time it was taken by the allottee's heirs on the ground that the lease to plaintiff was void, plaintiff was not entitled to recover the corn on the ground that he held the possessory title thereto.

Appeal from Superior Court, Spokane County; Frank H. Rudkin, Judge.

Action by Charles P. Coey against James R. Low and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Moore & Corbett, for appellant. Merritt & Merritt, for respondents.

PER CURIAM. Plaintiff, Charles P. Coey, commenced this action in the superior court of Spokane county against defendants, James R. Low, Virginia Low, his wife, Ted Butler, and the Sheldon Milling Company, a corporation, to recover the possession of 500 sacks of wheat, or \$400, its value, in case that a delivery thereof cannot be had, with damages for unlawful detention, and also costs and disbursements. The plaintiff, in his complaint, alleged ownership of and right of possession to such personal property, and that the defendants on the 7th day of October, 1901, at Kootenai county, Idaho, wrongfully took such goods, chattels, and property from his possession. Plaintiff further alleges demand for the restoration of such property prior to the commencement of this action, and the wrongful detention thereof by defendants. The defendants James R. and Virginia Low and Ted Butler answered by general denial of each and every allegation contained in the complaint. The action was thereafter dismissed on motion of plaintiff as against the Sheldon Milling Company.

The cause came on for trial before the lower court, without a jury. The court made findings of fact and stated conclusions of law herein as follows:

"(1) That the wheat described in the plaintiff's complaint was grown upon lands within the Coeur d'Alene Indian reservation. (2) That on the 1st day of April, 1897, one Julian Butler and the plaintiff entered into a contract whereby they agreed that the said Julian Butler leased said land to the plaintiff herein for an uncertain and indefinite period, being for such a time that one-third of the crops from said premises would pay certain unknown indebtedness to the plaintiff in this case. (3) That thereafter the plaintiff verbally sublet said premises to True James and William Shearer, who farmed said land in the years 1899, 1900, and 1901, and by the terms of said lease the said True James and William Shearer were to render to the plaintiff herein one-third of all the crops grown in said land during each of said years. (4) That the said True James and William Shearer occupied said lands under said verbal lease during the cropping season of 1901, and grew and harvested the wheat described in the complaint. (5) That the plaintiff herein is a white man, residing in the county of Spokane, state of Washington, and not a member of the Coeur d'Alene tribe, and that said written lease entered into by said Julian Butler and the plaintiff and the verbal lease whereby said premises were sublet by the plaintiff to True James

and William Shearer never received any approval of the Indian Department. (6) That the plaintiff has no right or title to the wheat described in the complaint except such right as he might have in law by virtue of the said leases of said Indian lands existing between him and the said Julian Butler, and between him and the said True James and William Shearer.

"And as conclusions of law upon the foregoing findings of fact the court makes and files the following, to wit: That said leases were void, and of no force and effect; and that the plaintiff was not in possession of said land, and did not raise and harvest said wheat; and that the plaintiff is not entitled to recover anything by this action, and defendant is entitled to the return of said wheat."

Plaintiff excepted to each finding of fact save the first, and also excepted to the conclusions of law above stated. He requested the trial court to make and state certain findings and conclusions of law in his behalf establishing his ownership of and right of possession to the property in question at the commencement of the present action. These exceptions were overruled, and such requests were denied, and plaintiff duly excepted. Plaintiff thereupon made and filed his motion for a new trial on certain statutory grounds. This motion was denied, exception taken, and judgment was entered in favor of the answering defendants. Plaintiff appeals.

The facts presented in this controversy are practically undisputed. At the trial, the appellant, not having the original lease in his possession or under his control, introduced a copy thereof in evidence, which was excluded by the trial judge, except for the purpose of explaining appellant's possession of the property in controversy at the time of the alleged wrongful taking thereof. Appellant furnished the seed from which the wheat described in the complaint was grown, and paid for the threshing thereof. Witness True James, for appellant, testified in part as follows: That the land on which this wheat was grown was a part of the Coeur d'Alene reservation, in Kootenai county, Idaho; that witness and his brother-in-law, Shearer, leased this land from appellant for three years beginning in 1899, paying appellant, Coey, one-third of the crops raised thereon. The wheat in controversy was grown on this land in 1901. When the wheat was threshed, one-third part thereof was set apart for Coey. Respondent Low, husband of Mrs. Low, notified James and Shearer at that time not to let Coey have any part of the wheat, "and not to let him on the ground. If he come there, to put him off." This wheat was afterwards placed in Low's sacks, and hauled into Spokane county, and replevied in the present action, the respondents furnishing a redelivery bond. Witness James further testified on his cross-examination in response to

questions propounded to him: "Q. You say that you had seen Mr. Low before you commenced threshing? A. Yes. Q. About how long? Two or three weeks or days? A. I don't know how long it was. Q. At that time did he tell you of his wife's claim to the land? A. He told me Mr. Coey had no right at all. \* \* \* Q. You let his men put it in sacks and haul it away? A. Yes, sir. Could not do any other way. Q. Was Coey down? A. No, sir. Q. Coey did not go out at all? A. Never on the land at all." There was no testimony that the above written lease was ever approved by the Indian Department of the United States. Respondents were and are Indians belonging to the Coeur d'Alene Tribe. Respondents Virginia Low and Ted Butler are the children of Julian Butler, deceased. James R. Low is the husband of Virginia.

For the purposes of this litigation these parties have been treated as the successors in interest of Julian Butler. Maj. Albert M. Anderson, agent for the Colville, Spokane, and Coeur d'Alene Indian reservations, testified that he never approved this written lease. Mr. Geo. F. Steele, who was in charge of the Coeur d'Alene reservation in the absence of the agent, testified that "it was always understood that we could not lease the land; \* \* \* there was a written rule in the office, that we went by, that Indian lands could not be leased"; that labor contracts for the first year's crops had been approved. This witness further said: "Yes: I approved of the agreement that Mr. Coey made with old Mr. Butler; that is, I approved of it by stating verbally I thought the agreement was a very good way to get straightened up with their debts."

The assignments of error are presented and argued in appellant's behalf under two heads:

1. It is contended that the trial court erred in holding the two leases noted in the findings and conclusions of law void. It is stated in appellant's brief that: "The validity or illegality of the leases was not a matter in issue. There was no pleading putting same in issue. The defendants, to avail themselves of any illegality of the leases, or to raise any question as to same, were bound to plead such illegality." The case of *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117, is cited in support of such contention. The case cited was an action brought to recover damages on an agreement to convey land. The complaint disclosed the nature of the agreement on which the action was founded. The illegality of the contract did not appear from the face of the pleading, but depended on collateral facts. Mr. Justice Dunbar observed, in delivering the opinion of the court: "But, while it is true that the courts will not enforce illegal contracts, the fact that such contract is illegal must be determined like any other fact, and, to be fairly determined, it must be made an issue by the pleadings, or be determined by the admis-

sion of the plaintiff or by testimony which, in the language of the Supreme Court of the United States, 'must necessarily prove the illegality of the contract,' as in the instance cited by the court, or where some public record was introduced which could not be disputed. In that event the reason for requiring it to be pleaded would not attach." Further along in such opinion the case of *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093, is cited, from which the following language is quoted with approval: "No waiver by the defendant, or neglect to plead such defense, can oblige the court to entertain an action founded upon an illegal or immoral contract, when such illegality appears." There is no question as to the general rule of pleading that the facts constituting the plaintiff's cause of action and the defendant's grounds of defense must be alleged. But this salutary principle of jurisprudence has never been carried so far in the administration of justice that a party defendant must, at his peril, anticipate in his answer evidentiary matters which may or may not be introduced at the trial of the action in support of plaintiff's complaint in which no reference thereto has been made. This rule has been most frequently recognized and applied with regard to the necessity of pleading as ultimate facts evidences of title in actions for the recovery of real estate and specific personal property. *Chamberlin v. Winn*, 1 Wash. St. 501, 20 Pac. 780; *Kerron v. N. P. L. & M. Co.*, 1 Wash. St. 241, 24 Pac. 445; *Gila Valley, G. & N. Ry. Co. v. Gila County (Ariz.)* 71 Pac. 913, and authorities cited. A good illustration of the proposition of law under discussion is furnished in actions for the recovery of goods and chattels, wherein plaintiff alleges ownership thereof in general terms, and at the trial seeks to sustain his allegations in that behalf by introducing in evidence a bill of sale in which he is named as vendee of such property. It is held that a defendant under a general denial in such cases may prove the instrument under which plaintiff claims fraudulent and void as to his (defendant's) rights in the property sought to be recovered. "This rule is doubtless based on the fact that in replevin the plaintiff is not bound to disclose any source of title, and therefore the defendant is not bound to anticipate the source of title under which the plaintiff may claim." *Jones v. McQueen*, 13 Utah, 185. See, further, *Cobbey on Replevin* (2d Ed.) §§ 752, 755; *Gallick v. Bordeaux (Mont.)* 56 Pac. 961. If this proposition be correct—and we so hold—we think, by parity of reason, that the rule applies with equal force in this class of actions; that when a plaintiff fails to disclose the source of his title to the property that he seeks to recover the defendant may show under a general denial that the instrument under which plaintiff claims title is illegal. Furthermore, courts will not lend their aid in any event to the enforcement of illegal agreements.

*Minnesota Sandstone Co. v. Clark (Wash.)* 77 Pac. 803. In the case of *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605, the following pertinent language is used by Justice Lyon, delivering the opinion of the court: "The general rule of law is that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that, if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation for his right of recovery. It is quite immaterial whether such illegal contract be *malum in se* or only *malum prohibitum*. In either case the maxim, '*Ex turpi causa non oritur actio*,' is applicable. And a contract in violation of a statute is void although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibited, and its invalidity follows as a legal consequence." We think that there can be no serious question in this controversy regarding the invalidity of the written contract between *Julian Butler* and appellant. If the latter had no right of possession in and to this land and the crops grown thereon, it was impossible for him to invest his tenants, *James and Shearer*, with any greater rights therein than he himself (appellant) possessed at the times above stated. "Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States, without the consent of the United States." *Jones v. Meehan*, 175 U. S. 8, 20 Sup. Ct. 1, 44 L. Ed. 49; Article 5, 26 Stat. 1028, Treaty with *Coeur d'Alene Indians*; *Light v. Conover*, 10 Okl. 732, 63 Pac. 966. Under the authority last cited, the court held that it was incumbent upon the lessor, in an action against his lessees for the recovery of rent of lands lying within the boundary lines of Indian reservations, to show that he had a valid contract, made with the consent and approval of the Indian agent and the Commissioner of Indian Affairs, before the lessor could legally enter into any contract to sublet any portion of such lands; and that such subletting must be sanctioned by both the agent and commissioner. *Rev. St. U. S. § 2116*. Furthermore, according to the rule enunciated in *Jones v. Meehan*, *supra*, and cases therein cited, it would seem that leases and contracts of this description must be authorized and sanctioned by some act of Congress or treaty regulation; otherwise such instruments are illegal and void. The trial court committed no error in declaring the foregoing leases void.

2. The appellant next contends that: "Conceding, for the sake of argument, that the court was right in holding the contracts leases, and as such void, still we insist the court was in error in denying a recovery to appellant. The error consisted in holding that the possession of James and Shearer was not the possession of appellant." He was not in the actual possession of the land or wheat in controversy at the time of the alleged wrongful taking mentioned in his complaint. It is therefore evident that he could not have been in the lawful constructive possession of such property under an illegal contract by his tenants or otherwise. "The stream cannot rise above its source." If the respondents had forcibly taken this wheat from the actual possession of appellant while it was on the reservation, and brought it into Spokane county, and appellant had there replevied the property in question, a different proposition would have presented itself for our consideration. *Churchill v. Ackerman*, 22 Wash. 227. The counsel for appellant have cited numerous authorities on the proposition that where crops were grown on government land under an invalid lease or contract courts have been inclined to uphold the possessory title to such crops of the lessor and lessee or the party in peaceable possession thereof under a claim of right made in good faith. *Burkhalter v. Nuzum* (Kan. App.) 61 Pac. 310, cited by appellant's counsel, furnishes a fair illustration of the application of this proposition of law. In that case it appeared that the crop of corn which was the subject-matter of the action was grown upon the land embraced within the limits of the Iowa Indian reservation, Brown county, Kan., allotted to Anna E. Richardson, an Indian woman. She entered into a written contract with one Ryan to raise and crib the corn on her land at the rate of 10 cents per bushel. Anna Richardson thereafter assigned in writing, for a valuable consideration, all her interest in this Ryan agreement to Nuzum, with the assent of Ryan, guarantying Nuzum peaceable and full possession of the land mentioned in the contract. Ryan proceeded to plant and raise the crop under the direction of Nuzum. Burkhalter, the plaintiff in error (defendant in the trial court), claimed title to the corn in controversy by virtue of a levy and sale thereof under a judgment rendered against Anna E. Richardson and her husband. In the opinion of the court the following language may be found: "The corn, as claimed by the defendant in error, and as found by the jury, was in the possession of the defendant in error [Nuzum], and was raised and cribbed by him or under his direction." The court held that Nuzum was entitled to a restitution of the property, that Burkhalter took nothing by reason of the levy and sale. The distinguishing features between the above case and the action at bar are that the controversy in the Kansas case was not

between parties to the original transaction or their legal representatives, but arose between parties claiming adversely to the allotter and a party in actual peaceable possession of the property replevied. The actual possession of Nuzum under a claim of right seems to have been the basis of the decision of the court given in his favor. In the present controversy the evidence in appellant's behalf shows undisputably that he was not in the actual possession of the wheat in question or the land on which it was raised. Therefore he could not have had constructive possession in any legal sense under an unlawful contract.

As we find no reversible error in the record, we are of the opinion that the judgment of the superior court must be affirmed, and it is so ordered.

### JAMES v. JAMES.

(Supreme Court of Washington. Sept. 21, 1904.)

#### ADOPTION — VALIDITY—RECORD—FOREIGN CERTIFICATES—EVIDENCE.

1. An action for the partition of real property is triable de novo on appeal.

2. Where defendant was adopted in Iowa under a statute of that state providing that the act of adoption should be evidenced by an instrument in writing signed by the parties consenting, etc., acknowledged and recorded in the recorder's office in the county where the person adopting resides, and the instrument of adoption was not shown to have been recorded, it was void.

3. Since public records of sister states, other than courts, must be certified in accordance with the United States statute to be admissible in evidence in the courts of Washington, a sealed certificate of the record of an instrument of adoption made by the keeper of such records in a foreign state was inadmissible to prove that the instrument was recorded.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by Charles James against Le Roy James. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Hartson & Holloway, for appellant. Nash & Nash and James Dawson, for respondent.

FULLERTON, C. J. This is an action for partition of real property. In his complaint the respondent, who was plaintiff below, alleges that he is the owner in fee of an undivided seven-tenths interest in the east half of the southwest quarter, and lots 3 and 4 of section 30, in township 24 north, of range 44 east of the Willamette Meridian; that Bertha James, Mabel E. James, and Walter W. James are the owners in fee of the remaining three-tenths interest; and that it is to the best interest of all of said owners that the property be partitioned between them. He then alleges that the appellant, Le Roy James, claims some interest in the property as the heir at law of Mar-

¶ 2. See Adoption, vol. 1, Cent. Dig. § 14.

garet James, the deceased wife of the plaintiff, who died leaving a community interest therein, but that "said Le Roy James is in no way related \* \* \* to Margaret James, deceased, \* \* \* and has no right, title, or interest of any name or nature in or to the property." The prayer of the complaint was that the defendant Le Roy James be adjudged to be without interest in the property, and that it be partitioned between the plaintiff and defendants other than Le Roy James. To the complaint Le Roy James answered, setting up that he had been adopted by the plaintiff and his wife in the state of Iowa in the month of March, 1888, by virtue of which he became an heir at law of Margaret James, since deceased. The answer was put in issue by a reply. On the issues thus made a trial was had before the court without a jury, and resulted in a finding and judgment to the effect that the appellant had no interest in the property described in the complaint, and was not entitled to share in its partition.

The trial court rested its decision on a judgment rendered in the superior court of Spokane county in an action in which the respondent was plaintiff and the appellant was one of the defendants, wherein the title to the property was quieted in the respondent against any claim or interest of the appellant. The appellant attacks this judgment, we think, successfully; but, as the action is one triable de novo in this court, the judgment can be rested on other grounds, if such can be found in the record. We think there is another such ground. The appellant failed to prove that he had any interest in the property sought to be partitioned. His right therein, if any, rested on the claim that he was adopted by the respondent and his then wife, Margaret, in the state of Iowa, in 1888, but the proofs fail to show a valid adoption under the laws of that state. The statute of Iowa in force at the time of the purported adoption, as shown by the record, provided that the act of adoption should be evidenced by an instrument in writing, signed by the parties consenting to the adoption and the parties or party adopting the child, which instrument should state, among other things, the names of the parents of the child, if known, and should be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged, and should be recorded in the recorder's office in the county where the person adopting resides. It was further provided that upon the acknowledgment, execution, and filing for record of such instrument the rights, duties, and relations of the parties arose. To prove the adoption in the case before us, the appellant introduced a written instrument substantially complying with the foregoing requisites of the statute (with the exception that it did not state the name of one of the parents of the

child, nor that this parent's name was unknown), but there was no proof that it was recorded in the recorder's office of the county where the persons adopting the child resided. That the failure to record the instruments of adoption is fatal to the legality of the proceedings has been repeatedly held by the Supreme Court of Iowa while construing the very statute invoked by the appellant here. In *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902, this language was used: "The right of inheritance is purely a statutory right, and is, therefore, arbitrary, absolute, and unconditional. Nevertheless, the provisions of the statute must prevail, although to do so in some instances is inconsistent with our views as to what constitutes natural rights or justice and equity. Therefore a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are that the written instrument must be executed, signed, acknowledged, and filed for record. When this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption. The filing for record is just as important in a statutory sense as the execution or acknowledgment. One may be dispensed with as well as the other, for the right depends solely on the statute. There is no room for construction, unless we eliminate words from the written law, and this we are not authorized to do. \* \* \* The statute cannot be regarded as directory, because a right is thereby declared which did not previously exist. The descent of property was thereby changed; to be done, however, only upon a compliance with the terms and conditions declared. \* \* \* In the case at bar the instrument was incomplete until filed for record between the parties. No rights were acquired until this was done, and neither was bound until then. Before this was done, Philo Reynolds died, and no one had the power and authority to do what he failed to do, or to do what was required to be done to render the instrument valid or obligatory. Upon his death his natural heirs inherited. Their rights became vested, and could not be prejudiced by filing the instrument for record after that time." To the same effect are *Gill v. Sullivan*, 55 Iowa, 341, 7 N. W. 586; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907, and *McCollister v. Yard*, 90 Iowa, 621, 57 N. W. 447. What effect an omission such as we have above pointed out would have upon the legality of the proceedings, the highest court of that state seems not to have determined directly. It can be inferred, however, from what has been said by it in passing upon the question of the necessity of recording the instrument, that it would regard this as such an essential of the statute as to render its omission fatal.

But, without determining this, we are compelled to hold the attempted adoption invalid because the instrument of adoption was not recorded. The adoption, to be valid here, must be valid in Iowa, and, as the highest court of that state has held that attempts similar to this are invalid under its laws, it must follow that this attempt is invalid also.

It may be argued that the indorsement on the back of the instrument was prima facie evidence that it was recorded, under the rule of the cases of *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463, and *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325; but the recital indorsed on this instrument is not a formal certificate over the hand and seal of the officer, as were the certificates in the cases cited. It is more in the nature of that found in *Jewett v. Darlington*, 1 Wash. T. 601, which was held not to be evidence of anything. Moreover, the certificate would not have been sufficient to prove the recording of the instrument had it been as full as the certificates mentioned in the cases from this state above cited. A record from a public office of a sister state is not admissible in evidence on the mere certificate of the keeper of the record over his hand and official seal. Only records from the public offices of this state or of the United States are so admissible. Records from public offices of sister states, other than courts, must be certified in accordance with the United States statutes to be admissible in evidence in the courts of this state.

As we find no reversible error in the record, the judgment will stand affirmed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

#### JAMES v. JAMES.

(Supreme Court of Washington. Sept. 21, 1904.)

#### ADOPTION—VALIDITY—CONSENT OF MOTHER—OBJECTIONS—DEMURRER—GROUNDS—NOTICE OF APPEAL—SUFFICIENCY.

1. Under Ballinger's Ann. Codes & St. § 6503, providing that no appeal shall be dismissed for any informality or defect in the notice of appeal, a notice "that defendant J. has appealed" from the judgment entered, instead of that "he appeals from the judgment," was sufficient to sustain the appeal.

2. Where defendant filed a general demurrer to the complaint for want of facts, he was not entitled to object thereunder that the complaint showed that plaintiff had not legal capacity to sue, which objection is a special ground of demurrer by statute.

3. Neither the false statements made by the natural father of an adopted boy at the time of the adoption concerning the death of the boy's mother, nor the fact that plaintiff would not have adopted the boy had he known that his mother was living, nor that the boy thereafter became incorrigible, and was sent to a reform school, from which he was subsequently taken by his natural mother, nor that plaintiff after removing from the state in which the boy was adopted to Washington took no steps there to adopt the boy, renders the adoption invalid.

4. Where plaintiff claimed that the adoption of a child in another state was void under the laws thereof, but did not set out the laws showing wherein they rendered the adoption void, the court in determining the question will apply the *lex fori*.

5. Where it was not shown that the mother of an adopted child, who did not consent to the adoption, was living with her husband at the time the adoption was effected, it would be presumed in aid thereof that she was living apart from her husband, and that her consent was therefore unnecessary.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Charles James against Leroy James and others. From a judgment in favor of plaintiff, defendant Leroy James appeals. Reversed.

Hartson & Holloway, for appellant. Nash & Nash, for respondent.

FULLERTON, C. J. The respondent, as plaintiff in the court below, brought this action against Nathan O'Dell, Emma O'Dell, Margaret A. James, Leroy James, Bertha James, Mabel E. James, and Walter W. James, as defendants, to quiet title in himself to certain real property situated in the county of Spokane. Leroy James appeals from a judgment quieting title against his interests.

The respondent moves to dismiss this appeal, assigning as reasons therefor that the notice given is insufficient to effect an appeal, and that the opening brief contains no assignment of errors. That part of the notice to which objection is made is as follows: "You will please take notice that the defendant Leroy James has appealed," etc., from the judgment entered. The argument is that a notice that a party "has appealed" from a judgment is not a notice that he "appeals" from that judgment, and hence there is no notice of appeal in the record. If the statute relating to the giving of the notice to appeal stood alone, doubtless the objection urged would be sound, inasmuch as that statute provides that a party desiring to appeal from a judgment or order of the superior court may serve on the prevailing party a written notice "that he appeals from such judgment or order." Ballinger's Ann. Codes & St. § 6503. But the Legislature later enacted that "no appeal shall be dismissed for any informality or defect in the notice of appeal, \* \* \*" (Laws 1899, p. 79, c. 49; Pierce's Code, § 1066); and since then we have held that the words "intends to appeal," "will appeal," or "give notice of their application to appeal" are equivalent to, and have the same effect as, the more direct phraseology of the statute—that is, each will effect an appeal. *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773; *In re Murphy's Estate*, 26 Wash. 222, 66 Pac. 424; *Brown v. Calloway* (Wash.) 75 Pac. 630. And of course if the phrases above cited are sufficient to effect the appeal, the words "has appealed" will likewise perform the same office.

Neither is the second objection well taken. The only question presented by the record or discussed in the brief is the question, does the complaint state facts sufficient to constitute a cause of action, and this is clearly stated in the brief. The fact that it was not formally assigned as the error relied upon is not material.

In his complaint the respondent alleged that he was the owner in fee of the land above mentioned. That he acquired the same under and by virtue of the homestead laws of the United States. That in 1888, the time he settled upon the same and filed his right of homestead, he was a married man. That his wife was then living with him, and that she continued to live with him, and reside upon the land, until her death in February, 1891. That at the time of her death she left surviving her, and as her heirs at law, Emma O'Dell, Margaret A. James, Bertha James, Mabel E. James, and Walter W. James, children of herself and the respondent, some of whom were then and now are minors, and that said children continued to reside with him upon the land from the time of their mother's death until he proved up on the same, and obtained a patent therefor from the United States in 1894. That Leroy James, the appellant, is not the son of the respondent nor of his deceased wife, but that his name was formerly Charles Le Roy Rumbaugh, and is no kin or relation to the respondent or his deceased wife, but plaintiff alleges the facts to be in regard to Leroy James: "That in the state of Iowa, in the county of Jasper, one Newton Melville Rumbaugh, the father of said Charles Leroy Rumbaugh, herein called Leroy James, represented to the plaintiff and his deceased wife, Margaret, that he was a widower, and that the mother of said boy was dead at the time aforesaid, to wit, in March, 1888, and requested the said plaintiff and his said wife, now deceased, to adopt the said Charles Leroy Rumbaugh, and that the said plaintiff and his said wife, relying upon the representations of said Newton Melville Rumbaugh that his wife, the mother of said boy, was then dead, did adopt, under the laws of the state of Iowa, the said Charles Leroy Rumbaugh, under the name of Leroy James, into his family, but the said plaintiff alleges that in truth and in fact the mother of said boy was not dead, as was represented by the said father, Newton Melville Rumbaugh, but was still living, and plaintiff alleges that the whole adoption under the said laws was illegal and was void and of no effect, and conferred no rights whatever upon the said boy in regard to the property of the said plaintiff herein, and if plaintiff had known that the said mother of said boy was living or in existence, he would not have adopted said child as aforesaid. That in the fall of said year, 1888, during the month of September, the said plaintiff, with his said wife and children, left the state of Iowa and emi-

grated to the then territory of Washington, bringing said Leroy James with them as a part of said family, and that in October of that year he filed his homestead on said land in question, as set forth in paragraph 2 of said complaint. Plaintiff further alleges that the said Leroy James continued to live in the family of said plaintiff until he became a wayward and at last incorrigible, and some time in the month of October, 1893, upon an examination had by the authorities of Spokane, he was committed to the State Reform School at Chehalis, Washington, as being an incorrigible boy, and he remained there for something like two years in said institution for the reformation of wayward boys, when the mother of said boy, who appeared to be then living in Whatcom, Wash., appeared at said State Reform School, and demanded said Leroy James, claiming him as her son, and finally took him from said reform school, and to her home in said Whatcom, Wash., where he was for a year or more. That said plaintiff alleges that he was entirely ignorant of her whereabouts, and supposed that said boy had no mother, and supposed that the representations of the father made at the time of the adoption were true as therein stated. That after the mother had taken charge and control of said boy, as aforesaid, she informed the plaintiff of her identity as the mother of said boy, claiming the right and the custody of him, and the said plaintiff then and there offered, and did, relinquish all claim and right to the custody and control of said child, and plaintiff avers that he had had no charge or control over the said boy since said time, and avers that he has no right or claim to the said boy or the custody of him. Plaintiff further alleges that he never took any steps in the territory of Washington or in the state of Washington to adopt said boy into his family except in the state of Iowa, as aforesaid. Plaintiff further alleges that the said adoption of the said boy in the state of Iowa, as aforesaid, in consequence of the false and fraudulent representations of the father of said boy in regard to the death of the said mother, was void under the laws of the state of Iowa, and that said boy acquired no rights to property or otherwise by virtue of the said adoption, even in the state of Iowa. Plaintiff further alleges that said boy has no rights of property, either as the heir of plaintiff or of his deceased wife in the state of Iowa, in the territory of Washington, or in the state of Washington. That the laws governing the adoption of children are not at all similar in the state of Iowa or the territory of Washington or state of Washington. That a different mode and a different tribunal is resorted to for adoption, and even if the adoption of the said boy was in any way legal in the state of Iowa, it has no force or effect in the territory of Washington or the state of Washington."

The respondent further alleges that the

defendants are claiming some right or interest in, or title to, the property, but that they have no such right or interest, and he prays that his title to the premises be quieted. To the complaint the defendant Leroy James filed a general demurrer, which the trial court overruled. He thereupon refused to plead further, and judgment was entered against him, in accordance with the prayer of the complaint.

The appellant first contends that the allegations of the complaint in reference to the manner title was acquired to the real property in question show that the heirs at law of the deceased wife of the appellant have an interest in an undivided half of the property, under the rule of the case of *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 76 Am. St. Rep. 912; and, as the respondent's interests are confined to the other undivided half, it is of no concern to him who claim to be heirs at law of the first. But this, it seems to us, is only another way of saying that the respondent has no legal capacity to sue, and to that objection it is a sufficient answer to say that appellant did not demur to the complaint on that ground. The demurrer filed, as we have said, was a general demurrer—one going to the sufficiency of the complaint to state a cause of action—and such a demurrer does not raise the question of the capacity of the plaintiff to maintain the action. The want of legal capacity to sue is made a special ground of demurrer by the statute, and to raise it by demurrer it must be pointed out specially. The question then turns on the allegations concerning the adoption of the appellant. The respondent, it will be noticed, after alleging that he did adopt the appellant into his family under the laws of the state of Iowa, avers that such adoption was void and of no effect because of certain matters which he particularizes. But it seems to us that none of these could avoid the adoption proceedings. That the father of the boy at the time of the adoption made false statements concerning the death of the mother, or that the respondent would not have adopted the boy had he known that the mother was living, or that the boy afterwards became incorrigible, and was sent to the reform school, and was subsequently taken therefrom by his natural mother, or that the plaintiff did not subsequently in the territory or state of Washington take steps to adopt the boy, does not render the adoption had in Iowa illegal in so far as we are informed as to the laws of that state. True, the respondent alleges in many places in his complaint that the adoption was void under the laws of Iowa, but this is only his conclusion from the facts alleged. He does not set out the laws of that state showing wherein they render the adoption void and of no effect, and this court must apply to the facts the rules of law of this state, and, applying such rules, we do not find the facts sufficient to avoid the adoption.

We have not overlooked the contention of the plaintiff to the effect that the consent of the mother is a prerequisite to a valid adoption under the laws of this state, and that the complaint sufficiently shows that there was no consent of the mother to the adoption of the appellant. But consent of the mother of a child to its adoption by another is only necessary when she is living with her husband, or has custody and control of her child; her consent is not necessary when she is living separate and apart from her husband, and the husband has the charge and control of the child. The complaint does not negative this condition, or show that the mother's consent was necessary. As under the laws of this state an adopted child is the legal heir of his adopters to the same extent he would be if born to them in lawful wedlock, the appellant, under the facts shown by the complaint, is the lawful heir of the deceased wife of the respondent, and as such has an interest in the property in suit. *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 76 Am. St. Rep. 912. The court therefore erred in overruling his demurrer to the complaint.

The judgment appealed from will be reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint, with leave to the respondent to amend if he so desires.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

#### McCONAGHY v. CLARK.

(Supreme Court of Washington. Sept. 21, 1904.)

MAILS — TRANSPORTATION — CONTRACTS — SUBSTITUTION OF CARRIERS — CONSENT — PLEADING — SUFFICIENCY — DETERMINATION — PRIOR RULING BY ANOTHER JUDGE — EFFECT — EVIDENCE.

1. A trial judge can pass on the sufficiency of an amended complaint at the trial, objected to on the ground that it did not state facts constituting a cause of action, notwithstanding a demurrer thereto on the same ground had previously been overruled by another judge of the same court.

2. P. contracted with the United States for the carrying of mails over a certain route, with the privilege of subcontracting the same to plaintiff, which he did. Thereafter plaintiff contracted with defendant for his substitution in his place with reference to such contract, but defendant having failed and refused to carry out such contract, plaintiff brought suit for damages. *Held* that, since such substitution could not be properly made except on the consent and approval of both P. and the Post-Office Department, a complaint failing to allege such consent was fatally defective.

3. Where, in an action for breach of a contract by which defendant agreed to substitute himself for plaintiff as subcontractor in a United States mail route contract, it appeared that, though the contractor was willing to make the substitution on certain terms, and there was no showing that the terms had been complied with, or that the United States had consented thereto, plaintiff was not entitled to recover.



Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Hugh McConaghy against Alva C. Clark. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Frank B. Wiestling and William Martin, for appellant. Greene & Griffiths, for respondent.

PER CURIAM. Plaintiff, Hugh McConaghy, sued defendant, Alva C. Clark, for breach of contract, in the superior court of King county. At the trial the plaintiff was nonsuited. Thereupon, in due time, he made and filed his motion for a new trial, which was overruled. Judgment was entered in the lower court dismissing the action, and plaintiff appeals.

The cause of action as alleged in the amended complaint is predicated upon the following written agreement entered into between the parties, to wit:

"Substitution of A. C. Clark for Hugh McConaghy.

"Whereas Alfred Parker of London, Kentucky, did on the second (2nd) day of February, 1901, release one Hugh McConaghy from his obligations and liabilities on a certain United States mail service subcontract, dated July 2nd, 1898, for Route No. 471,001.

"And whereas, the said Alfred Parker, is desirous of substituting one A. C. Clark of King County, State of Washington, for, and in the place of said Hugh McConaghy.

"Now therefore, the said Alfred Parker does hereby substitute the said A. C. Clark, for said Hugh McConaghy as party of the second part in said contract, and for value received, the said A. C. Clark does hereby substitute himself for, and in the place of said Hugh McConaghy, under said contract, as party of the second part.

"And the said Clark does hereby, for value received, agree faithfully on his part to perform each and all of the obligations and promises contained in said contract of July 2nd, 1898, on the part of the party of the second part, and said subcontract of said date is hereby referred to and embodied in, and made a part of this contract.

"And the said Alfred Parker for value received, does hereby agree with the said A. C. Clark, that he will carry out with him his obligations in said contract, of July 2nd, 1898, to all intents and purposes as if the said Clark were the said McConaghy."

It is alleged in such complaint that the parties to this written instrument "made a mutual mistake regarding the recital therein contained wherein it was stated that Alfred Parker did on the 2d day of February, 1901, release said Hugh McConaghy from his obligations and liabilities on a certain U. S. mail service subcontract, dated July 2, 1898, for route No. 471,001, which said instrument is the same as Exhibit A, herein referred to,

\* \* \* in that said parties thereto both then and there well understood that said Hugh McConaghy had not at that time been so released by the said Alfred Parker." It was further alleged that both of said parties (appellant and respondent) well knew that appellant was still under his obligations and liabilities contained in Exhibit A, and that appellant had not been released therefrom. The Exhibit A referred to was the subcontract for transporting the mail on route No. 471,001, entered into between Alfred Parker and Hugh McConaghy on July 2, 1898, which was annexed to the complaint, and also referred to in the agreement between McConaghy and Clark above set forth. There is a recital in this exhibit to the effect that the original contract for transporting the mail on route No. 471,001 was executed between the United States, by the Postmaster General, and Alfred Parker, and that conditional permission was obtained to sublet the same to appellant, McConaghy. Appellant further alleged that he performed all and singular his obligations, promises, and duties to be by him performed under the agreement between him and respondent Clark; that respondent totally failed to carry out or perform any of the obligations, covenants, and promises to be performed by him, and especially "failed, refused, and neglected to substitute himself for and in place of said Hugh McConaghy under the said contract herein referred to, to wit, Exhibit A, as party of the second part therein, and the defendant totally failed, refused, and neglected, faithfully or at all, on his part, to perform any of the obligations and promises contained in said Exhibit A, to be performed by the said defendant, the party of the second part therein, and the defendant refused to assume any of the obligations of the plaintiff under said Exhibit A. By reason of such neglect and refusal on the part of the defendant to enter into said contract with said Parker, and to carry out with said Parker the obligations thereunder of the plaintiff, the plaintiff was compelled to continue the performance of his obligations to said Parker, whereby the plaintiff has suffered damages at the hands of the said defendant in the sum of six hundred dollars (\$600), no part of which has been paid." Appellant prayed judgment for said amount, together with his costs and disbursements. Respondent in the court below demurred to this amended complaint, alleging, among other grounds, that it "does not state facts sufficient to constitute a cause of action." This demurrer came on for hearing before Hon. W. R. Bell, one of the judges of said superior court, and was overruled. The respondent, for answer to the complaint, denied all the material allegations thereof, except the allegation that he signed the paper writing therein set forth. The first affirmative defense charges that appellant procured the signing of the above contract by false repre-

sentations. The second affirmative defense is as follows: "Further answering said amended complaint, this defendant alleges that the said agreement referred to in paragraph 2 of plaintiff's complaint, and all negotiations with respect thereto between plaintiff and defendant, were conditioned upon the approval of said Parker, mentioned therein, and of the government of the United States and of the Postmaster General thereof, and that the approval of said Parker, or of said government and of said Postmaster General, was never obtained, and that this defendant never qualified or became competent to act as mail carrier in accordance with the laws of the United States and post-office requirements, and that plaintiff continued uninterruptedly, ever since before said agreement mentioned in paragraph 2 aforesaid was signed, until after the commencement of this action, to perform the terms, conditions, and requirements and to do the work referred to and required in said agreement between plaintiff and said Parker, and to receive the usual and contractual compensation for his services." The reply is unique in form, and is in the following words and figures, omitting the title of the action: "Comes now the plaintiff, by his attorney, Frank B. Wiestling, and for reply to the so-called answer or further answer to the complaint, as amended, alleges as follows: (1) He denies each and every allegation contained on pages 1, 2, 3, and 4 thereof, and especially denies that he has received any compensation since the 20th day of April, 1901, for the services mentioned on page 4 of said further answer to the amended complaint. Wherefore plaintiff demands judgment as is contained in his amended complaint." The cause came on for trial before the superior court, with Hon. Geo. E. Morris as the presiding judge thereof, and a jury. At the conclusion of the evidence in appellant's behalf, on motion of respondent's counsel a nonsuit was granted upon the following grounds: "(1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that there is no evidence in the case showing any contractual relation between the plaintiff and the defendant; (3) that there is no evidence in the case that Mr. Parker consented to this alleged agreement of substitution; and (4) there is no testimony at all of any damage having been suffered by this plaintiff."

1. From an inspection of the pleadings filed by appellant, it is difficult to ascertain the nature of the issues tendered by him with any degree of accuracy or precision. Under the rulings made by this court in *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256, Judge Morris had the legal right to pass upon and determine the sufficiency of this amended complaint at the trial, on the ground that it did not state facts sufficient to constitute a cause of action, notwithstanding the previous ruling of Judge Bell over-

ruling the demurrer to such complaint. This pleading seems to be wanting in material averments, in that it fails to allege that Alfred Parker, the original contractor with the United States government concerning this mail service, ever consented to the substitution of respondent, Clark, in place of appellant, McConaghy, with the approval of the Postmaster General, representing the United States in that behalf, or in any manner. It was necessary for appellant to allege and show not only that this substitution was made with the consent and approval of Parker, but that such change was authorized and recognized by the Post-Office Department of the general government, or that Parker and the general government were ready and willing to accept such substitution. This conclusion is strengthened when we consider the provisions of the above Exhibit A, and the document thereto attached, designated as "Principal Requirements of the United States for Transporting the Mails" on the routes of the character and kind named in the contract upon which the present action is founded. It appears that, from the contract between Parker and appellant, it was necessary for Parker to first obtain from the Postmaster General conditional permission to sublet the same to appellant, which language plainly implies that such permission was to be thus obtained before the subletting contract to appellant became effectual. There is also a provision in these requirements that "this service is subject in all respects to the approval of the Postmaster General." Wherefore it is evident that even Parker himself could not have made such substitution complete without the consent of the Postmaster General. The transportation of the mails is one of responsibility. In many respects it is both a personal and public trust. It involves important duties towards the general government, and it is necessary that the head of the Post-Office Department should know the party or parties who are engaged in such service. A subcontractor cannot during the life of his contract for the transportation of the mails change at his own instance his contractual relations with regard to such service. He must have the consent of his superiors.

2. The record discloses that the greater portion of the testimony was directed towards the alleged mistake in the recital contained in the above contract regarding the release of appellant "from his obligations and liabilities" on the subcontract between him and Parker. It appears that the trial judge was very liberally inclined towards appellant, in allowing him to put in his evidence not only with regard to such mistake, but also with reference to the alleged substitution of respondent for appellant in the mail-service subcontract with Parker. Conceding, for the purposes of this controversy, that the proofs adduced by appellant at the trial,

when considered in connection with respondent's answer, showed prima facie that there was a mistake in that respect, still we are of the opinion that there was a failure of proof as to the alleged substitution of respondent for appellant in the matter of this alleged subcontract. Much of the testimony regarding this feature of the transaction was hearsay in character, and indirect in its tendency. There is no testimony that the Postmaster General, acting in behalf of the United States, conditionally or otherwise approved this alleged substitution. The appellant's evidence only tended to show that Parker was willing to make the change in that behalf provided the necessary contract and bond therefor were forthcoming; that respondent was aware of some negotiations, the true nature of which does not appear, between Parker and appellant relating to such substitution, but that the same was not consummated, for some reason not apparent from the evidence, or from any showing made in the record. The testimony leaves us in the dark whether this alleged failure was owing to the acts or defaults of respondent, or that it was occasioned by circumstances over which both the appellant and respondent had no control.

3. The further contention of appellant that, under the showing made at the trial, he was at least entitled to recover nominal damages, is untenable, for the reasons hereinbefore stated.

No reversible error appearing in the record, the judgment of the superior court must be affirmed.

# **NORMILE v. NORTHERN PAC. RY. CO.**

(Supreme Court of Washington. Sept. 21, 1904.)

**CARRIERS—LOSS OF FREIGHT—DELIVERY—CARRYING FOR GOODS—NEGLIGENCE—REMOVAL—NOTICE—REASONABLE TIME—LACHES—QUESTION OF LAW.**

1. Plaintiff shipped an engine, together with certain tools and a cable used in connection therewith, consigned to himself at a flag station on defendant's road where defendant maintained a warehouse and a side track, but no station or agent. The consignment was shipped on an open flat car, and on its arrival plaintiff, in passing through the town, discovered the car set out on the side track, and notified his bookkeeper to confer with defendant's agent at an adjoining station, and ascertain if the tools belonged to plaintiff, and, if so, to unload the same. Plaintiff's bookkeeper was unable to obtain this information until it was too late to unload the material the next day, and during the night the tools and cable were lost or stolen from the car. *Held*, that the mere setting out of the flat car on the siding, without more, did not constitute a delivery.

2. The carrier, not having placed the tools and cable in its warehouse on their arrival, as it might have done, was liable to plaintiff for their loss.

3. Where tools were consigned to the shipper at a flag station, and on arrival the consignee, in passing through the town, noticed a car containing similar goods standing on the side track

whereupon he immediately took steps to ascertain if the shipment belonged to him, no notice of arrival on the part of the carrier was required.

4. Notice of the arrival of tools shipped, addressed by the carrier's agent to the consignee at the point of destination, and mailed, is sufficient.

5. A consignee of tools shipped was not guilty of laches in that he was not prepared to receive and remove the same until the day following the day on which he received notice of arrival.

6. In an action against a carrier for the loss of goods, where there is no dispute about the material facts, the question what is a reasonable time in which the goods should have been removed by the consignee is for the court.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by S. Normile against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Bennett & Whitham, for appellant. Jas. F. McElroy, B. S. Grosscup, and A. A. Booth, for respondent.

**PER CURIAM.** Action brought in the superior court of King county by plaintiff, S. Normile, against defendant, the Northern Pacific Railway Company, on account of the loss of freight. The cause was tried to the court without a jury. The following findings of fact and conclusions of law were made in the trial court: "(1) That on December 11, 1901, at Portland, Oregon, the defendant received from the plaintiff for shipment to Fremont, Washington, for the sum of \$34, the following goods, wares, and merchandise, to wit, one donkey engine and tool box and two coils of steel cable. (2) That the allegations set forth in paragraph three of plaintiff's complaint are untrue, and that the defendant did safely carry and deliver to the said plaintiff, at Fremont, Washington, in accordance with its contract of carriage, the goods, wares, and merchandise hereinabove described, and that plaintiff has suffered no damage whatsoever. (3) That the allegations set forth in the fourth paragraph of plaintiff's complaint are each and all untrue, and that plaintiff has suffered no damage in the sum of one hundred dollars, or in any other sum; that there was no failure on the part of the defendant to deliver said property to plaintiff. Wherefore the court finds as conclusions of law that plaintiff take nothing by his said action; that the defendant is entitled to judgment for its costs and disbursements herein." Plaintiff duly excepted to each of these findings and conclusions, save as to the first finding of fact above noted. These exceptions were overruled in the lower court. Plaintiff excepted, and judgment was entered dismissing the action, from which plaintiff prosecutes this appeal.

Paragraph 3 of the complaint, which is referred to in the findings, is in the following words and figures: "That the defendant did not safely carry and deliver the

said goods pursuant to said agreement, nor any part thereof, except the said engine, but, on the contrary, the said defendant so negligently conducted and so misbehaved in regard to the same, in its calling as carrier, that the said plow, steel cable, and the said tool box, together with the tools contained therein, were wholly lost to plaintiff, to his damage in the sum of \$243, the same being the value of said property which the said defendant has failed to deliver to plaintiff." The respondent company denied the material allegations of the complaint, and pleaded as a separate defense: "That at the time said goods were received by defendant for shipment, to wit, December 11, 1901, at Portland, Oregon, it was agreed and understood that said defendant should not be responsible for the loss of any article shipped upon open cars; that said goods were shipped upon open cars and at plaintiff's risk." Appellant, Normile, by his reply, denied all the allegations of this affirmative defense. It was stipulated at the trial that the value of the goods lost was \$243, as alleged in the complaint. Fremont was, at the time of the alleged grievances, what was termed a flag or prepaid station located on respondent's line of railroad in King county. The respondent company had no regular agent at such station. The nearest agent of the company at that time was located at Interbay, and had charge of other stations near by, including Fremont, in the matter of the delivery of freight from the cars of respondent company to consignees. Mr. Normile, the appellant, testified that this railway company had a warehouse or some kind of a building at Fremont; that he received the donkey engine, which was shipped with the tools and cables, from the flat car in proper condition; that these tools and cables were designed for use in connection with such engine; that he knew about the shipment of this property from Portland on December 11, 1901; that witness expected it would arrive at its place of destination in three or four days thereafter, and that he purchased such property for use in connection with his business, which was that of a contractor; that in going through Fremont on the street car about 4 o'clock in the afternoon of December 16, 1901, he noticed a donkey engine on one of respondent's flat cars, which he supposed was his property; that the next morning he found his bookkeeper, to whom he gave directions to go and ascertain if his said property had arrived; that when appellant had procured a dray on the morning of December 18th for the purpose of removing this property, the tools and cable were missing; that he did not get his mail at Fremont, and received no notice of the arrival of this freight through the mail; that he did not know that Fremont was a flag or prepaid station; that the weight of this merchandise in question was about 1,500 pounds, and was in two parcels. Mr. Maitland R. Sanford,

appellant's bookkeeper, testified in part as follows: "Well, it was on the morning of the 17th, possibly half past nine, that I met Mr. Normile, and he informed me that in passing through Fremont the night before he had seen a donkey engine on a flat car there. Well, he was expecting an engine for his work on the canal, and he instructed me to look the matter up, and ascertain if that was his, and, if so, to order a dray and remove it. Now, I tried to find the agent; done some telephoning \* \* \* in order to ascertain if that was Mr. Normile's engine before ordering the dray; but I failed to do so. \* \* \* It was nearly noon then; perhaps 11:30. I found a drayman that had a dray of sufficient size to remove the engine, but it was too late for him to get then to Fremont and remove the engine—too late in the day. Well, of course, if it was too late for him, it was too late for any other drayman to get there. So that was all I could do. I could not get the drayman to take it off on that day. So this drayman came the following morning, and it was too late then. The stuff was taken off then; that is, the tool chest and contents and cable." Witness, continuing his testimony, said that after he was notified by appellant of the arrival of the freight, it took an hour and a half to find the agent of respondent before ordering the dray; that he did not find any agent at Fremont station; that there was none there permanently. A. S. Pattullo, the secretary of the Columbia Digger Company, the consignor of this shipment, testified by deposition that "the Columbia Digger Company had nothing to do with the way it was to be shipped, and there was no arrangement in regard to any reduction of freight." On the part of the defense the affidavit of Mr. Jas. F. McElroy by stipulation was read in evidence. This affidavit related to the testimony of witness Tillotson, who was in the employ of appellant at the time of the arrival of this freight, and was to the effect that the engine and other property which Mr. Normile stated were there for delivery were at Fremont on the morning of December 17, 1901, in the same condition as when loaded on the flat car at Portland, where Tillotson helped load this freight; that the dray Mr. Normile had engaged to convey such property from the car to be used on the Lake Washington Canal did not arrive till December 18, 1901; that witness then went with four assistants to unload such freight from the car on to the dray, and found that the tools and cable had been removed. W. S. Clark, a witness for respondent, testified in part that in December, 1901, he was respondent company's agent at Interbay; that he had in his possession the data with reference to the shipment of the above property to appellant; that it arrived at Fremont on December 14, 1901; that the bill of this shipment was received by witness about 9 o'clock in the morning of that day; that he sent notice of the arrival

of this freight to appellant by postal card, which he deposited in the post office at Ballard on the afternoon of December 14th, directed to Mr. Normile at Fremont; that the first time witness learned about the loss of this freight was about December 26, 1901, when he received a letter through the mails from appellant's attorney, Mr. Whitham.

The respondent contends that appellant, by preparing to remove these goods on the 17th day of December, 1901, accepted the delivery thereof on the side track at Fremont. For the purposes of this controversy, we think that it is immaterial whether this freight arrived at Fremont on the 14th or 16th of December, 1901, though, from the testimony adduced in appellant's behalf and the statements contained in Mr. McElroy's affidavit, it would seem that the latter date is the correct one. There is no question but that these goods arrived at Fremont in the same condition as when the same were loaded on the car at Portland, and they were at such station on December 17, 1901. We must bear in mind that the days at that season in the year were and are of short duration. "Where goods are shipped to a place where there is a side track, but no depot, platform, or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the side track is a good delivery, and relieves the company from further responsibility." Vol. 4; Elliott on Railroads, § 1521. The rule was enunciated in the case of *Kirk v. Chicago, etc., Ry. Co.*, 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397, that while it is usual for the consignees themselves to unload and carry away certain kinds of freight, such as coal, lumber, and the like, directly from the cars, "it is also true \* \* \* that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that under any ordinary circumstances, \* \* \* in order to terminate the carrier's liability, he must remove the goods from the car in which they were transported, and place them for safe-keeping in his freight house." It is impossible to formulate any general rule, applicable to all cases, as to what constitutes a good and sufficient delivery of freight by the carrier to consignees. Each case must necessarily to a great extent depend upon its own particular circumstances. The question of delivery to a consignee is usually a question of fact, or a mixed question of law and fact, for the jury under proper instructions from the court. Sometimes, where the facts are undisputed, a question of law only is presented for the decision of the court. Elliott on Railroads, *supra*, § 1517, and authorities cited. "It may be stated, generally, that every delivery must be made to the right per-

son, at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery, except in so far as a compliance with them may be waived by the party entitled to the goods." Hutchinson on Carriers (2d Ed.) § 340. Unquestionably, as a general rule, the manner of delivery may be regulated by contract, but, in the absence of any specific stipulation upon the subject, it is in a great measure determined by custom. The carrier must, however, afford the consignee an opportunity to unload and remove his goods. On the other hand, the consignee must exercise reasonable diligence in the matter of the receiving and removal of his freight. The appellant prepaid the regular freight charges on this shipment, and was entitled to the protection that the law afforded him in that behalf. The following propositions of law pertinent to this controversy are enunciated by a learned author: "The carrier's responsibility does not end by mere delivery on the platform or dock at the place of destination. There must be such actual delivery as fills the contract of carriers; or, if not applied for by the consignee, the goods must be safely warehoused. Then the liability as carrier ceases, and that of warehouseman begins. \* \* \* And so jealous is the law in guarding the rights of shippers against contracts of carriers exempting themselves from the consequences of their own negligence, and so obligatory is the duty of carriers to furnish suitable vehicles and appliances for the transportation of property received to be carried, that the knowledge of shippers of the character of cars furnished will not exempt the company from liability for loss occasioned by the insufficiency thereof, although the contract of shipment be that there shall be no such responsibility on the part of the company." 2 Rorer on Railroads, pp. 1292, 1293. While it is true that these goods which were lost or stolen were intended for use in connection with the donkey engine, and that it was more convenient for the respondent to load the whole shipment on one flat car, as such engine could not well have been placed in a box car for shipment, and that it was intended by both carrier and consignee to be unloaded and received direct from the flat car at the place of destination, still it does not appear by any testimony in the record but that this respondent company might have placed these particular goods (the tools and cable) in its warehouse or building at Fremont station; that otherwise respondent is liable to appellant for their value. It would seem from the showing made in the record that appellant was not afforded a reasonable opportunity to enable him to remove these particular goods from the car prior to their loss, and that such loss should be borne by the respondent.

The principal authority cited by respondent's counsel in support of their contentions is *Allam v. Pennsylvania R. R. Co.*, 183 Pa. 174, 38 Atl. 709, 39 L. R. A. 535. The points

decided are fairly presented by the syllabus: "As a general rule, a common carrier must give to the consignee of goods notice of their arrival at the point of destination. While a common carrier cannot stipulate for a release from the consequences of his own negligence or fraud, yet he can modify his liability as such so far as to provide that notice of the arrival of goods need not be given at small stations where no station house has been built and no freight agent located. A contract that at such stations the goods shall be at the 'risk' of the owner until loaded into cars and when unloaded therefrom is not against public policy, and will be enforced. Where goods are carried under such a contract all responsibility for protecting the same after the goods reach their destination is assumed by the consignor." It would seem that in the matter of such shipments the consignor acts as the agent of or represents the consignee. In this Pennsylvania case the bill of lading under which the goods were received by the carrier contained the following provision: "When merchandise is destined to or from way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom; and when received from or delivered on private turn-outs it shall be at the owner's risks until cars are attached to and after they are detached from the train." We find no such stipulation in the bill of lading which was received in evidence in the action at bar. Furthermore, it appeared in the authority last cited that at Strafford, the place where the goods were to be received, there was no shelter, and no regular agent of the carrier company to take charge of the freight upon its arrival. "The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road." Thus it is plain to be seen that the facts in the Allam Case are noticeably dissimilar to those in the present controversy; that while it may have been inconvenient for the respondent to have unloaded the goods in question, and stored them in its station house or building at Fremont, still, in the absence of any express stipulation, it was bound to properly care for these goods upon their arrival both in the capacity of a carrier and warehouseman, under the well-established rules of the common law in that regard. See *Rorer on Railroads*, pp. 1292, 1293, *supra*. Regarding the matter of notice to Normile, the consignee, we think that under the facts as disclosed by the record no notice was required; but, assuming that such notice was necessary, the agent, unless otherwise advised, had the right to assume that notice addressed to the consignee at the point of destination would reach him in the due course of the mail. Appellant, on the arrival of these goods at Fremont station, pursued the safer

method of first communicating with the agent on the 17th day of December, 1901, before removing the same from the car. It would therefore seem unreasonable to charge the appellant with laches in not being prepared to receive and remove this freight until the morning following the date last named. There is no showing made in the record other than that the appellant acted with reasonable diligence in this particular. Where there is no dispute about the material facts, this question of reasonable time in which goods are to be removed by the consignee is one of law for the court. *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 223.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter a judgment for the agreed value of the goods lost.

### SCHUCH v. MCGUIRE.

(Court of Appeals of Colorado. Sept. 12, 1904.)

#### WITNESSES—IMPEACHMENT.

1. Where the general reputation of the plaintiff for truth and veracity was impeached by two witnesses, an instruction that the jury should disregard such witnesses' testimony, on the ground that truth and veracity of a witness could not be impeached by the testimony of only two witnesses, was error.

Appeal from County Court, Teller County. Action by A. McGuire against Philip Schuch, Jr. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Temple & Crump, for appellant.

MAXWELL, J. From a judgment rendered against appellant, defendant below, on an appeal from a justice of the peace, is this appeal. There being no pleadings, we gain a knowledge of the issues from the evidence.

It appears that the parties to this suit had had some difficulty, which they undertook to adjust by an appeal to arms. Plaintiff contended that a horse, his property, was killed by a shot from a rifle fired by the defendant, and sued for the recovery of the value of the horse. Twenty-two witnesses testified at the trial, equally divided in number between the parties. Some 20 to 30 shots were fired; the defendant admitting that he fired at least 10 shots. Defense was that the defendant did not kill the horse, and that he acted in self-defense. As to what took place immediately preceding the shooting, and until the termination of the affray, the plaintiff, his wife, and the defendant were the only witnesses. Plaintiff and his wife testified that defendant fired the first shot. This the defendant denied, thereby raising a question of veracity between himself and the plaintiff and his wife upon this point. As to the other matters involved, they became by the testimony of plaintiff and defendant peculiarly questions of veracity between the parties.

The defendant undertook to directly impeach the plaintiff by proof that his general reputation for truth and veracity in the community in which he resided was bad, and for this purpose introduced two witnesses—F. Morris and J. A. Noble—who testified upon direct examination that they were acquainted with the reputation for truth and veracity of the plaintiff in the community in which he lived, and that it was bad. At the close of defendant's testimony, the court *sua sponte* instructed the jury: "Gentlemen of the Jury: You will disregard the testimony of F. Morris and J. A. Noble respecting the reputation of the plaintiff, Dr. McGuire, as to truth and veracity. It is not sufficient to impeach on the testimony of two witnesses." This ruling of the court was excepted to, and is the only error assigned upon which a reversal of the judgment is asked.

We know of no rule of law or practice which requires more than two witnesses to directly impeach a witness. The above ruling was error, and it cannot be said that it was not prejudicial to the defendant, for which reason the judgment must be reversed. Reversed.

20 Colo.A. 202

HELGERT v. STEWART.

(Court of Appeals of Colorado. Sept. 12, 1904.)

SALES—CHANGE OF POSSESSION—RIGHTS OF CREDITORS—KNOWLEDGE—EFFECT.

1. Where a sale of personal property capable of manual delivery was not accompanied by an actual and continued change of possession, as required by Mills' Ann. St. § 2027, it was ineffective as against creditors of the vendor, though they had actual knowledge of the sale when the property was levied on.

Appeal from Teller County Court.

Replevin by Nels Helgert against James T. Stewart. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Scott Ashton, for appellant. J. Grattan O'Bryan, for appellee.

GUNTER, J. Replevin by vendee, appellant, to recover from the sheriff personal property held under execution against vendor. Judgment of nonsuit. Therefrom this appeal.

There was evidence tending to show a sale in April to appellant of the personal property involved. At the time of the sale, this property, used in the operation of a butcher shop, and capable of manual delivery, was in actual possession of the vendor. The following June it was levied upon under a writ of execution issued upon a judgment against the vendor. It was essential to the case in replevin by vendee, appellant, who took title through such sale, to show it valid against the execution creditor of the vendor. Requisite to the validity of the sale was a delivery, followed by an actual and continued change of possession of the property sold. Mills' Ann. St. § 2027. "Nor can a case be

taken out of the statute, nor can the statute be satisfied, by proving that the sale was bona fide and no fraud intended. Unless the purchaser can show such a substantial compliance with its terms as affords visible notice to the community of a change in the ownership of the goods, the transaction constitutes a fraud in law, and as such must be held to be void as to creditors and subsequent purchasers in good faith of the vendor." *Bassinger v. Spangler*, 9 Colo. 175, 179, 10 Pac. 809, 812. No facts were shown evidencing the required change of possession. If we assume there was evidence tending to show that the judgment creditor knew of the alleged sale to appellant when the execution was levied, it would not affect the question before us. "Whether the creditor has knowledge of such sale or not is of no consequence." *Bassinger v. Spangler*, 9 Colo. 186, 10 Pac. 816.

Appellant, having shown no title to the property involved as against appellee, the sheriff, was properly nonsuited.

Judgment affirmed. Affirmed.

20 Colo.A. 236

FITZHUGH v. BROWN.

(Court of Appeals of Colorado. Sept. 12, 1904.)

JURY—NONUNANIMOUS VERDICT—INSTRUCTIONS—APPEAL—HARMLESS ERROR—VERDICT—CONFLICTING EVIDENCE—CONCLUSIVENESS.

1. Where the evidence is conflicting, and there is evidence to support the verdict, it is conclusive on appeal.

2. Where a unanimous verdict was returned by a jury of six, the giving of an instruction that five of their number agreeing to and signing a verdict might return the same as authorized by an unconstitutional statute, was not prejudicial error.

Appeal from El Paso County Court.

Action between Mrs. M. E. Brown and Harriet M. Fitzhugh. From a judgment in favor of the former, the latter appeals. Affirmed.

Geo. Q. Richmond, for appellant. Orr & McKesson, for appellee.

MAXWELL, J. Appellant urges a reversal of the judgment in this case upon the ground that the verdict upon which the judgment was rendered was manifestly against the weight of the evidence. A review of the testimony here would accomplish no good purpose. We cannot say that the verdict of the jury is not supported by the evidence, nor that it is manifestly against the weight of the evidence. This case has been tried twice; once before a justice of the peace, and once in the county court, both trials resulting adversely to appellant. The motion for a new trial, based upon the ground urged here, was argued to the county court and denied. The courts below saw and heard the witnesses. If there was a doubt as to where the weight of the evidence was, the fact that two trials resulted in judgments

against appellant would be very persuasive, if not controlling, in arriving at a conclusion upon this point. However, a thoroughly settled rule of the appellate courts of this state as to the conclusiveness of the verdict of the jury upon disputed facts where the evidence is contradictory, and where there is evidence to support the verdict, is decisive of this point against appellant.

The only other question presented goes to the instruction given by the court to the jury that not less than five of their number agreeing thereto might return a verdict, each member of the jury so agreeing signing the verdict. The trial was to a jury of six, which returned a unanimous verdict. This court has ruled adversely to appellant upon this proposition in *Adams Express Co. v. Aldridge*, 77 Pac. 6. See, also, *First National Bank v. Foster*, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L. R. A. 549.

The judgment must be affirmed. Affirmed.

20 Colo.A. 234

**FITZHUGH v. NICHOLAS.**

(Court of Appeals of Colorado. Sept. 12, 1904.)

CHANGE OF VENUE—NOTICE—DISCRETION—  
JURY—NONUNANIMOUS VERDICT—AP-  
PEAL—REVIEW—HARMLESS ERROR.

1. The refusing of a motion for a change of venue is within the sound discretion of the trial court, and will not be reviewed unless it clearly appears that such discretion was abused.

2. Where no notice of an application for a change of venue was given to the adverse party or his attorney, as required by Mills' Ann. Code, § 30, the application could not be granted.

3. Where a unanimous verdict was returned by a jury of six, the giving of an instruction that five of their number agreeing to and signing a verdict might return the same, as authorized by an unconstitutional statute, was not prejudicial.

Appeal from El Paso County Court.

Action by A. M. Nicholas against Harriet M. Fitzhugh. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. Q. Richmond, for appellant. Orr & McKesson and A. M. Nicholas, for appellee.

**MAXWELL, J.** Appellant, defendant below, moved for a change of venue because of the prejudice of the inhabitants of the county, and supported the motion by her affidavit, to the effect that she had reason to believe, and did believe, that the inhabitants of El Paso county were so prejudiced against her that she could not secure a fair and impartial trial in such county; that such belief was based upon information derived from prominent citizens of said county, and from several attorneys, who had represented her in other litigations; that she had made diligent inquiry among the people of the county, and had been advised that it was the general opinion of a large number of the inhabitants of the county that she would

not, and could not, receive a fair and impartial trial before any jury selected from the inhabitants of the county. The motion for change of venue was denied, and error is assigned thereon.

The granting or refusing motions of this character is within the sound discretion of the trial court, and will not be reviewed unless it clearly appears that there was abuse of this discretion. Section 30, Mills' Ann. Code, under which this motion was made, requires reasonable notice of the application for the change of venue to be given the adverse party or his attorney. This was not done. In the absence of such notice, it would have been error to have granted a change of venue. No error was committed in denying the motion.

Trial to a jury of six resulted in a unanimous verdict against appellant, upon which judgment was rendered. The court instructed the jury that a verdict might be returned by not less than five of their number agreeing thereto, in which event each juror agreeing to the verdict should subscribe his name thereto. Error is assigned upon the giving of this instruction.

This court has ruled in *Adams Express Co. v. Aldridge*, 77 Pac. 6, that such an instruction, in the face of a unanimous verdict, does not constitute reversible error. See, also, *First National Bank v. Foster*, 9 Wyo. 157, 63 Pac. 1056, 54 L. R. A. 549.

There being no error in the record, the judgment will be affirmed. Affirmed.

20 Colo.A. 250

**STAR LOAN CO. v. DUFFY VAN & STORAGE CO.**

(Court of Appeals of Colorado. Sept. 12, 1904.)

JURY—VERDICT BY FIVE OUT OF SIX—VALIDITY—STATUTE—JUDGMENT.

1. The act of April 22, 1899 (Laws 1899, p. 244), providing that in civil cases in courts of record tried by a jury three-fourths of the jurors might concur in and return a verdict, having been declared unconstitutional, a judgment on a verdict in a cause tried in the county court before a jury of six, only five of whom agreed to the verdict, is erroneous.

Appeal from Arapahoe County Court.

Action by the Duffy Van & Storage Company against the Star Loan Company. From a judgment for plaintiff, defendant appeals. Reversed.

Clay B. Whitford and Henry E. May, for appellant.

**THOMSON, P. J.** This cause was tried in the county court before a jury consisting of six men. Only five of the jurors agree to the verdict, which was in favor of the plaintiff. These five signed the verdict, and judgment was entered upon it. An act of the Legislature approved April 22, 1899 (Laws 1899, p. 244), provided that in civil cases in courts of record tried by a jury three-fourths

¶ 2. See *Venue*, vol. 48, Cent. Dig. § 104.



of the jurors might concur in and return a verdict which should be signed by those concurring, and should have the same force and effect as if found and returned by all the jurors. This act was the authority for the verdict in question; but in *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403, the act was adjudged unconstitutional. The verdict was therefore a nullity, and the judgment entered upon it was erroneous, and must be reversed.

Reversed.

20 Colo.A. 204

**CITY OF COLORADO SPRINGS v. MAY.**

(Court of Appeals of Colorado. Sept. 12, 1904.)

**MUNICIPAL CORPORATIONS—STREETS—FALLING TREES—INJURIES TO TRAVELERS—BURDEN OF PROOF—INSTRUCTIONS—REVIEW.**

1. Where on appeal it appears from the charge as a whole that the jury was not improperly instructed as to any material point, the judgment will not be reversed on the ground of an erroneous charge.

2. Where, in an action against a city for injuries to plaintiff by the negligence of the city's employes in felling a tree in a street, the jury were plainly instructed that the city in felling the tree was bound to use reasonable and ordinary care to avoid injury to those traveling on the street, and that if such duty was observed there was no liability, but if it was not, the liability was incurred unless defeated by the plaintiff's contributory negligence, defendant was not prejudiced by an instruction that it was the duty of the city to see that its streets were in a safe condition for traveling.

3. Where plaintiff was injured while driving along the streets of a city by the negligence of the city's employes in felling a tree so that it struck plaintiff's horse, an instruction that it was incumbent on plaintiff to show that the horse she was driving was ordinarily gentle before she could recover was properly refused, since defendant's employes were required to use care in felling the tree, whether the horse driven was ordinarily gentle or not.

Appeal from District Court, El Paso County.

Action by Jennie A. May against the city of Colorado Springs. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. S. Morris, for appellant. Vanatta & Jones, for appellee.

GUNTER, J. In the evening, just after dark, appellee was driving in a single buggy along an avenue of appellant city, when a tree was felled by its employes in the avenue, striking and so frightening the horse driven by her that it overturned the buggy, and threw her to the ground, whereby she was injured. She sued to recover for the injuries, had judgment, and the case is here.

Appellant assigns error in the giving of instruction No. 6, and in the refusal of an instruction set out in the third ground of its assignment of errors. There was evidence strongly tending to show negligence by the employes of appellant in felling the

tree without taking greater precaution to protect against its falling on those who might be traveling the avenue. There was some evidence, if credited, tending to show that appellee was guilty of negligence contributing to the accident involved. There were only two questions for the jury: (1) Were the employes of appellant guilty of negligence in felling the tree without taking greater precaution to protect those traveling the avenue at the time of its fall? (2) Was appellee guilty of such negligence contributing to the accident as to preclude a recovery? If the law applicable to these issues was fully and correctly given the jury through the instructions, considered as a whole, then no prejudice was worked by the giving of instruction No. 6, or by the denial of the refused instruction. "In construing a charge, each instruction is to be considered in connection with the entire charge, and if, considered as a whole, this court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on the ground of an erroneous charge." *McClelland v. Burns*, 5 Colo. 391, 395; *Dozenback v. Raymer*, 13 Colo. 451, 455, 22 Pac. 787; *Stewart v. Kindel*, 15 Colo. 540, 543, 25 Pac. 990; *The Little Dorrit Gold Mining Co. v. Arapahoe Gold Mining Co.*, 30 Colo. 431, 439, 71 Pac. 389; *Davis v. Shepherd*, 31 Colo. 141, 151, 72 Pac. 57.

It was the duty of appellant's employes in felling the tree to use such care for the protection of appellee in its oversight of the avenue in question as an ordinarily prudent and careful person would have exercised under like circumstances. The jury was clearly told in instruction No. 4 that this was the duty of appellant, and in instructions 2, 3, 4, 5, and 7 that proof of the violation of this duty was essential to a recovery by appellee. The jury was plainly told, through the instructions considered as a whole, that the duty of appellant in felling the tree was to use reasonable and ordinary care to avoid injury to those traveling the avenue; that if such duty was observed, there was no liability; if not, there was, unless defeated by the alleged contributory negligence of appellee. The statement in instruction No. 6, "that it is the duty of the city to see that its streets are in a safe condition for traveling," could not, when read in connection with the other instructions specifically directed to the facts in evidence, have misled the jury, and caused it to believe that appellant was an insurer of the safety of the avenue, and liable for injuries inflicted by the falling tree, regardless of the question of negligence.

The denied instruction, upon the refusal of which error is assigned, charged that it was incumbent upon appellee to show by a preponderance of the testimony that the horse she was driving was ordinarily gentle before she could recover. This burden was

¶ 1. See *Trial*, vol. 46, Cent. Dig. §§ 704, 706, 707.

not upon appellee. It was the duty of appellant's employes to be careful in felling the tree, and this whether the horse driven was ordinarily gentle or not; and it was liable for injuries resulting proximately from its negligence in felling the tree, whether the horse of appellee was ordinarily gentle or not, provided appellee was free of contributory negligence. If appellee was knowingly driving an unsafe horse, such fact would go to the defense of contributory negligence. Upon this defense, the jury was fully and correctly instructed.

We think the court committed no prejudicial error in giving instruction No. 6, or error in refusing the denied instruction.

Judgment affirmed. Affirmed.

20 Colo.A. 245

### GODDING v. ROSSITER.

(Court of Appeals of Colorado. Sept. 12, 1904.)

FOREIGN JUDGMENTS — ACTIONS — DEFAULT JUDGMENT — RENDITION — PLEADING — DEMURRER — FAILURE TO ANSWER — APPEAL — ASSIGNMENTS OF ERROR — ABSTRACT — REQUISITES.

1. An assignment that the court erred in rendering judgment in favor of plaintiff and against the defendant for a certain sum, without proof, was insufficient to authorize the consideration on appeal of an alleged error of the court in sustaining plaintiff's demurrer to defendant's answer.

2. A ruling of the court not presented on appeal by an assignment of error cannot be considered.

3. Where the abstract of record filed on appeal did not set forth defendant's answer to which plaintiff's demurrer was interposed and sustained, an alleged error in the sustaining of such demurrer could not be reviewed.

4. Mills' Ann. Code, § 53, provides that on failure of a defendant to plead within the time ordered by the court judgment by default may be entered. Section 74 declares that when a demurrer is decided the court may fix the time for pleading over, and, if pleadings shall not be filed within the time fixed, judgment by default may be entered; and section 168 provides that if defendant fails to answer within such further time as may have been granted, the clerk, on plaintiff's application, shall enter defendant's default, and, if the complaint shall have been properly verified, enter judgment for the amount specified in the summons. Held that, where plaintiff sued on a foreign judgment, and his complaint was properly verified, and three months before judgment an authenticated copy of the judgment was filed in the trial court, it was proper to enter judgment against defendant by default without requiring plaintiff to make proof, on defendant's failure to answer over within the time allowed, after sustaining plaintiff's demurrer to an answer filed.

Appeal from District Court, Pueblo County.

Action by F. C. Rossiter against John E. Godding. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Platt Wicks, for appellant. Wm. B. Vates, for appellee.

MAXWELL, J. June 22, 1900, appellee filed in the court below his verified complaint, wherein he alleged that November 23, 1898,

he commenced an action against appellant in the circuit court of Cook county, Ill., by the issuance of summons, which summons was duly and personally served upon appellant; that appellant entered his appearance in said action in person and by attorney; that February 5, 1900, judgment was rendered by the circuit court of Cook county, Ill., against appellant and in favor of appellee for \$499.28 damages and \$10.75 costs; that no part of such judgment or costs had been paid. Prayer for judgment and interest. To this complaint numerous dilatory motions, pleadings, and pleas were filed. December 10, 1900, plaintiff's demurrer to defendant's answer was heard and sustained, and defendant granted seven days within which to amend his answer. December 20, 1900, defendant's default for failure to comply with the order of the court to file an amended answer within seven days was entered, and, upon motion of plaintiff, judgment on the pleadings was entered in favor of plaintiff and against defendant for \$545.71 and costs.

It appears that defendant was represented by counsel in court at the time this judgment was rendered. An exception to this judgment was saved. The case is here on appeal from that judgment.

The only error assigned is: "The court erred in rendering judgment in favor of plaintiff and against the defendant in the sum of \$545.71, without making his proof." Counsel for appellant in his brief abandons this assignment of error, and urges that the court erred in sustaining the plaintiff's demurrer to defendant's answer, and for this error the judgment should be reversed.

There are two answers to this contention. First. The ruling of the court complained of is not before this court for review, as it is not presented by the assignment of error, and therefore we cannot consider it. *Kis-kadden v. Allen*, 7 Colo. 206, 208, 3 Pac. 221; *Barnes v. Beighly*, 9 Colo. 475, 478, 12 Pac. 906; *Patrick Co. v. Skoman*, 1 Colo. App. 323, 326, 29 Pac. 21. Second. The abstract of record filed by the appellant does not set forth the answer of defendant to which the plaintiff's demurrer was interposed and sustained, so that, even if this court felt disposed to go into this question, there is nothing presented by the abstract of record upon which an opinion could be passed. As stated, the complaint was verified. In addition to this, it appears that some three months previous to the rendition of the judgment by the court below an authenticated transcript of the proceedings and judgment of the circuit court of Cook county, Ill., was filed in the court below. Section 53, Mills' Ann. Code Colo., provides that, upon failure of the defendant to plead in such time as ordered by the court, judgment by default may be entered. Section 74 provides that, when a demurrer is decided in term time or vacation, the court or judge may fix the time

for pleading over and filing amended pleadings, and if the same be not filed within the time so fixed, judgment by default may be entered. Section 168 provides that, if the defendant fails to answer within such further time as may have been granted, the clerk, upon application of the plaintiff, shall enter the default of the defendant, and immediately thereafter, if the complaint shall have been properly verified, enter judgment for the amount specified in the summons. Either of the above sections of the Code afford authority for the action of the court in the rendition of the judgment appealed from.

There being no error in the record, the judgment will be affirmed. Affirmed.

20 Colo.A. 207

**LATHROP v. HALLETT et al.**

(Court of Appeals of Colorado. Sept. 12, 1904.)

**ATTORNEYS—RETAINER — EMPLOYING ASSISTANT—IMPLIED AUTHORITY—RATIFICATION—LIEN ON JUDGMENT.**

1. Retainer of counsel in a suit is not implied authority to him to employ associate counsel therein at the expense of his client.

2. Knowledge by a client that his counsel is being assisted in the case by another attorney is not enough to show that the client ratifies the employment on his behalf by his counsel of such attorney; the act of such assistance being consistent with employment of the attorney to assist the counsel at the latter's expense.

3. An attorney employed by counsel to assist him in a case at his own expense is not entitled to a lien on the judgment therein.

Appeal from District Court, City and County of Denver.

Action by Mary F. Lathrop against Moses Hallett, executor and trustee under the will of George W. Clayton, deceased, and the city of Denver, also trustee thereunder. From a judgment dismissing the action, plaintiff appeals. Affirmed.

C. C. Brown, for appellant. Macbeth & May, for appellee Hallett. H. A. Lindsley, for appellee city and county of Denver.

GUNTER, J. From a judgment for appellees (defendants) is this appeal. The complaint alleges the probating of the will of George W. Clayton, deceased, the appointment and qualification of Moses Hallett as the executor thereof, the institution of an action by an heir at law to annul the will, the employment of appellant by said executor to defend the action, her successful defense thereof in his behalf and in behalf of appellee city, the value of the service so rendered, and the refusal and failure to pay therefor. It further alleges that by the said will the residue of the estate of deceased, such residue being of great value, was given to appellees in trust to establish and maintain a college. Judgment is prayed awarding appellant a lien upon the judgment obtained in the action con-

testing the will, and on the trust fund involved therein, for securing and satisfying the amount due her for legal services in said action, and requiring appellee Hallett, as executor and trustee under said will, and appellee city as trustee thereunder, to pay from said funds the amount so due. The answers of appellees deny the employment of appellant, also that she rendered any service in behalf of them, or either of them. The case was tried to the court, and its findings were: (1) That appellant rendered valuable service in defense of the action contesting the will; (2) that she was not employed to perform such service by appellees, or either of them; (3) that she performed such service under the employment, on his own account, of W. C. Kingsley, to assist him in the defense of said action, he having been employed by appellee Hallett to defend the same. Judgment went dismissing the action.

Appellant denies the correctness of findings 2 and 3, which are to the effect that she was not employed by the executor, and insists that while the executor did not employ her directly, nor did he expressly authorize her employment, he did impliedly empower his counsel, Mr. Kingsley, to retain her on his (the executor's) account, and that she was so retained. The evidence relied upon to support this contention was that the executor employed Mr. Kingsley to defend the action contesting the will, and that the executor regularly employed him as his counsel. The contention, in effect, is that, the mere retainer of counsel is implied authority to him to employ associate counsel at the expense of his client in the litigation in which he is engaged. Such is not the law. *Northern Pacific Railway Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635, 637. While the retainer of Mr. Kingsley by the executor to defend the action contesting the will did not preclude him from employing at his own expense appellant to assist him in the defense of the contest, yet such retainer did not authorize him to employ appellant as counsel at the expense of the executor or of the estate. *Young v. Crawford*, 23 Mo. App. 432; *Porter v. Elizalde*, 125 Cal. 204, 207, 57 Pac. 899; *Northern Pac. Ry. Co. v. Clarke*, supra.

2. Appellant says that Mr. Kingsley assumed authority in her employment to retain her on account of the executor, and that such employment has since been ratified by the executor. We express no opinion as to whether Mr. Kingsley claimed such authority when employing appellant, because not necessary to this decision. If, however, he did assume such authority in retaining appellant, the evidence does not show that the executor ever ratified such employment. The evidence relied on to prove ratification of the alleged employment tended to show that appellant, to the knowledge of the executor, was assisting Mr. Kingsley in the defense of the contest. The fact that she was so engaged was entirely consistent with the con-

¶ 1. See Attorney and Client, vol. 5, Cent. Dig. § 326.

clusion that she was there as the assistant of, and at the expense of, Mr. Kingsley, and not on account of the executor. *Young v. Crawford*, supra; *Porter v. Elizalde*, supra.

A further fact fatal to the contention that the evidence showed ratification of the alleged employment is that the executor never knew of the existence of the facts claimed to show ratification. The evidence was not such that the trial court could reasonably conclude therefrom that the executor consented to the employment of appellant upon his account. We agree with the finding of the trial court that the executor did not employ appellant, nor did he ratify the alleged employment by Mr. Kingsley. Further, there was no evidence justifying the conclusion that the executor was estopped to deny the alleged employment of appellant on his account. We also concur in the findings of the trial court that appellee city in no manner employed appellant as counsel upon its account.

3. Appellant insists that, regardless of the question whether she was employed by the executor or the city, she should have a lien on the judgment recovered in the action contesting the will for the reasonable value of her services therein, and an order should be made that the same be paid from the trust estate. If we accept the court's findings of fact (which we do), the case is reduced to this: Appellant was employed by Mr. Kingsley on his own account to assist him in the litigation involved in the action contesting the will. Pursuant to such employment, she rendered valuable service in such litigation, and was thus the attorney for Mr. Kingsley. She was not under the employment of the executor, nor was the estate her client. She now asks the court to make an order for the payment to her from the funds of the estate, not of the executor's debt, nor the debt of the estate, but the payment of the debt owing to her by her employer, Mr. Kingsley. No authority has been cited, and we think none could be, that would sustain us in taking the action requested. The executor employed counsel, Mr. Kingsley, to defend the action to annul the will. Such counsel undertook the defense, and the same was conducted successfully, and it may be that under *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567, an equitable action would lie to establish a lien on the trust fund preserved by the judgment, to secure such allowance as the court might make for the legal services of the counsel so employed by the executor; but we think it cannot be that any kind of an action would lie to declare a lien on such trust fund for the amount that counsel, so employed by the executor, might be owing to counsel retained by him on his own account for legal services rendered in his assistance in such action. In *Fillmore v. Wells*, supra, counsel were employed by the guardian of certain minors to recover certain property interests. The

suit was brought, and a judgment obtained awarding the minors an interest in certain real estate and certain money. The counsel so employed afterwards brought suit against the minors, the guardian, and certain other parties to have the court determine the amount of the fees to which they were entitled for such legal services, and for a decree declaring the amount of such fees to be a lien upon the judgment so secured. Judgment went granting the relief prayed. That case is not authority for saying that if counsel therein who were employed by the guardian had retained counsel on their own account to aid them in the trial of the case, that such assistant counsel, after having performed the services stipulated, would be entitled to have the fees for their services allowed against the wards, and a lien declared therefor upon the judgment recovered in favor of the wards. The evidence herein did not make out a case of any character against appellees, or either of them, nor did it make out a case authorizing the allowance to appellant of any sum from the trust estate for her legal services. For the reasonable value of them, she must look to her client, *Mr. Kingsley*.

4. The motion of appellant for a new trial upon the ground of newly-discovered evidence was denied. This ruling is urged as prejudicial error. Evidence thus sought to be availed of was cumulative, and would not, if adduced, have brought about a different result than that of the former trial. Such was the finding of the court, in which we agree.

Judgment should be affirmed. Affirmed.

20 Colo.A. 212

#### HALLETT v. LATHROP.

(Court of Appeals of Colorado. Sept. 12, 1904.)

EXECUTORS—FILING OF FINAL REPORT—PENDENCY OF ACTION FOR ATTORNEY'S FEE.

1. Pendency of an action by an attorney, who assisted in defending a contest of a will, against the executor and trustee under the will, to have a lien on the judgment in the will contest case declared in plaintiff's favor for the amount of his fee, and for an order that the fee be paid from the trust fund, is no ground for refusal to approve the final report of the executor, and order his discharge, as the effectiveness of any decree in the action would not be impaired thereby.

Appeal from District Court, City and County of Denver.

Application of Moses Hallett, executor of George W. Clayton, deceased, for approval of his final report and for discharge. On objection of Mary F. Lathrop this was denied, and the executor appeals. Reversed.

W. C. Kingsley and Richard McKnight, for appellant. C. C. Brown, for appellee.

GUNTER, J. Appellant filed with the county court his final report as executor of the will of George W. Clayton, deceased, and asked its approval. Appellee excepted

to the report because of the pendency of Lathrop v. Hallett, as Executor, et al. (decided at our present term), 77 Pac. 1095, wherein she was plaintiff below. The exception was sustained. To review the ruling is this appeal.

Said will, after providing for the payment of debts, legacies, and annuities, gave the residue of the estate of deceased—near \$2,000,000—to trustees for the establishment of a college. The final report of the executor (appellant), the correctness of which, in the absence of exception, we assume, discloses that the executor has performed all of the duties as such, and is ready to turn over said fund to the trustee for the realization of the purposes of the trust—the establishment of the college—and asks an order permitting him to turn over the fund to himself as trustee, for the approval of his final account, and his discharge as executor. Appellee objected to the order being made because of the pendency of said action. Lathrop v. Hallett, as Executor, et al., 77 Pac. 1095.

If whatever rights appellee was litigating in that action would not be prejudiced by granting the order sought by appellant, the executor, the order should not be denied on such objection of appellee. The wholesome step—the closing of the administration—should be taken, unless it will substantially prejudice appellee's interest involved in that litigation. The complaint therein avers the appointment and qualification of appellant as executor of said will, the institution of an action contesting the will, the employment of appellee by appellant to defend the contest, her successful defense, the reasonable value of the services so rendered, and the refusal of appellant, the executor, to pay therefor. The complaint further alleges that the residue of said estate (such residue being of great value) was given appellant and the city of Denver in trust for the establishment and maintenance of a college, and prays that a lien be declared on the judgment obtained in the action contesting the will and the trust involved therein for the reasonable value of appellee's services therein, and for an order that appellant, as executor of, and trustee under, said will, and the city of Denver, as trustee thereunder, pay the amount so allowed from said trust fund. The trustees under the will were made defendants. The answers denied the employment, also the rendition and value of the alleged services.

If such complaint stated a cause of action (which we assume, but do not decide), it is admittedly one in equity for the enforcement of a statutory lien on the trust fund for the reasonable value of appellee's services in the action in which her judgment was rendered—the action contesting the will. Fillmore v. Wells, 10 Colo. 228, 15 Pac. 343, 8 Am. St. Rep. 567.

If such assumed cause of action should be proved at the trial, and the decree prayed be granted, the effectiveness of such decree

would to no extent be impaired by appellant having been previously discharged as executor of said will, because perforce the only favorable decree that could be obtained in Lathrop v. Hallett, as Executor, et al., 77 Pac. 1095, she would have a lien on the solvent trust fund to secure the amount allowed her for counsel fees, and an order on the trustee to pay the amount of such lien from the trust fund. We do not think the pendency of Lathrop v. Hallett, as Executor, et al., 77 Pac. 1095, was a sufficient ground for the court's declining to approve the final report of the executor, and ordering his discharge. Reversed.

Judgment reversed.

20 Colo.A. 238

ALBRO MIN. & MILL. CO. v. CHINN.

(Court of Appeals of Colorado. Sept. 12, 1904.)

CORPORATIONS—AGENTS—DIRECTORS—OFFICERS—TREASURER—AUTHORITY.

1. Where, in an action against a corporation to recover for goods sold by plaintiff to P., who was the corporation's treasurer, and used by him, the evidence tended to show that the corporation was organized merely for the personal benefit of P., and that he had never been appointed as agent or manager for the corporation, but instead was permitted to operate its property for his personal benefit, the fact that he was one of the directors and treasurer of the corporation was insufficient to establish either his appointment as the corporation's agent or his authority to purchase goods on its credit.

Appeal from District Court, Clear Creek County.

Action by Richard P. Chinn against the Albro Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. A. Lindsley (W. S. Decker, of counsel), for appellant. E. M. Sabin, for appellee.

MAXWELL, J. Chinn sued the appellant corporation upon an account for goods, wares, and merchandise alleged to have been sold and delivered by him to the corporation at its request, and upon five counts for work and labor alleged to have been done and performed and material alleged to have been furnished to the corporation at its request by others, which last accounts were assigned to Chinn prior to the commencement of this suit. The case was tried to a jury, which returned a verdict against appellant, upon which judgment went, from which this appeal.

At the close of the testimony, defendant requested the court to charge the jury to find the issues joined in favor of the defendant, which request was refused, exceptions saved, and error is assigned thereon. Prior to February 6, 1896, W. H. Price was the owner, in possession of, and operating certain mining properties in Clear Creek county, this state, known as the "Albro Mine." That date the Albro Mining & Milling Com-

pany, appellant, was incorporated. The articles of incorporation named W. H. James, James B. Grant, Dennis Sullivan, E. J. Seeley, and W. H. Price directors for the first year. Capital stock 1,000,000 shares, par value \$1. The directors named in the articles of incorporation met and organized by adopting by-laws and electing officers: W. H. James, president; Dennis Sullivan, vice president; E. J. Seeley, secretary; and W. H. Price, treasurer. The office of general manager or agent, provided for by the by-laws, was not filled. This was the only meeting held by the board of directors of the corporation. 999,995 shares of full-paid capital stock of the company was issued to W. H. Price as consideration for the conveyance by him to the corporation of the mining claims known as the "Albro Mine." At the date of the incorporation of the company the Denver National Bank held Price's past-due note, upon which James, Sullivan, and Grant were sureties. The bank was urging payment of the note. Price could not pay, and was anxious to procure money to continue operations at the mine. Price induced James, Sullivan, and Grant to sign another note with him to the bank for an amount sufficient to take up the old note and give him \$8,000 with which to continue operations at the mine, and deposited with these gentlemen the stock of the Albro Mining & Milling Company as collateral security to secure them in the risk assumed in becoming his sureties on the note. After this transaction Price continued operations at the mine as before. The former superintendent remained in charge of the work, receiving his instructions from Price, and no one else. Price and the superintendent employed and discharged the men, purchased the supplies for the mine in the name of Price, shipped the ore produced from the mine to the mills in the name of Price, who received the proceeds thereof, applied them to his own use, making no account thereof to the company. The money expended on and in the mine, the bills for supplies and material furnished the mine for nearly two years, were paid by Price, partly in cash and partly by checks signed "W. H. Price." Seeley, the secretary of the company, son-in-law of Price, was the only other officer or director of the company who was ever on the property after the incorporation of the company. Mr. James, president of the company, testified that the company was organized to enable Price to borrow money on the stock; that the company never took possession, or authorized or empowered any one to take possession, or operate the property for it; that it did no work, and contracted no bills on account of operating the property; that Price was operating the property on his own account, shipping the ore, receiving the proceeds, and applying them to his own purposes; that the company did not know that Price was contracting any indebt-

edness on account of the company; that he knew nothing of the claims involved in this suit until after suit was brought, when summons was served upon him as president of the company. Price testified, in substance, that when the company was organized three of the directors thereof orally leased the property to him upon the terms, among others, that he should and would operate and manage the same entirely for his own personal and private use and benefit, and at his own personal and private expense; that he conducted operations upon the property personally and individually and for his own use and benefit, and not for the company; that he was personally liable for the expenses of the same; that all statements of account and bills were rendered against him personally and individually, and not against the company, and were so kept upon the plaintiff's books; that all ore shipped and sold from the mine was shipped and sold by him and the proceeds retained by him for his personal use and benefit.

The fundamental proposition which it was necessary for plaintiff to establish to entitle him to recover in this action was the agency of Price. To establish this proposition, a certified copy of the articles of incorporation and Price's deed to the company were introduced in evidence. Testimony was also introduced tending to prove that some supplies and machinery were consigned to the Albro Mining & Milling Company. Upon whose order this was done, however, does not satisfactorily appear. None of these items are involved in this suit. That plaintiff and some of his assignors early in 1896 knew of the incorporation of the company. That plaintiff opened his account in the name of W. H. Price. That he went to Price personally, and had a conversation with him in regard to the matter. That Price said: "The Albro mine was good for it anyway. He said it was worth enough to buy my store two or three times. If you are afraid of your money, you can take the Albro mine for it." After this conversation the account was still kept against Price, statements rendered to him, and payments made by him. Plaintiff testified that at that time he considered Price "perfectly solid." There was no testimony whatever tending to show that either the plaintiff or any of his assignors had any conversation whatever with any officer of the company, or made any attempt whatever to ascertain whether or not Price was authorized to contract any indebtedness on account of the company. Witnesses testified that Seeley, secretary of the company, made two visits to the property, and made some statements about what the company intended to do after ore was struck. Seeley had no recollection of having made such statements. A more extended presentation of the evidence is not deemed necessary. From a very thorough and critical examination of all the testimony in the case,

we are of the opinion that the plaintiff failed to establish by competent testimony the fundamental proposition which would entitle him to recover in this action.

Counsel for appellee contends that the nature of the business done and the character of the agency itself shows such authority by implication that plaintiff and his assignors had a right to rely under the law upon those appearances, and actual proof of power was thereby dispensed with; citing in support of this proposition *Mining Company v. Fraser*, 2 Colo. App. 15, 29 Pac. 667. In the *Fraser* Case there was no question as to the appointment of the agent. That fact was admitted. There the question was, did the agent act within the scope and extent of the powers conferred by virtue of his office? Here the sole question is, was Price the agent of the company for any purpose? To establish an agency, in the absence of direct proof, as in this case, there may be submitted proof of facts which tend to show recognition by the principal of the alleged agent's authority: a holding out to the world of the alleged agent by the principal as having authority in the premises; receiving the profits arising from the acts of the alleged agent, or the application thereof to the principal's use and benefit; knowledge upon the part of the principal of the acts of the alleged agent, and failure upon his part to disavow the acts of the alleged agent within reasonable time; communication between the principal and the alleged agent in which the authority of the agent is expressly or impliedly admitted; payment by the principal of debts contracted by the alleged agent in the name of the principal; subsequent ratification of acts of the alleged agent, which ratification may be manifested by silence of the principal after knowledge of the facts. No evidence tending to prove any of the above facts was introduced at the trial. All of the authorities cited by appellee are cases where the authority of a duly appointed manager or agent to bind his principal in a particular matter are in issue, not the fact of the appointment of a manager or agent, and for this reason the authorities cited are not in point. It is admitted that Price was a director and treasurer of the corporation. Appellee argues from this fact that the defendant was bound for the acts of Price as such officer, and quotes in support thereof the following from *Union Gold Mining Company v. Rocky Mountain National Bank*, 2 Colo. 248: "If an officer of a corporation is allowed to exercise general authority in respect to the business of the corporation, or a particular branch of it, for a considerable time—in other words, if he is held out to the world as having authority in the premises—the corporation is bound by his acts in the same manner as if authority had been expressly granted." In the above case the acts of the president of the corporation were under discussion. The

president being the principal executive officer of a company, and as such charged with the management and operation of the property of the company, his acts in purchasing necessary supplies, employing men, hauling ore, etc., would clearly be within the scope and extent of the authority conferred upon him by virtue of his office. The treasurer of a corporation, however, is invested with no such authority by virtue of his office. Ordinarily, the treasurer is simply the custodian of the funds of the corporation, and its disbursing officer. In the absence of proof that the treasurer was authorized by appropriate action of the corporation to take possession of and operate the property of the corporation, such authority will not be presumed or implied by virtue of his office, and the assumption thereof would be unwarranted, and his acts in that behalf would not bind the corporation. The duty of third persons dealing with an ostensible agent is thus stated by Mr. Mechem: "In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen: That the law indulges in no bare presumption that an agency exists. It must be proved or presumed from facts. That the agent cannot establish his own authority either by his representations, or by assuming to exercise it. That an authority cannot be established by mere rumor or general reputation. That even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent, therefore, whether the assumed agency be a general or special one, are bound, at their peril, to ascertain not only the fact of the agency; but the extent of the authority, and, in case either is controverted, the burden of proof is upon them to establish it." *Mechem on Agency*, § 276. This doctrine has been expressly approved by this court in *Lester v. Snyder*, 12 Colo. App. 351, 356, 55 Pac. 613; *Gates I. Wks. v. Denver Eng. Wks. Co.*, 17 Colo. App. 15-18, 67 Pac. 173. The appellee failed to establish the authority of Price to act as the agent of the corporation.

The court erred in refusing to charge the jury to return a verdict for the defendant, and for this reason the judgment will be reversed. Reversed.

IN RE TURNER'S ESTATE. (Sac. 1,249.)  
(Supreme Court of California. March 17, 1904.)

ADMINISTRATION—PETITION FOR LETTERS—  
HEARING—NOTICE.

1. After the filing by a widow of a petition for letters of administration various other persons also petitioned for letters contesting the widow's petition, and thereafter the widow fil-

ed an amended petition contesting the other petitions, but stating no jurisdictional fact. Code Civ. Proc. § 1374, provides that any person interested may test the petition for letters of administration by written opposition, or may assert his own right to administration, in which case the contestant must file a petition and give the notice required for an original petition. *Held*, that the court had jurisdiction to hear all the petitions on the date set for the hearing of the widow's original petition, and was not required to wait until the time set for hearing her amended petition.

Commissioners' Decision. In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Judicial settlement of the estate of William C. Turner, deceased, in which Elizabeth Turner, his widow, filed a petition for letters of administration. Edward W. Putnam, at the request of the regents of the University of California, filed a petition contesting the widow's petition, and asking for letters of administration, and from on order granting letters to the widow the regents appeal. Affirmed.

See 72 Pac. 718.

Osgood Putnam and Chas. E. Snook, for appellant. J. W. Knox, for respondent.

CHIPMAN, C. This is an appeal by the regents of the University of California from the order granting letters of administration of the estate of William C. Turner, deceased, to Elizabeth Turner, surviving widow of deceased. The following proceedings took place leading to the appointment: On April 16, 1902, Mrs. Turner filed her petition for letters, through her attorney, James F. Peck, Esq. On April 30, 1902, J. W. Knox, Esq., was substituted as her attorney, and she on that day dismissed her petition filed April 16, 1902. On April 28, Edward W. Putnam, at the request of the regents, claiming to be a creditor of said estate, filed his petition praying for letters to be issued to him. On April 30, 1902, said Elizabeth Turner, as surviving widow of deceased, filed her petition for letters, stating therein, among other things, that she "contests the petition of Edward W. Putnam, filed herein April 28, 1902." On May 5, W. J. Stockton, public administrator of Merced county, filed his petition praying for letters in said estate, and also contesting the petitions of said Putnam and said Elizabeth Turner. On May 17, 1902, Thomas C. Turner, son of deceased, filed his petition for letters, also contesting the petition of said Putnam and said Stockton. The time of hearing of each of said petitions (except the petition dismissed as aforesaid) was duly fixed, and the hearing was duly postponed to June 9, 1902. On May 31, 1902, said Elizabeth Turner filed an amended petition for letters, and among other things contested the petition of said Putnam and said Stockton. The clerk of the court, on filing said amended petition of said Elizabeth, fixed the 18th of June, 1902, as

the time for hearing the same, and on June 6, 1902, he posted notices of the hearing for that day. Copies of the amended petition of said Elizabeth were served on the parties contesting the appointment on said 31st day of May, 1902. On June 9, 1902, said Putnam filed his petition contesting the amended petition of said Elizabeth for letters. It also appears that on May 6, 1902, said Stockton filed his petition contesting the petition of said Elizabeth, filed April 30, 1902, and also contesting her petition for special letters, filed May 5th (which latter petition is not in the record). It further appears that on June 9, 1902, the said petitions, filed as aforesaid, between April 28, 1902, and May 17, 1902, were on the calendar, and were called for hearing by the court, and thereupon the regents of the University of California appeared at the hearing "for the express purpose of objecting to the jurisdiction of the court to proceed at this time with the hearing of said petitions, or any of them, and thereupon objected to the hearing \* \* \* prior to June 18, 1902, on the ground that on May 31, 1902, a petition for letters of administration [a copy of which is above set forth, being said amended petition] was filed herein by Elizabeth Turner, and that said petition had been duly set for hearing on June 18, 1902, and notice was posted accordingly, and that said date had not arrived, and that all petitions \* \* \* must be heard together, and the court was without power to hear any of said petitions until June 18, 1902." Proof of posting notice of the hearing for June 9th was made. The attorney for said Elizabeth Turner stated in open court that the petition filed May 31, 1902, was filed simply as an amendment to her original petition filed April 30, 1902, and was intended to obviate certain objections raised to her original petition by the contest of said Stockton, and was not intended to supersede the original petition; that she was willing to proceed with the hearing of said petition filed April 30, 1902, and said amendment filed by her on May 31, 1902, as one and the same petition. "The judge presiding thereupon stated that he considered that Elizabeth Turner had really but one petition before the court, and that he would proceed to hear the same as one petition, and also hear the petition filed by the said Putnam, said W. J. Stockton, as public administrator, and said Thomas C. Turner, and determine the whole matter; and that the petition filed by said Elizabeth Turner was sufficient in form and substance; and that said amendments contained in said amended petition were immaterial and not necessary, and did not change in any manner the issues before the court." The objections to the hearing were overruled, and the hearing ordered to proceed, the regents excepting to the order. The court found certain facts, and in its conclusions of law found that said Elizabeth Turner was entitled to letters, and it was



accordingly so ordered. The regents alone appeal from the order.

Appellant relies upon section 1374, Code Civ. Proc., which reads: "Any person interested may contest the petition [i. e., the petition for letters—section 1373] by written opposition thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together." It is contended that this provision is mandatory, and the court had no discretion to disregard the notice of hearing the amended petition of Elizabeth Turner set for nine days later than the date the hearing actually took place. The court treated the amended petition of the widow as an amendment merely of her original petition, and, disregarding the notice of the hearing of the amended petition, proceeded to hear her original petition, together with all other petitions, on the day fixed for such hearing. In the petition of Stockton he set forth certain facts showing that there had been an administrator appointed in 1894, and that he had acted as such administrator until April 12, 1902, when he died. In her original petition Mrs. Turner made no mention of any prior administration. In the amended petition the facts were fully stated, and that she was applying for letters to complete an unfinished administration. The amended petition also contained a contest and opposition to the appointment of Putnam and Stockton. The value of the estate was stated to be much greater than in the original petition. The facts necessary to the jurisdiction of the court, however, sufficiently appeared in the original petition, and no additional necessary jurisdictional fact appeared in the amended petition. Under the statute fixing the order in which persons are entitled to administer, the widow was entitled to letters before any other of the petitioners applying, her competency otherwise not being disputed. A postponement of the hearing until June 18th would have served no purpose not attainable on June 9th. The parties were all before the court by appearance and by plea. The amended petition of the widow had been duly served. We do not think a new notice of hearing was necessary, but, notice having been given, we think the widow could waive its hearing at the date fixed, and consent to the hearing of her original petition.

The estate was undistributed and but partly administered at the death of the former administrator. Some one had to be appointed, and it was immaterial to all who were interested in the estate whether the appointment was made on June 9th or June 18th, so long as the court had jurisdiction to make the appointment. It is true, as appellant claims, that an amended complaint in an ordinary action supersedes the original com-

plaint; but no new summons issues, and when served upon all the defendants the cause proceeds without interruption, the parties already being in court by service of the original complaint.

There was no objection made to the hearing on any ground except want of jurisdiction of the court. If the widow had in her amended petition set up some material facts, and objection had been made to her proving them, she might have insisted that the hearing stand over to the day fixed for hearing the amended petition. But she set up no material facts, and, besides, she, by consenting to the hearing, in effect waived her amended petition, and perhaps waived the right to prove any new material facts therein set up to which objection was made. There was, however, no such objection. There being no rights of any persons affected by her consent to the hearing, and all contesting parties being in court, we see no reason why it could not hear all the petitions at the time fixed. Of its jurisdiction to do so we have no doubt.

The order should be affirmed, and it is so advised.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: BEATTY, C. J.; VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.

142 Cal. 501

FRESHOUR v. HOWARD. (Sac. 1,165.)

(Supreme Court of California. March 14, 1904.)

ELECTION — CONTEST — ILLEGAL BALLOTS — DISTINGUISHING MARK—FRAUD OF ELECTION OFFICERS—PLEADING—AMENDMENT AT TRIAL.

1. The failure of election officers, through ignorance or carelessness, to remove the number of the ballot, does not make it illegal, as in violation of Pol. Code, § 1215, prohibiting voters from placing any mark on ballots for identification.

2. Under Code Civ. Proc. § 1115, requiring, in an election contest, the filing of a verified statement of the particular grounds of the contest within 40 days after the election return day, and section 1116, providing that no testimony as to the reception of illegal ballots can be given, unless the contestant deliver a list of them to the contestee at least 3 days before the trial, it was not permissible at the trial of a contest, more than 40 days after return day, to amend the statement, which contained no allegation of fraud by the election officers, by adding an allegation that the failure of the judges in an election precinct to remove the number from each of the ballots was for the purpose of enabling a record to be made of how each voter voted.

In Bank. Appeal from Superior Court, Siskiyou County; H. M. Albery, Judge.

Election contest by Marion Freshour against Charles B. Howard. From a judgment in favor of contestee, contestant appeals. Affirmed.

James F. Farragher, for appellant. O'Neill & Butler, for respondent.

**VAN DYKE, J.** This is an election contest for the office of sheriff of the county of Siskiyou. The election was held on November 4, 1902. By the returns, as canvassed by the board of supervisors, the respondent received 1,878 votes, and the appellant 1,816 votes; giving the respondent a majority of 62 votes. In the petition or complaint filed by the appellant, irregularities were charged in certain precincts in said county in the receiving and counting of alleged illegal ballots for respondent. As a result of the trial, there was a net reduction from respondent's majority, as declared by the board of supervisors, of 49 votes, leaving his majority at 13 votes. The only question presented on the appeal, as stated by appellant's counsel, is in reference to the Oro Fino precinct.

At the hearing of the contest in the court below, the county clerk produced a package containing the voted ballots at the Oro Fino election precinct, which were "offered by counsel for contestant as an exhibit, and for the sole purpose of calling the court's attention to the condition of the ballots, and as a basis for a motion for an order rejecting the entire ballots of said precinct; and it appeared therefrom that each and all of said ballots had yet attached to them, and not separated, the slips bearing the numbers thereof." The precinct register of Oro Fino precinct was also offered in connection with the foregoing, and thereupon counsel asked that all the ballots for the Oro Fino precinct cast at the said election be rejected, which request or motion on the part of the contestant, upon objection by the contestee, was denied by the court, and this action of the court is assigned as error. Thereupon counsel for contestant offered the following amendment to his written complaint or statement, to wit: "Contestant avers the fact to be that the failure of said board of judges to separate the slip containing the number of the ballot from each of the ballots cast at the Oro Fino election precinct, and to immediately destroy same, was for the purpose—so designed and intended—of enabling a record to be made of how each and all the votes in said Oro Fino precinct voted, thereby preventing a fair election in said precinct." The request to file the amendment was denied by the court, which action of the court is also assigned as error by the appellant. The contest is based upon the misconduct or malconduct of the board of judges of certain precincts enumerated in the contest, as shown by the original complaint or statement, in carelessly and erroneously receiving and counting a number of illegal and unlawful ballots in each of said precincts, specifying the same, so marked by the voters that each of them could be readily distinguished from the other ballots. In reference to the Oro Fino election precinct, the original complaint or statement

simply alleges that the officers constituting the board of judges of said precinct were guilty of misconduct, consisting "of neglecting and failing to separate the slip containing the number of the ballot from each of the ballots cast at said election precinct on said 4th day of November, 1902; that said malconduct on the part of said board of judges left said ballots, and each of them, with an identifying mark thereon, that rendered them readily distinguishable from the ballots of each of the other electors who voted at said precinct at said election." There is no allegation, however, that there was any fraudulent or corrupt misconduct on the part of the judges of election at any of the precincts. The court finds "that there was no malconduct whatever on the part of the board of judges of Oro Fino election precinct, appointed by the board of supervisors, and who did in fact serve as such judges at the general election held in said county and state on the 4th day of November, 1902, in said Oro Fino election precinct, and there were in fact no illegal votes cast, counted, or canvassed for the contestee, Charles B. Howard, therein; neither were there any legal votes cast in said precinct in favor of said contestant, Marion Freshour, that were not in fact counted and canvassed for him." The failure or neglect, through ignorance or carelessness on the part of the precinct election officers, to remove the number of the ballot, did not have the effect to make the ballot illegal, on the ground of a distinguishing mark placed thereon by the voter. Pol. Code, § 1215. In *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, 366, this question was considered, and the court in that case said: "It is claimed that the trial court should have rejected ballots which had the stub attached to them—a stub that should have remained in the book from which the ballots were taken. We hold that these ballots were properly counted, and likewise those ballots were properly counted which the officers of election placed in the ballot box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or malconduct upon the part of those officers may render them liable to severe penalties, but that is all. The law as to identifying marks refers to marks made by the voter, and it is only marks made by him that demand the rejection of the ballot." In *People v. Prewett*, 124 Cal. 13, 56 Pac. 619, after citing cases to the point, it is said: "The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it shall appear that a fair election and an honest count were thereby prevented." And the Code declares: "No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct

as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." The cases cited and relied upon by appellant do not militate against the foregoing rule.

An election contest is a special proceeding, and the requirements of the Code in reference thereto must be strictly followed. It is required that a written statement setting forth the particular grounds of the contest, verified by an affidavit of the contesting party, shall be filed within 40 days after the return day of the election. Code Civ. Proc. § 1115. And when the reception of illegal votes is alleged, no testimony in reference thereto can be received unless the contestant shall deliver to the opposite party, at least three days before the trial, a written list of the number of illegal votes, and by whom given. Code Civ. Proc. § 1116. The purpose of the law is very plain. The party who is declared elected, and whose right to hold the office is questioned, should have notice in advance of the trial of the grounds on which his right to the office is contested. In the statement or complaint filed by the contestant herein there was no allegation of any fraudulent or corrupt misconduct on the part of the officers in said Oro Fino election precinct in not removing the numbers from the ballots cast thereat. The case went to trial on the issue made by this statement or complaint, and the answer thereto, on January 15, 1903. The proposed amendment was offered at the close of the trial, as appears by the bill of exceptions. It contained a new specification or ground of contest, and the Code requires, as above appears, that the statement or ground of contest should be filed within 40 days from the return day of the election. Under these circumstances, it was not error on the part of the court below in refusing to allow the proposed amendment to be filed.

Judgment affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

142 Cal. 506

McKEE v. HUNT. (S. F. 3,009.)

(Supreme Court of California. March 16, 1904.)

GUARDIANS—EMPLOYMENT OF ATTORNEYS—LIABILITY OF ESTATE—ORDERS OF COURT.

1. An action will not lie against a minor or his estate for the value of legal services rendered to the guardian in assisting him in the execution of his trust.

2. An order, on the application of a guardian under Code Civ. Proc. § 284, for the substitution of attorneys for the guardian, does not authorize a contract with the new attorney affecting the property of the ward.

3. An allegation in the complaint in an action by an attorney against the estate of a deceased minor to recover for legal services rendered to the guardian that plaintiff performed the services by order of the court, when considered in connection with the averment setting forth the order of the court directing that plaintiff be substituted as attorney for the guardian, only refers to the order of substitution of attorneys, and not as directing plaintiff to perform legal services for the guardian.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by J. C. McKee against Louisa Hunt, administratrix of the estate of Joseph L. Soher, deceased. From a judgment for defendant on sustaining a demurrer to the amended complaint, plaintiff appeals. Affirmed.

F. W. Nowlin, for appellant. Campbell, Metson & Campbell, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment rendered in favor of defendant upon the sustaining of her demurrer to plaintiff's amended complaint and his failure to further amend. As stated by counsel for appellant, the real question on this appeal is as to whether or not the amended complaint states facts sufficient to constitute a cause of action. The action was brought against Louisa Hunt purely in her capacity as administratrix of the estate of Joseph L. Soher, deceased, to obtain judgment against his estate for \$1,000, alleged to be due plaintiff as the reasonable value of legal services rendered by him during the minority of deceased, under employment by the guardian of his person and estate to act as attorney for such guardian in the execution of her trust. The employment of plaintiff by such guardian, the rendition of services in pursuance thereof, the reasonable value of such services, the due presentation of a claim therefor to the administratrix, and the fact of nonpayment were all alleged in the amended complaint. It is the settled law of this state that an action will not lie against a minor or his estate for the value of services rendered to the guardian of such minor to assist him in the execution of his trust. The position of a guardian in this respect is the same as that of the administrator of the estate of a deceased person. Both the administrator and the guardian are primarily liable to those whom they employ to aid them in the care, management, and protection of the estate, and the question as to the reimbursement of the administrator or guardian from the estate for such necessary expenses as he may incur is one solely between the administrator or guardian and the estate which he represents, and one which the court having jurisdiction of the estate has the sole power to determine. The person rendering services to the administrator or guardian cannot maintain an action for the value thereof against the estate or against the ward. This has been directly held at least

¶ 1. See Guardian and Ward, vol 65, Cent. Dig. § 372.

twice by this court in actions brought against the ward for the value of legal services rendered to the guardian (*Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56; *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896), and many times in cases involving the question of compensation of attorneys employed by the legal representatives of deceased persons (*Gurnee v. Maloney*, Adm'r., 88 Cal. 85, 99 Am. Dec. 352; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; *McKee v. Soher*, 138 Cal. 367, 71 Pac. 438, 649, and cases there cited). This does not appear to be disputed by counsel for appellant, but it is contended that the services for which compensation is here sought were rendered under order of the court having jurisdiction of the minor's estate, and that, where a guardian is authorized by such an order, he may bind both his ward and the property of his ward. The rule for the application of which appellant here contends is simply that the court having jurisdiction of the guardianship proceeding may, when allowed by the law applicable to such proceedings, authorize the guardian to make a contract directly affecting the property of the estate; such, for instance, as a contract of sale of property of the ward, or a contract creating a lien thereon. Whether or not, under our statute, the court could, under any circumstances, authorize a contract for legal services for the benefit of the estate, the effect of which would be to render the estate of the minor directly liable to the attorney rendering the same, it is not necessary here to determine. The only order of the court alleged in the amended complaint and here relied on as rendering the estate of the deceased minor liable at the suit of the attorney is an order made on the application of the guardian, under the provisions of section 284, Code Civ. Proc., substituting this plaintiff as her (said guardian's) attorney in the place and stead of her former attorney employed by her, and who had refused to consent to the substitution. This order simply had the effect of making plaintiff the attorney of record employed by said guardian—the same effect precisely that the consent of the guardian and her former attorney to such change, filed with the clerk or entered on the minutes, would have had (section 284, Id.)—and it in no degree attempted to authorize a contract affecting the property of the estate of the minor, or to require the performance of any legal services. In addition to alleging the application for an order of substitution of attorneys, and the order made thereon, by setting forth the same in *hac verba*, it was alleged that the plaintiff "performed legal services for said defendant as said guardian of said Joseph L. Soher, since deceased, by order of said court, and at the express request and direction of said guardian"; and it is urged that the allegation that plaintiff performed the services "by order of said court" sufficiently shows a good cause of action against the estate of

the deceased minor. Manifestly, this general allegation must be construed as having reference to the order of substitution of attorneys set forth with so much detail in the amended complaint, for no other order is alleged therein. Were this not so, however, we know of no provision of law authorizing the court having jurisdiction of the guardianship proceedings to require or direct an attorney to perform legal services for the guardian. There was no sufficient allegation of any order authorizing the guardian, on behalf of the minor, to enter into any contract with plaintiff, and, as before stated, it is therefore unnecessary to here determine what would have been the effect of such an order. The amended complaint failed to state a cause of action against the estate of the deceased minor.

We find nothing else in the record or briefs requiring notice.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

142 Cal. 497

DOTY v. JENKINS. (Sac. 1,178.)\*

(Supreme Court of California. March 14, 1904.)

ELECTIONS—CONTEST—STATEMENT—AMENDMENT—CONSTRUCTION—REGULAR PROCEEDINGS—WAIVER OF OBJECTIONS—RESIDENCE OF ELECTORS—ADMISSIONS—COURTS—ADJOURNMENTS—PRESUMPTION.

1. An amendment to a statement of election contest is to be construed by the same rules as an amendment to a complaint.

2. An amendment to a statement of contest for the office of county supervisor, adding to an allegation of residence and electorship in the state and county an averment of residence and electorship in the supervisory district, so as to comply with Code Civ. Proc. § 1111, giving the right to contest only to electors in the district in which the office is to be exercised, must be construed as taking effect as if originally incorporated in the statement, so as to mean that plaintiff was at the time of filing the statement an elector in the district.

3. Where, within the 40 days allowed by law for the institution of election contests, plaintiff filed an amendment to the contest statement previously filed, it could, if necessary, be considered a new contest, and being filed within the jurisdictional time, and the contestee, making no motion to dismiss for want of jurisdiction, would be deemed to have appeared and waived all objection to irregularities in the manner in which he was brought before the court.

4. It is not necessary that the court grant leave to amend an election contest statement in some particular form.

5. A failure to deny an averment in an election contest statement that contestant was an elector at the time and period mentioned therein is an admission of that fact rendering proof unnecessary.

6. An admission, on the last day of trial of an election contest, that plaintiff and defendant were electors of the district, would be construed as an admission of electorship as alleged in the respective pleadings, and was sufficient to support a finding of residence as alleged.

7. Under Code Civ. Proc. §§ 73, 74, providing that a superior court is always open, except on legal holidays, and may sit at any time, where

\*Rehearing denied.

the findings were filed the day after the close of the evidence it would be presumed that the court regularly adjourned until that day, although the record failed to recite an adjournment.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Proceeding to contest an election by Gillis Doty against Thomas Jenkins. From a judgment for plaintiff, defendant appeals. Affirmed.

Devlin & Devlin and James B. Devine, for appellant. A. L. Shinn and R. T. McKisick, for respondent.

SHAW, J. This was a proceeding to contest the election of the defendant to the office of member of the board of supervisors of the Fifth District of Sacramento county. The plaintiff had judgment in the court below, and the defendant appeals.

The original statement of contest was filed November 29, 1902. The allegation of the original statement showing the right of the contestant to maintain the contest was contained in paragraph 3 of the statement, and did not state that the contestant was an elector of the supervisorial district. On the last day of the trial the plaintiff, by leave of court, over the objection of the defendant, amended paragraph 3 of the statement of contest so as to make it read as follows, the words inserted by the amendment being italicized: "That plaintiff is now, and for more than two years last past has been, a resident and elector of the county of Sacramento, state of California, and of the fifth supervisorial district therein." This amendment was made on the 18th day of December following the election in November, 1902, and within 40 days after the return day thereof. The appellant contends that the amendment must be considered as taking effect on the day it was made, and is to be construed as an allegation that at that time the plaintiff was an elector of the district, and that it cannot be construed to mean that he had been theretofore such elector. From this appellant reasons that, as section 1111, Code Civ. Proc., gives the right to contest only to one who is an elector of the district in which the office is to be exercised, the statement is insufficient to give a right of action, or to give the court jurisdiction to entertain the same. An amendment to a statement of contest is to be construed by the same rule as an amendment to a complaint. Unless from the nature of the fact alleged, or otherwise, the contrary appears, it is to be deemed a statement of facts existing at the commencement of the action or proceeding. The amendment in question must be thus construed. It takes effect as if it had been originally incorporated in the statement. And, even if this were to be considered as the filing of a statement at the date of the filing of the amendment, the court would still have jurisdiction, for it was within the 40 days allowed for the initiation of a contest,

and, although the proceeding would be irregular, it would not be void, nor would the irregularity be sufficient in this case to require a reversal. No motion was made to dismiss the proceeding for want of jurisdiction. If the point had been made, the contestant could then have begun new proceedings. By allowing the time to lapse, the contestee must be deemed to have appeared to the contest as a new proceeding, if it is necessary to consider it such, and to have waived any objection to the manner in which he was brought before the court. There is nothing in the objection that the court did not grant leave to make the amendment in the form in which it appears. In allowing amendments the court does not usually take pains to state in exact terms the allegation to be allowed. It is clear that the only purpose of the amendment was to make the statement show that the plaintiff was entitled to maintain the proceeding, and that both court and counsel, in speaking of the matter, were referring to such an amendment as would be effectual for that purpose, and intended precisely such an amendment as the contestant made.

The appellant further contends that the evidence is insufficient to prove the fact that the contestant was such elector at the time and for the period mentioned. No evidence was necessary, for the defendant had an opportunity to answer the amendment, and failed to do so. It therefore stands as an admitted fact in the case. Moreover, the bill of exceptions contains this statement: "It was admitted that both plaintiff \* \* \* and defendant were electors of the said fifth supervisorial district." This admission was made apparently on the last day of the trial, and presumably immediately after the amendment of the statement aforesaid. The admission is not specific as to the time to which it relates, but, in view of the pleadings, it must be construed as an admission that they were electors, as alleged in their respective pleadings, and is sufficient to support the finding with respect to the allegation in question, even if such a finding had been necessary.

Another objection is that the court lost jurisdiction to enter judgment because, as appears from the bill of exceptions, the trial closed on December 18th, and findings were filed and judgment entered on the day following. We do not think there is any merit in this point. A formal adjournment is not necessary as a part of the record in the case, and, in the absence of any showing to the contrary, it will be presumed that the court adjourned until next day. A superior court is always open, except on legal holidays, and may sit at any time. Code Civ. Proc. §§ 73, 74. The trial is not ended until the filing of the findings, and as this took place on the next day, after the close of the evidence, we will presume that the court regularly adjourned until that day.

The plaintiff and the defendant were opposing candidates for the office in question. By the election's returns, as compiled by the canvassing board, the defendant appeared to have received a majority of 5, and was duly declared elected by that board. Upon the trial of the contest the court found that a number of the ballots counted by election officers were illegal, and refused to count them, the result of which was that upon the count as made by the court the plaintiff received a majority of 44 votes, and judgment was given declaring him elected accordingly. The appellant objects to a great many of the ballots which were counted by the court in favor of the respondent, and also to the action of the court in refusing to count numerous ballots apparently for the appellant, but which were rejected because of illegal marks thereon. We have carefully examined the ballots, and find that of the ballots for the appellant which the court refused to count for him there were only 16 concerning which there could be any doubt that the court correctly rejected them, and of the ballots counted for the respondent, over the objection of appellant, there are 14 which contain marks which have not by this court been held to be lawful. Giving the appellant the benefit of all these doubtful ballots, the result would be that 30 would be taken from the majority of 44 found by the court, leaving the respondent still with a majority of 14. Under these circumstances, we do not deem it necessary to notice the ballots in detail. The law respecting the form of the ballots and the rules by which they are to be rejected upon a contest was amended in material respects by the last Legislature, and for that reason a consideration by this court of the previous law relating to these subjects would serve no useful purpose. We find no error in the record sufficient to justify a reversal.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

142 Cal. 519

GREER v. GREER et al. (L. A. 1,224.)  
(Supreme Court of California. March 15, 1904.)

DIVORCE—PERMANENT ALIMONY—DESERTION—  
RES JUDICATA—EVIDENCE—JUDG-  
MENT ROLL.

1. Plaintiff in July, 1898, commenced an action for permanent alimony, and to set aside a deed executed by her husband; alleging that her husband had deserted her, and had, in fraud of her marital rights, conveyed, without consideration, his separate property to his daughter. Subsequently plaintiff commenced an action for divorce, setting forth the desertion of her husband from the date alleged in the first action, and his failure to provide for her, and praying for the setting aside of the conveyance sued on in the first action. *Held*, that the judgment in the first action, to the effect that plaintiff was

not entitled to recover alimony, and that defendants were entitled to judgment, was a bar to the second action, so far as it related to desertion, and to the claim that the deed was fraudulent.

2. In an action for divorce, brought by a wife on the ground of desertion and nonsupport, and praying for the setting aside of a deed made by the husband, the judgment roll in a prior action by her for permanent alimony, and to set aside the deed, based on the ground of desertion, and that the deed was in fraud of her marital rights, was admissible in evidence, though an appeal from the judgment was pending.

Commissioners' Decision. Department 2. Appeal from Superior Court, Kern County; Geo. E. Church, Judge.

Action by Johanna Greer against James Greer and others. From a judgment for plaintiff, defendants appeal. Reversed.

See 67 Pac. 20.

C. M. Fickert, for appellants. T. M. McNamara, C. E. Arnold, and S. W. Mahon, for respondent.

COOPER, C. This is an appeal from the judgment, and from an order denying defendants' motion for a new trial. This action was commenced May 4, 1900. It is found, in substance, that the defendant Greer willfully deserted the plaintiff on the 4th day of June, 1898, and that such desertion has ever since continued; that at the time of said desertion the defendant Greer was the owner, as his separate property, of certain lands described in the complaint, of the value of \$4,000; that on June 6, 1898, said defendant Greer, with the intent of cheating and defrauding the plaintiff out of her marital rights, and for the purpose of preventing said real property from being subjected to any liens for the support and maintenance of plaintiff, and without consideration, made a deed of conveyance to defendant Catherine Ann Belshaw, his daughter, and placed the same upon record; that said deed was made without the knowledge of the grantee therein named, and was never delivered; that plaintiff is in poor health, and has no means of support. The judgment granted plaintiff a divorce, and directed the payment to her by defendant Greer of \$100 counsel fees and costs of suit, and \$25 per month alimony during her life, and that all said sums be made a lien upon the said real estate; that the conveyance made by defendant Greer to defendant Catherine Ann Belshaw be canceled; and that so much of the real estate as shall be found necessary be sold to pay the several amounts and the expenses of sale. Defendants pleaded, by way of abatement, a judgment, which had been suspended by appeal to this court, in a prior action between the same plaintiff, as plaintiff, and the same defendants, as defendants, involving the question of desertion, the conveyance sought to be set aside in this case, and alimony sought to be recovered. 67 Pac. 20. The record shows that on the 6th day of July, 1898, the plaintiff commenced an action against these defendants in which she sought to recover permanent alimony, costs,

and counsel fees against defendant Greer; to set aside the deed to Catherine Ann Belshaw; and to have the alimony, costs, and counsel fees made a lien upon the same lands described in the complaint in the case at bar. The allegation as to Greer's desertion in the former case was "that on or about the 4th day of June, 1898, and before the commencement of this action, said defendant James Greer, willfully disregarding the solemnity of his marriage vows, willfully and without cause, or any sufficient reason, deserted and abandoned this plaintiff, and ever since has and still continues to willfully and without cause desert and abandon this plaintiff, and to live separate and apart from her, without any sufficient cause or reason, and against her will, wish, or consent." The language in the complaint at bar as to desertion is in the exact words above quoted. The deed sought to be set aside in each case is copied verbatim at literatim in each complaint. In the action pleaded by way of defense, the allegation as to the deed is as follows: "That said defendant James Greer never received any money or consideration whatever for or on account of the execution of said instrument in writing by him as aforesaid; that said defendant James Greer executed, acknowledged, and caused said instrument in writing to be recorded as aforesaid for the sole purpose of cheating and depriving this plaintiff of her marital rights in and to the real estate described in said instrument, and to prevent said real property from being subjected to a lien for the support and maintenance of this plaintiff." The allegation as to the deed in the complaint at bar is in the precise words quoted from the complaint in the former action. Many other allegations in the present case are copied substantially in the language of the complaint in the former action. The only material difference in the two cases is that the complaint here alleges the desertion to have continued up to the 4th day of May, 1900, while in the former case it was alleged to have continued up to July 8, 1898; and in the case at bar it is alleged, as an additional ground for divorce, that for more than one year prior to the commencement of the action the defendant Greer had willfully neglected to provide for plaintiff the common necessities of life, having the ability so to do. In the present action, plaintiff seeks a divorce, which was not sought in the former action.

It will thus be readily seen that, as to the right of plaintiff to divorce on the ground of failure to provide, should her evidence support her complaint, the plea as to the former suspended judgment as to defendant Greer was not good. If at the time this action was commenced the allegations of the plaintiff's complaint as to failure to provide were true, the plaintiff was entitled to a divorce, and probably to alimony and counsel fees, payable out of any property owned by defendant Greer, and which had not been disposed

of in the former action. The court found the allegations to be true as to the desertion. As to the question of the lands conveyed by the deed, and of the desertion on June 4, 1898, the two cases involve the same subject-matter in the same right between the same parties. The former action had been tried, findings filed, and judgment entered at the time of the trial of this one, and was then on appeal to this court. In the former case the court found that defendant Greer did not on the 4th day of June, 1898, or at any time before the commencement of the action, desert the plaintiff, but that, by reason of cruel treatment by plaintiff, defendant Greer was compelled at various times to leave his home, and that on the 4th day of June, 1898, he left his home, and went to the Veterans' Home, in Napa county, for the purpose of receiving medical treatment; that he left plaintiff in possession of the house and household furniture, the stock of provisions on hand, four head of horned cattle, two head of horses, all the farming tools and implements used on the premises, and \$525 in money, the said money being one-half the proceeds of sales of personal property; that besides this the plaintiff owned 160 acres of land, as her separate property; that the amount of property so left with plaintiff was sufficient for her support for at least nine months from June 8, 1898; that the real estate conveyed by the defendant Greer to his daughter, Catherine Ann Belshaw, was at the time of such conveyance the separate property of said defendant Greer.

The judgment of the court in the former case was that plaintiff was not entitled to recover alimony, counsel fees, or costs, and that defendants were entitled to judgment. That case was afterwards affirmed here (Greer v. Greer, 135 Cal. 121, 67 Pac. 20), and this court said: "And, as the right to have the transfer avoided depended on proof of the willful desertion alleged, which failed, it was not necessary to find on the issue of fraud. If the husband did not desert his wife, she could not question his right to dispose of his separate property. Section 172 of the Civil Code, prohibiting the husband, without the consent of the wife, from disposing of the community property without consideration, has no bearing on the case." The plaintiff in the former action brought the defendants into court for the purpose, among other things, of having the transfer to Catherine Ann Belshaw set aside and annulled on the ground that it was made without consideration and in fraud of plaintiff's marital rights, and for the alleged reason that defendant Greer had deserted the plaintiff. The court heard the parties, and held the transfer to be valid as against the plaintiff. It was held that the defendant Greer had not deserted the plaintiff at the time he made such transfer, that he divided his own personal property with her, and that she had 160 acres of land of her own. Be-

ing his own separate property, he had the right, in the absence of fraud, to convey it to his daughter. If the conveyance was valid when made, it could not afterwards, by any act of defendant Greer, become invalid. *Metzler v. Metzler*, 99 Ind. 388; *Barrow et al. v. Barrow*, 108 Ind. 345, 9 N. E. 371; *Bishop on Marriage, Divorce & Separation*, vol. 2, § 1105, and cases cited. And he had the right to provide for his daughter. He was an old man, and went to the Veterans' Home for treatment. The plaintiff was 49 years old when this case was tried. The parties were married in December, 1894, and lived together only about 3½ years. The defendant Greer left her in possession of the household furniture and certain personal property, and her own 160 acres. He also gave her one-half the proceeds of sales of personal property. If the deed made by defendant Greer having been once attacked by plaintiff, and found valid by the judgment of a court of competent jurisdiction, can again be attacked by the same plaintiff against the same parties in a different suit, there would be no end to the litigation. The plaintiff might bring a separate action for a divorce every year on each of the different causes set forth in the Code, and each time claim that she had the right to investigate the validity of the transfer. It is evident that such proceedings might be kept up beyond the lifetime of defendant Greer. It is the rule that when a matter is once fairly before the court, and adjudicated between the same parties, involving the same question, it cannot afterwards be litigated, even upon grounds not disclosed in the former case. *Wheeler v. Eldred*, 137 Cal. 37, 69 Pac. 619; *Bingham v. Kearney*, 136 Cal. 175, 68 Pac. 597. Desertion is the voluntary separation of one of the married parties from the other, with intent to desert. Civ. Code, § 95. The fact that in this case it was alleged to have continued up to the commencement of the action is not equivalent to an allegation of desertion at a later date than that alleged in the complaint. The act of desertion is the same in each case. In the former case it was not necessary that it should not have continued for a year, in order to entitle plaintiff to maintain her action for alimony. *Hardy v. Hardy*, 97 Cal. 130, 31 Pac. 907. It was there said: "The defendants' plea herein, that this judgment is a bar to the present action, should have been sustained. The contention of the plaintiff that the cause of action set forth in the present complaint is different from that in the former action, for the reason that at that time the desertion claimed to have taken place on the 19th day of December, 1887, had not become a ground for a divorce, because it had not been continued for a year, cannot be maintained. The desertion by the husband which will authorize the wife to maintain an action for permanent support must be of the same character as would

authorize her to maintain an action for a divorce, but, while the statute prescribes that her application for a divorce must be denied unless the desertion has continued for a year, it has not placed any such limitation upon her right to maintain this action." It is stated in *Bishop on Marriage, Divorce & Separation*, vol. 2, § 1595: "It is fundamental in judicial practice that parties can litigate to judgment the same thing but once, the consequence whereof is that, after a divorce suit has terminated in favor of either the plaintiff or the defendant, no second suit can be brought to try anew anything within the scope of this one, whether in fact it was considered therein or not." In this case the same principle applies, although the former suit was not for a divorce. Its objects were to obtain alimony, to set aside the deed to Greer's daughter, and to recover costs. These objects could not be obtained unless the proof showed the desertion June 4, 1898. The desertion was the wrong of which defendant Greer was accused. In *Fera v. Fera*, 98 Mass. 155, it was held that a judgment in favor of the husband in an action by the wife for divorce from bed and board on the ground of extreme cruelty and failure to provide, was a bar to a subsequent action for divorce, alleging five years' continuance of the same desertion. It was said that, although the first action was not for a divorce, yet the proceedings had a direct and intimate relation to each other. In the later case of *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765, it was held that a decree in a wife's favor for separate maintenance while living apart from her husband for justifiable cause was a bar to a suit by the husband for a divorce on the ground of the alleged desertion of the wife. See, also, *Dwyer v. Dwyer*, 28 Mo. App. 647. As the former case was pending on appeal, the judgment could not have been pleaded as an estoppel. The plea of "action pending," in its proper sense, did not apply. But the judgment roll in the former suit was properly admitted in evidence for the purpose of showing that the question as to the deed to Greer's daughter and the desertion had been adjudicated in a proper tribunal between the same parties. The jurisdiction, as to the deed, and the alleged desertion, had vested in another suit in the superior court, and was then pending on appeal to this court. The superior court, although having jurisdiction in this case as to the cause of divorce for willful neglect, and as to any proper alimony or counsel fees incidental thereto, to be made payable out of other property than that which had been the subject of litigation in the prior suit, should not have retried the validity of the transfer, nor the alleged desertion. The rule as to a judgment suspended by appeal, and the reason therefor, are well stated in *Smith v. Smith*, 134 Cal. 117, 66 Pac. 81. It was there said by Temple J., speaking for the



court: "In this case the defendants could not have successfully interposed the plea of another action pending, and they did not ask for a continuance. They can only get such relief, therefore, as they could show themselves entitled to while the judgment in the divorce suit was so suspended that it could not be received as evidence that the matters involved in it had been finally adjudicated. I think, even then, that the defendants had rights which could have been, and which ought to have been, preserved for them." As the findings and judgment in this case proceed upon the theory that the defendant is still the owner of the land conveyed to his daughter, and that he deserted the plaintiff, and as the court did not find on the issue as to willful neglect, we cannot see our way clear to affirm any part of the judgment. It may be that, with this part of the case eliminated, the judgment would have been different in other respects.

It is advised that the judgment and order be reversed, with directions to the court below to make new findings upon the evidence introduced at the former trial, and such other evidence as may be offered by either party, under the issues, in accordance with this opinion, and to cause judgment to be entered accordingly.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the court below to make new findings upon the evidence introduced at the former trial, and such other evidence as may be offered by either party, under the issues, in accordance with this opinion, and to cause judgment to be entered accordingly: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 501

In re ELLIOTT et al. (L. A. 1587.)

(Supreme Court of California. Aug. 29, 1904.)

PARTIES TO ACTIONS—JOINING IN CONTRACT—INTERVENTION IN SPECIAL COLLATERAL PROCEEDING—APPEAL AND CERTIORARI—PERSONS NOT PARTIES TO RECORD.

1. One by merely making himself party to a contract, which is filed as a stipulation in an action, and embodied in orders made therein, does not make himself a party to the action.

2. One by intervening in opposition to the application of a receiver appointed in an action, to make a certain expenditure, and by consenting to the order settling the receiver's account, does not become a party to the action, or any other special and collateral proceeding therein, other than that in which he intervenes.

3. Code Civ. Proc. § 1069, authorizing a party beneficially interested to sue out a writ of certiorari, as well as section 938, allowing a party aggrieved to appeal, gives a right only to a party to the record.

4. One not a party to the record, whose rights or interests are injuriously affected by a judgment or order, may make himself a party by motion to set aside the judgment or order, and

then, if his motion is denied, appeal, if the judgment or order was appealable, or, if the contrary is the case, sue out a writ of certiorari.

In Bank. Application of J. M. Elliott and others for a writ of certiorari to review certain orders of the superior court of San Diego county. Respondent demurs to the petition. Demurrer sustained.

Jas. A. Gibson, Wm. J. Hunsaker, and S. C. Ward, for petitioners. J. Wade McDonald and C. H. Garoutte, for respondents. Samuel M. Shortridge, in pro. per.

BEATTY, C. J. The petitioners herein seek a review upon certiorari of certain orders of the superior court of San Diego county made after final judgment in a cause entitled "Free Gold Mining Company, a corporation, Plaintiff, v. Spliers et al., Defendants." Upon the filing of the petition an order was made requiring the respondent to show cause why a writ of certiorari should not issue as prayed. At the appointed time the judge of the superior court and the parties at whose instance and for whose benefit the orders in question were made appeared, and severally demurred to the petition upon the ground that the facts alleged were insufficient to justify the issuance of the writ. One of the parties also assigned as additional ground of demurrer that the petitioners were without legal capacity to maintain the proceeding. The petition, with its annexed exhibits, is voluminous, and the transactions which it details are intricate and confusing, but the essence of the matter may be sufficiently stated in comparatively brief space. The Golden Cross Mining & Milling Company (a corporation) was the owner of a number of mining claims in San Diego county, together with a quantity of mining machinery, lands, reduction works, etc. Being largely indebted to James Spliers and others, the corporation, on the 4th of January, 1896, conveyed the whole of said property to Spliers and certain co-trustees for the purpose of securing its creditors. Spliers and his co-trustees, claiming the right so to do according to the terms of the trust, took possession of the property, and undertook to operate it for the benefit of the creditors; but finding, as they alleged, that its operation resulted in a loss, they advertised it for sale. To save the property from being sold at a sacrifice by its trustees, the Golden Cross Company sold and conveyed it to another corporation, the Free Gold Mining & Milling Company, which, in consideration of the conveyance, agreed to pay all the debts of the Golden Cross Company to Spliers and others, and to pay to that corporation one million of dollars in addition, which payment was secured by a lien expressly reserved in the deed of conveyance. As a part of the same transaction the Golden Cross Company also assigned and transferred to the Free Gold Company all its claims, demands, and causes of action against Spliers

and his co-trustees for damages resulting from their alleged wrongful acts, in taking the property into their possession and injuring and impairing its value by wasteful, unskillful, and negligent methods of operation. Upon receiving this conveyance and assignment the Free Gold Company commenced the action against Splers and the other trustees, in the course of which the orders in question here purport to have been made.

The complaint in said action contained a number of counts setting forth different causes of action, and prayed judgment for the recovery of possession of the property, quieting the title thereto, and damages. It prayed also for an injunction pendente lite and for the appointment of a receiver. Upon the filing of the complaint a receiver was appointed, with authority to operate the mines and works. Before any trial of the cause the parties to the action settled all the matters in controversy between them by a compromise agreement dated the 26th day of November, 1897. By this agreement the plaintiff released the defendants from all claims for damages, and undertook to pay the reasonable fees of their attorneys in the action; the several amounts due to the creditors represented by Splers and his co-trustees were ascertained and scheduled, and a list was made of certain other creditors whose claims were to be paid by the Golden Cross and Free Gold Companies directly, and without the intervention of the trustees or receiver. Finally, it was agreed that the receivership should be continued until all the creditors represented by Splers and his co-trustees were paid in full, after which the property remaining in the hands of the receiver should be restored to the possession of the plaintiff, the Free Gold Company. By a supplemental agreement the claims of certain other creditors were adjusted and put upon the same footing as those previously represented by the trustees, and the order of payment as between these creditors, and those to be paid directly by the Free Gold and Golden Cross Companies was settled. Preference was given to the former to the extent of 5 per cent. of their respective claims on each monthly dividend, and, if any surplus remained to be divided, the latter were to share pro rata in the surplus. To these agreements the Golden Cross Company and the deferred creditors (T. S. Fuller, Mrs. E. C. Fuller, and Mary E. Hedges, petitioners herein) assented, and they were embodied in and became orders of court in the said action of Free Gold Co. v. Splers et al. In pursuance of these orders the successive receivers in the cause have operated the properties, and out of the net proceeds have paid in full the claims of the creditors represented by the defendants Splers and his co-trustees. It is not directly alleged that the claims of the Fullers and Mary E. Hedges have not been paid, but it appears inferential-

ly that a portion, at least, of their respective claims is still unsatisfied. No part of the \$1,000,000 purchase money payable to the Golden Cross Company has been paid, and that claim, together with the lien reserved for its security, is held by the petitioner, J. M. Elliott, under an assignment in trust for certain creditors of the Golden Cross Company and its stockholders. On May 21, 1903, all the creditors represented by Splers and his co-trustees having been fully paid, and they having executed a reconveyance of the property held by them in trust, a final judgment was entered in the action of Free Gold Co. v. Splers et al., in accordance with the agreement of November, 1897, and the supplemental agreement of April, 1898, and the orders of court based thereon. By this judgment Splers and his codefendants were exonerated from all claims for damages, etc., and the title of the Free Gold Company to all the property mentioned and described in the several deeds of trust was quieted. Though expressly made final as between the parties, the judgment contained the following reservation: "But as to the pending receivership, the creditors of Isaac Trumbo's late receivership, all matters of administration, accounting, dealing, and transactions of the present receiver, Pauly, this cause and jurisdiction thereof is hereby expressly retained, reserved, and continued for such further action, orders, and proceedings by and before this court as shall be meet and proper." On March 18, 1904, an order was entered settling the final account of Chas. W. Pauly as receiver. By this order he was directed to pay certain expenses of the receivership incurred by him, including his own compensation, to continue the operation of the mines and works until the 30th day of April, to make a clean-up on that date, and on the following day deliver possession of the mines and works to the Free Gold Company, and thereupon to make a further supplemental and final report, upon approval of which he would be discharged. On March 23, 1904, Samuel M. Shortridge filed a petition asking the court to make an order ascertaining and allowing to him a reasonable compensation for his services as attorney for Trumbo, who had acted as receiver from September, 1899, to April, 1901, and directing payment of the same by Receiver Pauly out of the funds in his hands. April 4, 1904, Jefferson Chandler filed a petition setting out the nature and value of his services as attorney for the plaintiff in the action, the Free Gold Company, and asking the court to determine the amount justly due to him as compensation for said services, and to make an order requiring payment of the same by the receiver, and continuing the receivership until the sum so fixed should be paid. On the 9th day of April, 1904, these applications came on to be heard without notice to any of these petitioners. At the time of said hearing, without filing

any petitions, and likewise without notice to any of these petitioners, Samuel M. Shortridge and J. Wade McDonald appeared and moved the court to ascertain, allow, and order paid to them the value of their services as attorneys for the plaintiff in the action. The court thereupon made and entered an order allowing Shortridge \$4,500 for his services as attorney for Trumbo, and ordered the same paid forthwith out of the funds then in the hands of the receiver. By a separate order it was found that the reasonable value of the services of Chandler as attorney for plaintiff was \$15,000, of Shortridge \$10,000, of McDonald \$2,500, and the receiver was ordered to pay these sums, aggregating \$27,500, out of the proceeds of the property in his hands, and the receivership was continued in force until such payment should be made, the former order terminating the receivership on the 30th of April being modified accordingly. These two orders of April 9th allowing Shortridge \$4,500 as attorney for Receiver Trumbo, and Chandler, Shortridge, and McDonald \$27,500 as attorneys for the plaintiff, and prolonging the receivership to enable the receiver to realize from the working of the mines funds sufficient to pay the same, are the orders which the petitioners herein seek to have reviewed upon the ground that the superior court, in making them, exceeded its jurisdiction.

In support of their demurrers the respondents urge various objections to the proceedings by certiorari. In the first place, they say the petitioners either are parties to the action of the Free Gold Company v. Spiers et al., or they are not; that, if they are parties to that action within the meaning of section 938 of the Code of Civil Procedure, they have an undoubted right to appeal from these orders, made after final judgment; and, even if they are not parties to the action, if they are parties to the special proceedings to obtain the allowance of attorneys' fees, they have an equally unquestionable right of appeal from the orders requiring the receiver to pay the allowances out of the funds in his hands, because such orders are, in effect, judgments against them in a collateral proceeding growing out of the action, as was held in *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604, and *Los Angeles v. Water Co.*, 134 Cal. 121, 66 Pac. 198, and if they can appeal from the orders they cannot invoke a review upon certiorari. Section 1068, Code Civ. Proc. If, on the other hand, the petitioners are not parties to the proceeding or to the action, then it is contended, though they may be persons aggrieved by the orders, they are not parties beneficially interested in having them annulled, and for that reason cannot proceed by certiorari.

There is no doubt that a right of appeal excludes the right to proceed by certiorari, and it is equally clear that, if the petitioners are parties to the action or the proceeding, they have the right of appeal. But there is noth-

ing in the petition which lends any support to the claim that the petitioners are parties within the meaning of section 938 of the Code of Civil Procedure as it has been construed in a series of decisions of this court commencing with the dictum in *Senter v. De Bernal*, 38 Cal. 637, and coming down as late as *Estate of McDermott*, 127 Cal. 450, 59 Pac. 783. A review of these cases would perhaps not disclose any very satisfactory reason for construing section 938 so narrowly as to deny the right of direct appeal from an order or judgment to any person shown by the record to be injuriously affected by it, especially when it is void on its face. When not void on its face, a right of direct appeal would be of no value to a person not a party, because he would have had no opportunity of getting into the record the matters necessary to show error or excess of jurisdiction. But it has been settled as a rule of practice by a long series of decisions that only a party to the record can appeal, and other rules of practice equally well settled have remedied any inconvenience that might have resulted from this construction of section 938; so that there is no reason now to depart from it, if there ever was. These petitioners do not appear, from the allegations of their petition, ever to have been parties to the record, either of the action or the proceeding resulting in the orders of which they seek a review. They did, it is true, assent to and ratify the agreements of November, 1897, and April, 1898, which were filed as stipulations in the action of *Free Gold Co. v. Spiers et al.*, and embodied in orders of the court, but they did not thereby become parties to that action. Their assent to those agreements was not given for the purpose of placing themselves and all their interest in the property in controversy within the jurisdiction of the court, or even of authorizing the entry of the orders, but merely for the purpose of making the contract between the parties effective and binding so far, and only so far, as it affected their interest in the property. In other words, they made themselves parties to the contract, but not parties to the action. Respondents, in their argument on this point, call attention to some matters which do not appear in the petition, and cannot be noticed in dealing with the demurrers. But, even if these matters could be considered, they would not affect our conclusion. The records of this court show that certain appeals have been prosecuted by some of the petitioners from an order made in the action of *Free Gold Co. v. Spiers et al.*, 135 Cal. 130, 67 Pac. 61; 186 Cal. 484, 69 Pac. 143. It appears from these cases that during the time Trumbo was acting as receiver some of the petitioners were allowed to intervene in opposition to his application for leave to install a cyanide plant for working the tailings from the reduction works, and they took their several appeals from the order granting the application. But

this intervention was only in that special proceeding. It did not make them parties to the action generally, and did not, of course, make them parties to another special and collateral proceeding in the action. Nor did their consent given to the order settling Trumbo's account make them parties to the action, or to any proceeding except that in which they specially intervened. This evidently was the view of respondents themselves, for, if they had regarded these petitioners as parties to the action, or proper parties to the proceedings, they would not have taken the orders in question without notice to them. It is clear, we think, that the petitioners are not parties to the record, and that they have no right to prosecute a direct appeal from these orders.

This brings us to the alternative proposition of the respondents that, if only parties to the record are allowed to appeal under section 938 of the Code of Civil Procedure, then none but parties to the record can invoke the remedy by certiorari under section 1069; for they contend the word "party" must be construed in the same way in both connections. By section 938 a "party aggrieved" may appeal, and by section 1069 the "party beneficially interested" may sue out a writ of review. The contention is that, if "party" in one section means party to the record of the proceeding to be reviewed, it can mean nothing less in the other. The conclusiveness of this argument, however, depends upon the assumption that the Legislature in the various sections of the Code regulating the practice in special proceedings has chosen its language with critical discrimination. But a comparison of different portions of the statute shows that it has not done so. By section 1086 it is provided that the writ of mandate must issue "upon application of the party beneficially interested." The provision, indeed, is substantially identical with that relating to the writ of review; yet no one would claim that in this connection "party" means a party on the record of an action or proceeding to which the writ of mandate is auxiliary or corrective, for ordinarily there is no such action or proceeding. To determine the true meaning of the word "party," therefor, as used in section 1069, it is necessary to look to the decisions in this and other jurisdictions defining the class of persons entitled to the remedy by certiorari. Upon this precise point we have not been greatly aided by the briefs of counsel, but we find by reference to the cases cited in the Encyclopedia and by the text-writers that the great preponderance of authority sustains the proposition that the writ will not be granted to a stranger to the record when the matter to be reviewed is the judgment or order of a court made or entered in a cause litigated inter parties. There is a class of cases like *Maxwell v. Supervisors*, 53 Cal. 389, in which the writ has been awarded to a taxpayer to review the orders of bodies like the board of

supervisors when acting judicially in matters affecting the whole body of taxpayers, and by which all are bound. These cases, however, seem to be exceptional. There being no formal parties, and no appeal or other remedy for an excess of jurisdiction, a review upon certiorari is allowed to those who are substantially the parties, and who are bound by the proceedings. Another exceptional class of cases are those which have arisen under special statutes extending the remedy. These grounds of exception, however, have no application here, and we cannot find in the decisions of this court a single case in which certiorari to review a judgment or order of a court has been issued at the suit of a stranger to the record. There is in fact another plain, speedy, and adequate remedy allowed by our practice to one whose rights or interests are injuriously affected by the judgment or by any appealable order of a court given or made in an action or proceeding to which he is not a party. He may make himself a party by moving to set aside such judgment or order, and, if his motion is denied, may, on appeal from that order, have the proceeding of which he complains reviewed not only for excess of jurisdiction, but for error. *People v. Grant*, 45 Cal. 97; *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009. It is true that in one respect this remedy is less efficacious than that by certiorari, for neither the motion nor the appeal stays the enforcement of a void order unless this court, in the exercise of its inherent power, should approve a stay bond. *Credits Com. Co. v. Superior Court*, *supra*. But, while this is an inconvenience to the party compelled to appeal, there is always the opportunity of obtaining a stay in a proper case, and the possible injury from this cause is perhaps no greater or more to be apprehended than the injury to the party claiming the benefit of an order or judgment when its enforcement is stayed by certiorari without any undertaking to indemnify him. In case of an order or judgment in excess of jurisdiction, but not appealable, and therefore reviewable only upon certiorari, the remedy could be made available to any stranger to the record injuriously affected by a resort to the same method of moving to set it aside and thereby making himself a party. And this is a practice to be commended and encouraged for its convenience, for it is to be presumed that, the attention of the court being drawn to its excess of jurisdiction, the order or judgment would be vacated on motion without the trouble and expense of certifying the record to a court of review.

Our conclusion on this point renders it unnecessary to consider other objections to the proceeding, and precludes a decision upon the merits of the controversy.

The demurrers to the petition are sustain-

ed, and the proceeding dismissed, without prejudice to the right to proceed by motion and appeal.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SHAW, J.

144 Cal. 578

**MONTECITO VALLEY WATER CO. v.  
CITY OF SANTA BARBARA**  
et al. (L. A. 1,128.)

(Supreme Court of California. Sept. 2, 1904.)

**WATER COURSES — DIVERSION — PERCOLATING  
WATERS — TUNNELS — PRESCRIPTION — COR-  
PORATIONS — POWERS — ACQUISITION OF WA-  
TER RIGHTS — INJUNCTION — PARTIES — JOIN-  
DER — PLEADING — FINDINGS — OPINION —  
JUDGMENT.**

1. While owners of land are entitled to drive tunnels therein, and to develop and use percolating waters collected thereby, they are not entitled, as against the owners of water flowing in a stream, to so construct such tunnels as to create a direct draft on the flow of the stream.

2. Where, in a suit to restrain the operation of a tunnel adjoining a stream a part of the surface flow of which was claimed by plaintiff, the court found that defendant, by means of the tunnel, wrongfully abstracted from the stream 4.16 miners' inches of water measured under a 4-inch pressure, plaintiff was not precluded from relief by a further finding that the court was unable to determine how much of such water, if permitted to flow past defendant's tunnel in its natural way, or if returned from the tunnel into the stream, would reach plaintiff's dam and point of diversion, since such finding amounted to no more than a declaration that the court could not determine that the particular water would, under natural circumstances, have reached the point of diversion, it being immaterial what particular 4.16 inches was diverted so long as a certain 4.16 inches had been withdrawn, which, in the absence of diversion, would have maintained the plane of saturation.

3. Where, in a suit to restrain the diversion of the water of a stream, the court found that defendant wrongfully diverted a certain amount of water, it was error to refuse to grant final relief by injunction and damages on the ground that the court was unable to determine what part of the water, if it had not been diverted, or if returned, would have reached plaintiff's point of diversion.

4. Where, in a suit to restrain the operation of a tunnel by reason of the alleged diversion of water from a water course, it appeared that defendant had driven a tunnel at great expense, of which plaintiff was aware, and that plaintiff also had reason to believe that the effect of the tunnel, when completed, would be to drain the waters of the creek, and in fact only 4.16 miners' inches of water was drawn therefrom, a prohibitive injunction should not be granted unless the water could not be made good to plaintiff by having the amount withdrawn returned to the stream or otherwise.

5. The bringing of an action against the alleged owner of a right to take water from a stream, who was in possession thereof, for the purpose of contesting his title, did not stop the running of limitations and prevent the perfecting of a prescriptive right as against third persons.

6. A finding of ownership, continuous use and occupation of a water right for beneficial purposes for the full prescriptive period constitutes a sufficient finding of ownership by prescription.

7. Civ. Code, § 354, subd. 4, providing that a corporation shall have the right to "hold" land, and section 1007, declaring that occupancy for the period prescribed by the Code of Civil Procedure is sufficient to bar an action for the recovery of the property, and confers a title thereto denominated a title by prescription, authorizes a corporation to acquire title by prescription notwithstanding Civ. Code, §§ 288, 360, providing that a corporation may obtain title by purchase and condemnation.

8. A single suit may be brought to enjoin several defendants from diverting water from a stream to the injury of plaintiff claiming an appropriative right to take water from the stream, though the defendants are not acting in concert, and are not joint tortfeasors.

9. Where, in a suit for the wrongful diversion of water from a stream, the court in its findings, on which its conclusions of law were based, found that the diversion did not exceed 4.16 inches, it was immaterial that the court held in an "opinion" filed that the diversion amounted to 6 inches.

10. Under Code Civ. Proc. §§ 322-325, requiring adverse possession to be actual, open, and notorious, and in hostility to plaintiff's title, and under a claim of title exclusive of any other right, which occupation shall have been continuous and uninterrupted for more than five years, and section 325, requiring payment of taxes assessed, a plea of prescriptive title was not objectionable for failure to allege that the possession was peaceable.

11. Where a tunnel alleged to have wrongfully diverted water from a stream to plaintiff's damage was openly constructed at a point only 500 feet distant from plaintiff's place of diversion, and an officer of plaintiff corporation had actual knowledge of the construction, and of its abstraction of water of the stream, and of the intention of the owners to divert the water as early as February 24, 1894, when a complaint in an action by such officer against the owners of the tunnel was verified, knowledge of the construction of the tunnel and of the diversion of the water would be imputed to the corporation.

12. Where a composition agreement entered into between certain parties had for its object the settlement of the dispute concerning the ownership of water flowing into a branch stream from a water tunnel belonging to a city, and the agreement, except in one minor clause, did not embrace the waters drained by the tunnel, such agreement did not affect the running of limitations and the acquiring of prescriptive right to the waters flowing in such tunnel by the owners thereof.

13. In a suit to restrain the wrongful diversion of water from a stream by the owners of a tunnel, a finding that defendants had diverted and applied to useful purposes all the water flowing from the tunnel in excess of the 1.43 miners' inches, such finding in effect declared that the defendants were entitled to all the water in the tunnel except the excess so fixed, and hence the omission of an additional finding as to how much water in fact the tunnel was carrying was not prejudicial to plaintiff.

14. Where, in a suit to restrain the diversion of water by means of a tunnel, the complaint did not charge a threatened extension of the tunnel, but merely a continuance of the present diversion, an injunction against a further extension of the tunnel was unauthorized.

15. Where, in a suit to restrain the wrongful diversion of water from a stream, the court found that 15 miners' inches belonging to plaintiff had been diverted, but that only 2½ inches of such diversion was chargeable to defendants, plaintiff had a complete remedy by a mandatory injunction compelling the restoration of such 2½ inches to plaintiff's supply.

¶ 8. See *Waters and Water Courses*, vol. 48, Cent. Dig. § 89.

16. Where, in a suit to restrain the diversion of water from a stream by means of a tunnel, the complaint and findings averred that a certain group of defendants had purchased from B. certain of his alleged rights to portions and amounts of the water flowing from the tunnel, and it was further alleged that all of the water flowing therefrom was unlawfully abstracted from plaintiff's supply, such purchasers were interested in the result of the litigation, and were therefore proper parties defendant.

**In Bank.** Appeal from Superior Court, Santa Barbara County.

Suit by the Montecito Valley Water Company against the city of Santa Barbara and others. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Reversed.

Geo. H. Gould and R. B. Canfield (Wm. G. Griffith, of counsel), for plaintiff. Henley O. Booth and Thos. McNulta, for defendant city of Santa Barbara. Richards & Carrier, for defendants Coleman, Stevens, Beale, Waterman, and Eaton. Henry Strong, pro se. James L. Barker, pro se. J. W. Taggart, for defendant William Gillette.

**HENSHAW, J.** Plaintiff claims and the court found it to be the owner of 15 miners' inches of the natural flow of the Cold Springs Branch of Montecito creek, which waters it carried away to nonriparian lands, and sold for beneficial purposes to the inhabitants of Montecito. At different times three separate and independent tunnels were driven by the defendants upon lands owned by them and contiguous to the creek. The portals of these tunnels were above the bed of the creek. They were driven through the native rock, in a northerly direction, following generally the line of the creek and the main branch thereof. While starting above the level of the creek, as the tunnels were driven with slighter incline than that of the natural flow of the creek, they soon were developed, and continued to be developed, below the line of the creek bed. The distances of the tunnels from the creek bed varied with the sinuosities of the stream from a few hundred to a thousand or more feet. In brief, therefore, and with substantial accuracy, it may be said that the tunnels were driven to one side of the creek, parallel with it, and below its level. The country through which the creek flows is rocky and mountainous. The mountains are composed chiefly of parallel strata of porous sandstone, some of which strata are fractured and fissured, permitting the ready seepage or percolation of water. These strata extend across the cañon and across the line of the creek, which cuts them at a right angle. They are separated from each other by parallel seams of clay, practically impervious to water, which serve to retain the waters which each stratum of sandstone has gathered. The stream is formed by meteoric waters falling upon its watershed of some  $3\frac{1}{2}$  miles. Some of these wa-

ters flow from the surface into the stream; others reach it by percolation through the sandstone stratifications.

Plaintiff, contending that the direct effect of these tunnels was to lower the plane of saturation; and to withdraw water theretofore naturally flowing in the creek into the tunnels, thus permanently impairing and reducing the supply to which it was of right entitled, brought this action against the owners of these tunnels for injunction and for monetary compensation for the value of the water of which it had already been deprived. The court made its findings and gave its judgment, from which cross-appeals are taken by all of the parties. We will first consider the cross-appeals of the plaintiff and of the defendant the city of Santa Barbara, since the determination of the principal questions presented upon these appeals will dispose generally of the main contentions of all the parties, and leave for further consideration only those peculiar to the case of each separate litigant.

First, it should be noted, as applicable to all of these appeals, that this case is radically different from that of *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 706, 64 L. R. A. 236. Here no question arises as to the use, or the right to use, or the apportionment of seepage or percolating waters by and between the owners of the overlying lands. Here the waters flow or are developed in a barren and mountainous country, are of no use upon the lands within the watershed where they are found, but are of great value to the neighboring towns, cities, and fertile valleys. Each one of the parties to this action is carrying the water to alien soil, and no claimants, even those who are riparian proprietors, pretend to use the water upon the lands from which it is obtained. In *Katz v. Walkinshaw* the condition presented was that of a well-defined underground catchment basin; a subterranean lake, so to speak, loosely filled with gravels. The lands above this subterranean basin were valuable because of the waters beneath, and such of the water as was taken from this basin and used upon its superior lands found its way back to the source of supply as surely as does such water when used by a riparian proprietor of a flowing stream within its watershed. In *Katz v. Walkinshaw* the controversy arose between the owners of such superior lands upon the one hand and a defendant water company upon the other, which, tapping the subterranean basin, was draining its waters for use upon lands without the limits of the basin, which use, if continued, threatened the impairment and destruction of all the overlying lands. The main question which this court was called upon to consider, and did consider and decide, was whether the common-law doctrine of absolute ownership in percolating water—the *cujus solum* doctrine—was or was not, under the peculiar

conditions existing in this state, subject to just limitation under the doctrine of *sic utere tuo*; and this court, recognizing the inevitable injury that must be worked to private interests whichever rule should be held to apply, after much deliberation decided that, however differently the rule might be applied in states and countries well and regularly supplied by rainfalls, that in this state, with its great arid stretches, its seasons of drought, and its irregular meteoric water supply, percolating waters, when circumstances of hardship or injury should be presented in some particular case, must be held under the rule and doctrine of *sic utere*.

One more general observation pertinent to the whole case should be made. The right is unquestioned, and plaintiff itself nowhere disputes the right, of these defendants to drive their tunnels, to develop, take, and use any and all new waters which they may thus find. Plaintiff's contention, however, is that the effect of these tunnels below the line of the surface of the flowing stream is first to draw into the tunnels the waters of the saturated sandstone strata above (which saturated strata under normal conditions form a support to the flowing waters of the stream), and thus create a direct draft upon the flow of the stream itself, so that it no longer follows its natural course and bed, but sinks into the lower tunnels, which themselves practically, efficiently, and absolutely form new channels in place of the original surface stream. This effect of the tunnels is denied by the defendants, and this issue and the court's finding upon it present the principal question in the case.

#### Cross-Appeals of Plaintiff and City of Santa Barbara.

The court, after finding that the plaintiff was entitled of first right to the natural flow of the creek to the extent of 15 miners' inches, and that it was devoting this water to a public use, declared (finding No. 9): "That the said tunnels have pierced the strata hereinbefore mentioned, and have drawn off the water stored in said strata, and lowered the planes of saturation in said strata (which said planes of saturation had previously thereto supported the flow of water in said creek), and caused the voids and crevices in said strata to be in part emptied of the water contained therein, and caused the waters of said creek and said tributary springs and cienegas to be in part drawn into said voids and crevices and to enter said strata, and to pass along said strata and into said tunnels and through the same, and that the said tunnels have caused the partial absorption as aforesaid of the flow of said creek so that no water at all flows down the main branch thereof below the junction of the west fork with said main branch nor over the falls on said main branch, which

are about 4,500 feet above plaintiff's aforesaid dam, nor for a long distance above said falls, and so that only for a short time during heavy rains does any water flow down the east branch thereof into said main branch, but the flow of said creek is partially absorbed as aforesaid into said strata, and passes in part into and through said tunnels, and is in part given out gradually by the flow of said tunnels from the mouths thereof, and that partially by the influence of said tunnels said creek has been destroyed as aforesaid." And declared as to the city of Santa Barbara (finding No. 8): "That by means of said tunnel said defendant city has since the commencement of this action and prior thereto abstracted and diverted, and still abstracts and diverts, four and sixteen one-hundredths (4.16) miners' inches of water, measured under a four-inch pressure, from the main fork (sometime called the West Fork) of said Cold Springs Branch, and said quantity of water now passes into and through said tunnel, and not in its natural and accustomed channel; \* \* \* that the said city intends to continue to divert and use said waters as aforesaid, and to sell the same, unless restrained by the order of this court." Again (finding No. 11): "That since the commencement of this action and prior thereto the defendant city of Santa Barbara has, by means of its tunnel aforesaid, abstracted from said Cold Springs Branch a portion of the flow thereof amounting to four and sixteen one-hundredths (4.16) miners' inches of water, measured under a four-inch pressure, which amount of water said city of Santa Barbara has not returned into said stream, but has diverted and applied to its own use, and has sold for large sums of money, which said city has received therefor and retained." And still further (finding No. 13): "That none of the water developed or obtained by or through the city tunnel, other than said amount of four and sixteen one-hundredths (4.16) inches, measured under a four-inch pressure, is or has at any time been a part of said stream, or abstracted therefrom. On the contrary, all of said water developed and obtained by and through said city tunnel, other than said four and sixteen one-hundredths (4.16) inches, measured under a four-inch pressure, are percolating waters, no part of which were ever a part of said stream, or necessary to the protection or support thereof." And lastly (finding No. 17): "That the court is unable to find or determine from the evidence in this case whether or not all or any part, and, if a part, what part, of said four and sixteen one-hundredths (4.16) inches of water abstracted from said stream by said city tunnel would, if permitted to flow by said city tunnel in its natural and accustomed way, or if returned from said city tunnel to said stream, reach plaintiff's dam and point of diversion." Following these findings the court announced the following conclusion of law (No. 4), upon

which judgment was accordingly entered: "That, in order that equity may be done to all parties herein, leave ought to be and is granted to plaintiff and defendant city of Santa Barbara, and to each of them, and to all and any other persons claiming any interest with, through, or under them, or either of them, in or to said four and sixteen one-hundredths (4.16) inches of water hereinafter in this paragraph mentioned, to bring another action to determine whether or not all or any part, and, if a part, what part, of said four and sixteen one-hundredths (4.16) inches of water abstracted from said city tunnel would, if permitted to flow by said city tunnel in its natural and accustomed way, or if returned from said city tunnel to said stream, reach plaintiff's said dam and point of diversion; and for like reason leave ought to be and is granted to plaintiff to bring another action to determine the amount of money received by said city of Santa Barbara from the sale of all or such part, if any, of said four and sixteen one-hundredths (4.16) inches of water as would reach plaintiff's said dam and point of diversion if permitted to flow by said city tunnel in its natural and accustomed way, or if returned from said city tunnel to said stream, and to compel said city of Santa Barbara to account to plaintiff therefor."

It would unnecessarily and uselessly prolong this consideration to enter into a discussion of the evidence bearing upon finding 9 of the court. It must suffice to say that the evidence justified the court's conclusion that the tunnels did draw into themselves a part of the natural flow of the creek. But it is contended that, even so, these waters were percolating waters, which had so far left the stream as to have lost their distinctive character as part of its flow, within the meaning of *Vineland Irrigation Dist. v. Azusa Irrigation Co.*, 126 Cal. 496, 58 Pac. 1057, 46 L. R. A. 820, where it is said that percolating waters "may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream, which have so far left the bed and other waters as to have lost their character as part of the flow." But in that case it is further said: "If, upon the other hand, the taking of this water by plaintiff, as the court finds, creates an artificial draft upon the surface flow of the stream, draws down a part of it, and weakens and injures the natural bed of the stream, and tends to interrupt and carry away from the defendants the surface flow, and to deprive them of it, \* \* \* defendants are entitled to an injunction to restrain this illegal interference." This last quotation presents the case declared by the finding, so that it is not a new proposition in this state, nor is it a new decision to declare that one who has no legal right to the surface flow of the stream may not, by indirection, acquire that right by a subterranean tapping and taking

of it. Riparian proprietors and appropriators of the surface water still have the right to invoke the maxim, "*Aqua currit et debet currere ut currere solebat.*" For the extent to which this principle has been recognized reference may be made to the later cases of *McClintock v. Hudson* (Cal.) 74 Pac. 849, and *Cohen v. La Canada Land & Water Co.* (Cal.) 76 Pac. 47.

It is, however, contended by the city of Santa Barbara that, giving all due force and effect to finding 9, that the following finding 17, in which the court announces its inability to determine from the evidence whether all or any part of the 4.16 inches of water abstracted from the stream by the city tunnel would, "if permitted to flow by said tunnel in its natural and accustomed way, or if returned from said city tunnel to said stream, reach plaintiff's dam and point of diversion," is absolutely destructive of plaintiff's case, and necessitates either a judgment for the defendant, or, at the least, a reversal of the cause, and, in this immediate connection, that the conclusion of law above quoted and embodied in the judgment relegating the parties to future litigation for the determination of this question is improper and illegal. Upon the other hand, the plaintiff contends upon its appeal that the ninth and eleventh findings, above quoted, are findings of ultimate facts, are absolutely conclusive upon the merits of the case, and themselves entitle plaintiff to its judgment, and that finding 17 may and should be disregarded.

Upon behalf of the defendant it is argued that it was incumbent upon the plaintiff to show not only an abstraction of water, but to show detriment and damage caused by the abstraction. That, since the court, as it declared in finding 17, was not able, under the evidence offered, to determine whether the 4.16 inches of water abstracted from the stream would reach plaintiff's point of diversion, the plaintiff had failed to show any loss in the taking by defendant of this water, and that it must be concluded that the water which the defendant took was such waters as are mentioned in *Vineland Irrigation Dist. v. Azusa Irrigation Co.*, 126 Cal. 496, 58 Pac. 1057, 46 L. R. A. 820; that is to say, waters which had so far left the bed of the stream and its other waters as to have lost their character as part of the flow. By finding 9 the court declares that the effect of these tunnels is to create an artificial draft, first upon the saturated strata which support the flow of the stream, and, exhausting that, or, in the process of exhausting that, to suck down and drain directly the waters flowing in the channel of the stream. By finding 11 it is declared that the amount so abstracted is 4.16 miners' inches, but by finding 17 it is said that it cannot be determined how much of this water, if permitted to flow past the city tunnel "in its natural and accustomed way,



or if returned from the city tunnel to the stream, would reach plaintiff's point of diversion." The construction of this finding is somewhat difficult. Did the court mean that it could not determine whether the water would reach plaintiff's point of diversion because of the changed conditions created by these tunnels, or did it mean that it could not determine whether this water would reach plaintiff's point of diversion if the natural conditions had never been disturbed? The answer is somewhat in doubt. But, nevertheless, the other findings plainly declare that the defendant has created an unnatural and artificial draft upon the waters of the stream, by which it has abstracted a portion of the flow thereof amounting to 4.16 inches. Under these findings it would seem to be indisputable that defendant has been taking, and is taking, that amount of water rightfully belonging to plaintiff. But, if that amount of water rightfully belongs to plaintiff, since plaintiff only claims the surface flow, it could only be plaintiff's water because it was a part of that surface flow or the support of it. In either case plaintiff would be entitled to its remedy. What, therefore, is meant by the declaration of finding 17, we confess ourselves under difficulty in determining. But, construing it most favorably for defendant's contention, it amounts to no more than a declaration that the court cannot determine that this particular water would, under natural circumstances, have reached the point of diversion. But this is not all of the question. If the particular 4.16 inches would not so have reached the point of diversion, it must follow from the other findings that this particular 4.16 inches would have maintained the plane of saturation, and furnished a support whereby some other 4.16 inches would have flowed on to the point of diversion. In other words, the court has said that it could not determine whether the tunnel took the direct flow of 4.16 inches, but it has unequivocally said that it has taken the indirect flow of that amount of water, and what the defendant could not do directly it could not legally do by indirection.

The trial court, in relegating these parties to a future action for the determination of this question, and of the amount of money to which the plaintiff may be entitled for the unlawful taking and disposition of its waters, seemingly relied upon the case of *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158. *Bathgate v. Irvine* was not at all similar in principle to the case at bar. That action was brought by nearly 300 plaintiffs to quiet their title to the waters of Santiago creek, seeking an injunction against the defendant, James Irvine, an upper riparian owner. The essential matter in controversy, therefore, was the right of Irvine against the collective plaintiffs, and the court determined those rights, decree-

ing that he was not entitled to divert or use the whole of the waters of the creek, except for domestic and stock uses, or to divert or conduct any portion of the waters of the creek outside the watershed thereof, or to use any portion of the waters upon any lands except for domestic and stock uses and purposes. As to the plaintiffs, under their claim of injunction, the court found that they were riparian owners of land through which the creek flowed, and that each was entitled to divert, take, and use a portion of the water for the purpose of irrigating his lands and for domestic use and watering stock. It is plain that, so far as Irvine was concerned, his rights to the water having been determined as against all the plaintiffs collectively, it could be no injury to him that the court failed to find the separate and individual rights of the 275 plaintiffs, and it was as to that proposition that this court said, upon the assigned error for failure to find the extent of the plaintiffs' rights, that, having quieted the title of the plaintiffs against the defendant, and having determined his rights, while the court could, if the evidence had justified it, have determined the separate rights of the plaintiffs, it was warranted in doing as it did, rendering a judgment leaving it open to any of the party plaintiffs to bring appropriate action to determine the proportion of the waters to which he was entitled. That case, however, as the statement shows, is radically different from the case at bar, where the vital questions to be determined between the plaintiff and the defendants is whether they are unlawfully injuring plaintiff's water rights and unlawfully taking plaintiff's water. If so, to what extent? How long has the unlawful taking and injury continued? What is the damage to plaintiff for such injury, and what, by way of injunction or otherwise, should be the relief accorded in contemplation of a continuance of the wrong? By the judgment actually rendered in this case the only matters determined are the unlawful taking and injury, and the extent thereof. All other matters by the judgment are relegated to future litigation. In this the judgment of the court is clearly erroneous, and must be reversed upon the findings actually made. At the same time it was the duty of the court to have found upon the matter of the damage sustained by plaintiff because of the unlawful abstraction of the water by defendants. And upon this point the case must be reopened for the taking of testimony and the making of appropriate findings, and, finally, it will be for the court to determine whether an injunction is a necessary, or even appropriate, remedy in this case. By this we mean that in such a case as this the extraordinary remedy of a prohibitive injunction should be granted only if it shall appear that no other relief is adequate. It is disclosed by the facts in this

case that the city of Santa Barbara has driven its tunnel at great expense. The plaintiff was aware of this, and had reason to believe that the effect of the tunnel would be to drain its waters. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201. It is disclosed that of all the waters which the tunnel takes but 4.16 inches are from the flow of the stream. If that amount of water could be made good to the plaintiff, the judgment in common equity should provide accordingly. It would be a manifest hardship and injustice to deprive the defendant by injunction of the right to take any of the water when only a small part of that which it does take is subject to the claim of plaintiff, and plaintiff could be fully compensated by a restoration of it.

The court found that since the year 1888 the plaintiff had been the owner of 15 miners' inches, which it was actually diverting and distributing among the inhabitants of the town of Montecito, and that the use so made by the plaintiff was a beneficial use for domestic purposes—the watering of stock and the irrigating of otherwise arid lands. Plaintiff's title was based, first, upon a judgment in its favor in condemnation proceedings instituted by it against John Coe and John W. Coe; and, second, a prescriptive title growing out of its continued, uninterrupted, adverse taking and use of the waters since the date of the decree in the condemnation suit. Defendant alleges many imperfections and defects in the condemnation proceedings, which it will not be necessary here to consider, and more particularly because it appears that these questions are themselves in litigation in an action brought by the executrix of John W. Coe's estate against this plaintiff. We think plaintiff sufficiently establishes its prescriptive right to the waters in controversy. First. The use under claim of right is well established. Second. Although the use made was for the purposes of rental and sale of the water, that use is beneficial under the very terms of the Constitution itself. Article 14, § 1. Third. The only asserted interruption to the use was by proof of an action brought by Elizabeth A. Coe, as executrix of John W. Coe, one of the defendants in the condemnation suit, against the plaintiff in this case (plaintiff likewise in the condemnation suit), on account of its claim to the water here in question; and it is argued, upon the authority of *Alta Land Co. v. Hancock*, 85 Cal. 227, 24 Pac. 645, 20 Am. St. Rep. 217, that the effect of this action was to stop the running of the statute of limitations and prevent the perfecting of a prescriptive right. But defendant's position cannot be supported. In *Alta Land Co. v. Hancock*, the defendant Hancock had sued the grantors of the plaintiff in ejectment before the expiration of the period limited by law, and had recovered. As to him, therefore, plaintiff had acquired no prescriptive right. At the same time its prescriptive

right against all the world but the true owner who had brought his action within the statutory period was complete. This is explained in *Breon v. Robrecht*, 118 Cal. 468, 50 Pac. 689, 51 Pac. 33, 62 Am. St. Rep. 247, where it is said: "The owner is simply required to sue within a limited period. If he does not, he cannot maintain an action to recover the property. In such event the disseisor, being in possession, can maintain his right against the whole world. He could always prevail over all save the true owner, and when the owner cannot sue his title has become unassailable. \* \* \* Title by possession, good against all the world save the true owner, defendant already had. He has only the same title after the statute has run, but the true owner has then lost his right of action." In this case it is to be observed that the defendant does not pretend to connect itself with the title of the Coe estate, and, indeed, its claim to these waters is in as strict hostility to the title of that estate as it is to the title of plaintiff. The plaintiff's title is still good against all the world, saving that, as to the undecided question upon the part of the Coe estate, it is sub judice. The evidence in this case demonstrates that this plaintiff refused to recognize the validity of the Coe claim, which only tends to prove that plaintiff's claim is, in fact, adverse to the whole world. *Langford v. Poppe*, 56 Cal. 77; *Carpenter v. Natoma Water Co.*, 63 Cal. 616.

Plaintiff pleaded ownership, and the court in terms found ownership in the plaintiff. Defendant's further objection that there is no finding of ownership by prescription is untenable. The court finds ownership and continuous use and occupation for beneficial purposes for the full prescriptive period. This finding of ownership includes all the probative facts. *Cooper v. Miller*, 113 Cal. 238, 45 Pac. 325; *Adams v. Crawford*, 116 Cal. 499, 48 Pac. 488. Title by prescriptive right can be proved under the general allegation of ownership. *Gillespie v. Jones*, 47 Cal. 259. But against this title it is urged that, because plaintiff is a corporation, it has no power under the law to acquire title by prescription, and is limited strictly in its mode of acquirement to purchase, and to condemnation, which is but a form of purchase. Civ. Code, 286, 360. It is herein contended that "purchase," as employed in the Code, means the acquisition of title from a voluntary grantor by the payment of price or other valuable consideration, and that, as the law has not conferred upon these corporations the general right belonging to the individual to "acquire" lands by any legal method, the mode of acquisition must be strictly limited to purchase. We think, however, that this presents altogether too narrow a view of the rights and powers of corporations in this regard. The right of a corporation such as this to "hold" land is, of course, unquestioned. It is expressly conferred by section 354,

subd. 4, of the Civil Code. Section 1007 of the same Code declares that occupancy for the period prescribed by the Code of Civil Procedure is sufficient to bar an action for the recovery of the property, and confers a title thereto denominated a "title by prescription," which is sufficient against all. "The same evidence available to prove ownership of a natural person in property may be used to establish the title of a corporation." Fourth Am. & Eng. Ency. of Law, p. 231. In this state a corporation's title to water either by appropriation or prescription has been recognized and upheld from the very earliest day, *Bear River & Auburn W. & M. Co. v. N. Y. Mining Co.*, 8 Cal. 327, 68 Am. Dec. 325; *Stein Canal Co. v. K. I. I. Co.*, 53 Cal. 563; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 80 Pac. 623; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *So. Yuba Water Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075. Indeed, the very prescriptive title here asserted by plaintiff was passed upon and upheld by this court in *Gallagher v. Montecito Co.*, 101 Cal. 242, 35 Pac. 770.

The demurrer of the defendant city to the complaint upon the ground of misjoinder of causes of action was properly overruled. Indeed, the appellant city concedes in this case that in an action which is brought by a plaintiff who claims an appropriative right to take water from a stream against several defendants who are alleged to be diverting water from the stream to the injury of plaintiff it is not necessary that the defendants be acting in concert or by unity of design. Such was the action here brought, against independent divertors, with no claim for joint damages against them as joint tortfeasors. The action of the plaintiff was proper, under *Hillman v. Newington*, 57 Cal. 56, and *People v. Gold Run Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80. In *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254, a joint judgment for damages against several independent tortfeasors, not acting in concert or by unity of design, was, for very obvious reasons, held to be erroneous. But no such joint judgment was here sought.

The trial court filed a paper, which it entitled its "Opinion," the views expressed in which were somewhat modified when the formal findings of the court were subsequently prepared, signed, and filed. At the time that the opinion was presented, the court entertained the view that an amount of water in excess of 4.16 inches, namely, 6 inches of water, were abstracted by the city tunnel, and plaintiff insists that the amount so declared should control, and that this opinion should be treated as the findings of the court. The position, however, is untenable. The opinion was no more than its name imports—the informal views of the court, subject to future modification after argument, which was actually had—the legal expression of those views being found, as only properly

they could be found, in the formal findings of fact and conclusions of law. *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775; *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225.

We have examined the alleged errors in the rulings of the trial court in admitting evidence, and find nothing therein of which the defendant city has just cause for complaint.

#### Appeal of Plaintiff against Defendants Owners of the Eaton Tunnel and of the Waters Derived Therefrom.

The defendants owners of the Eaton tunnel and of the waters gathered therein do not appeal from the judgment of the court, and appear herein in the role of respondents. Their tunnel was first constructed, and has heretofore been the subject of litigation as to the effect of it upon the flowing waters of the stream. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 88 L. R. A. 181. The trial court found that the defendants owners of the Eaton tunnel had acquired a prescriptive right to all the water flowing in their tunnel in excess of the quantity of 1.43 miners' inches, which, under the judgments in the cases above cited, they were found to be abstracting from the waters of the creek, and which they were ordered to return thereto; an order with which, admittedly, they have complied. The language of the answers upon the plea of prescriptive title is as follows: "They and their predecessors in title have been in the actual occupation, possession, use, and enjoyment, open and notorious, and not clandestine, and in hostility to plaintiff's title and claim of title, under a claim of title exclusive of any other title, and as their own, continuously and uninterruptedly for a period of more than five years." It is first urged that the pleading is defective in failing to allege that the possession was peaceable, but nowhere in the Code is such an averment required. Sections 322, 324, Code Civ. Proc., require an actual occupation, that this occupation be open and notorious, and that it be in hostility to plaintiff's title, and under a claim of title exclusive of any other right, and that the occupation shall have been continuous and uninterrupted for five years. Section 325 of the same Code makes the additional requirement of the payment of all levied and assessed taxes. In *Unger v. Mooney*, 63 Cal. 595, 49 Am. Rep. 100, these essential elements for the acquisition of a title by prescription are specifically set forth. It is true that in *Cave v. Crafts*, 53 Cal. 135, it is said that the adverse use must be peaceable. But that means no more, as the opinion itself explains, quoting *Wood on Nuisances*, than that it must be uninterrupted. Says *Wood*: "The use must also be open and as of right, and also peaceable; for, if there is any act done by other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use." If the possession has been unin-

interrupted, of necessity it has been peaceable. If it has been interrupted, of necessity it has not been peaceable. The words are therefore interchangeable and synonymous in the pleading of prescriptive title. *American Co. v. Bradford*, 27 Cal. 360; *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453.

It is next urged by appellant that the possession of defendants was clandestine, and not brought to its knowledge until less than five years before the commencement of this action. The water was actually diverted for a little more than five years before the commencement of the action, but the construction of the tunnel antedated the diversion by a year and a half. The work was openly carried on during this time, and it could not be reasonably urged that such work—running a tunnel for 600 feet in the side of a cañon, at a point only 500 feet distant from plaintiff's place of diversion—could be carried on clandestinely. From the moment when the tunnel began to take water, it would seem that plaintiff was charged with notice. The means of knowledge were certainly open to it. *Montgomery v. Keppel*, 75 Cal. 131, 19 Pac. 178, 7 Am. St. Rep. 125; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100. But, in addition to that, Mr. Gould, plaintiff in the litigation of *Gould v. Eaton*, during all this time was himself an officer of plaintiff corporation, and had actual knowledge of the construction of the tunnel, and its abstraction of the waters, and the intention of the owners to divert the water. This knowledge was his as early as February 24, 1894, when the complaint in *Gould v. Eaton* was verified. As a corporation can only have knowledge through the information of its officers and agents, the knowledge of such officers within the scope of their duties and employment becomes the knowledge of the corporation. *Phelps v. M. C. G. M. Co.*, 49 Cal. 337; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Balfour v. F. C. & I. Co.*, 123 Cal. 395, 55 Pac. 1062.

It is next urged that defendants' user did not ripen into a prescriptive title by reason of a composition entered into between the parties for a temporary division of the water flowing in the creek. It is insisted that this agreement embraced the Eaton tunnel flow, which was dependent upon the flow of the creek and its tributaries, and that no contest could have been begun against the tunnel diversion while the flow of the creek which fed the tunnel was being divided under this settlement. The agreement was entered into between the plaintiff, the defendant Charles F. Eaton, and G. H. Gould. It may be said in passing that the defendant Richardson is not affected by this agreement, as his predecessors in title, Sheffield, Vall, and Gillette, were none of them parties to it. But, as to the agreement, it does not appear to have embraced within its contemplation (excepting in one minor clause) the waters drained by the Eaton tunnel. The

recital declares that whereas Eaton has been diverting a quantity of water from the Cold Springs Branch at a point on the west fork above plaintiff's point of diversion "under claim of ownership of water flowing into said branch from the tunnel of the city of Santa Barbara in said county, and under further claim that said tunnel is a nonriparian source of said water; and whereas said party of the first part, Montecito Valley Water Company, denies the right of said party of the second part so to divert said water." It thus appears that the water which was the subject of their composition was not water gathered by the Eaton tunnel, but water claimed by Eaton, and flowing from the tunnel of the city of Santa Barbara under his (Eaton's) contract with that city. The agreement then provides that Eaton will supply a flume by which the Montecito Valley Water Company shall, until the fall rains, divert from the creek all of its waters, but delivering to Eaton, at his box, six inches of it. Gould, during this time, was to waive his right to have 1.46 inches of water turned into the creek, and the water company and Gould released Eaton, not from any claims as to the damages occasioned by the Eaton tunnel, but solely "for damages on the ground of the abstraction from said west fork of any water heretofore diverted therefrom by Eaton by means of said line of flumes so belonging to him as aforesaid." And, finally, the parties seem to have been particular to preserve the status of their respective claims touching the Eaton tunnel, for it is further provided: "That nothing in this agreement shall be understood as a waiver on the part of any party hereto of any right to any water running in any part of said Montecito creek or the branches or forks thereof, except subject to the foregoing terms and agreements and during the continuance thereof and as provided therein." The trial court construed this contract as not interrupting the continuance of defendant's asserted prescriptive right, and in this we think its finding is supported.

It is further contended by appellant that its rights were not invaded until the tunnel actually operated to decrease the supply to which it was entitled, and that this result was reached within five years. A discussion of this would involve some mathematical calculations and an analysis of conflicting evidence. It must be sufficient to say that the conclusion of the court that the invasion of plaintiff's right had existed for five years is supported.

It is last complained that the court did not find the amount of water to which the Eaton tunnel defendants were entitled under their claim of prescriptive right. The finding of the court is that the defendants have diverted and applied to useful purpose all the water flowing from said tunnel in excess of the quantity of 1.43 miners' inches. Plaintiff's right, so far as this tunnel is concerned, is fixed by this finding, which, in

effect and substance, declares that defendants are entitled to all the water which their tunnel carries in excess of the 1.43 inches. An omission of an additional finding as to how much water in fact the tunnel was carrying cannot injure plaintiff, since it is found that defendants were entitled to it all, as in *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570, where it is said: "While the finding that the plaintiffs are entitled to all the water at the place in dispute remains, the capacity of the ditch or its enlargement is of no moment."

**Cross-Appeals of Plaintiff and Defendants  
Owners of the Barker Tunnel and of the  
Waters Derived Therefrom.**

The Barker tunnel is in location intermediate between the Eaton tunnel and city tunnel, and was the second upon which work of construction was begun. Plaintiff impleaded the defendant Barker as claiming ownership in the tunnel and the waters collected by it, and certain other defendants, who for convenience may be designated the "Coleman group of defendants," as claiming interests in the tunnel and its waters. The court's findings in regard to this tunnel were that Barker had excavated it for a distance of more than 1,200 feet; that by a judgment between the parties the plaintiff was estopped from claiming that the first 925 feet of the Barker tunnel abstracts any of the water from the Cold Springs Branch or its tributaries, but that it is not estopped from asserting such abstraction as to the remaining portion of the tunnel; that the remaining portion of the tunnel has abstracted and diverted, and still abstracts and diverts,  $2\frac{1}{2}$  miners' inches of water; that Barker has conducted this water away from the creek, sold it to divers persons, who have beneficially used it, for large sums of money, and has not accounted to plaintiff for any of this money, nor has he returned the waters, or any of them, to the channel of the creek; that Barker threatens and intends to continue to divert and use the water in this manner; that the Coleman group of defendants claim, under purchase from Barker, rights to certain portions and amounts of the water flowing from the mouth of the tunnel of Barker, as aforesaid; that no part of the water developed and obtained through the Barker tunnel, saving this  $2\frac{1}{2}$  inches, is, or at any time has been, a part of the stream, or abstracted therefrom, or necessary to the protection or support thereof. The court then makes its finding, identical with finding 17, above quoted, to the effect that it cannot determine how much of this  $2\frac{1}{2}$  inches, if permitted to flow by the Barker tunnel in its natural and accustomed way, would reach plaintiff's dam and point of diversion. Its conclusion of law and judgment upon these matters is identical with that which it rendered in the matter of the city; that is to say, it relegated the litigants to another action, both to determine

this question and to determine what relief by way of mandatory injunction, compensation, or otherwise should be accorded.

Upon the grounds previously discussed and for the reasons previously given in the consideration of the cross-appeals of the plaintiff and the city of Santa Barbara, the judgment relegating the parties to further and future litigation must be reversed, since, as said in *Steinberger v. Meyer*, 130 Cal. 158, 62 Pac. 483, it serves only "the single purpose of furnishing the groundwork for future litigation, and plaintiff is certainly entitled to something more." So, also, must the case be opened for the taking of further testimony, and the determination of the financial loss which plaintiff has undergone by reason of the unlawful taking of its waters. All that has heretofore been said upon the cross-appeals of the plaintiff and the city of Santa Barbara touching the support which the findings draw from the evidence, and touching the consideration to be given to finding 17 (which is identical with finding 16 so far as the Barker tunnel is concerned), is applicable to the consideration of the questions presented upon these appeals. As to plaintiff's claim that it is entitled to an injunction to prevent the further extension of the Barker tunnel, it is sufficient to say that the complaint does not charge a threatened extension, but merely a continuance of the present diversion. As to plaintiff's second contention—that these defendants should not be allowed to withdraw any water until the full 15 inches found to belong to plaintiff have been supplied—it is a complete answer to say that the court finds that of that 15 inches these defendants are responsible for the abstraction of but  $2\frac{1}{2}$  inches. Over this amount there is no controversy by any of the parties, and as to this amount plaintiff's remedy would be complete under a mandatory injunction compelling its restoration to the supply of plaintiff.

The Coleman group of defendants contend that their demurrer should have been sustained, and that no relief should have been awarded against them, for a failure of the complaint to make it appear that they are asserting any rights in hostility to plaintiff, or taking any of the water rightfully belonging to plaintiff; but it is charged in the complaint and declared in the findings that they have purchased from Barker certain of his alleged rights to portions and amounts of the water flowing from the tunnel; and it is further alleged that all of the water flowing from the tunnel was unlawfully abstracted from plaintiff's supply. It is certainly true that these defendants are interested in the result of the litigation, and in the relief which may be accorded, and are, therefore, proper parties defendant to have before the court in this equitable proceeding for the complete adjustment of all claims and rights. *Randall v. Duff*, 79 Cal. 115,

19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756; *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135. The demurrer was therefore properly overruled.

The other propositions advanced by the Coleman group of defendants are the contentions urged upon the appeal of the city of Santa Barbara, and they are considered disposed of, namely, that the findings of the abstraction of water are not supported by the evidence, that the findings fail to show injury, and that upon the findings defendants are entitled to their judgment.

We have thus considered all of the propositions advanced upon the various appeals with the result here expressed.

First. That the judgment as to the Eaton tunnel defendants is affirmed.

Second. That the judgment as to the city of Santa Barbara is reversed, with directions to the trial court to determine what compensation by way of damage plaintiff is entitled to for the unlawful abstraction of 4.16 inches of water, and to make provision against a continuance of this injury by appropriate decree—either that of a mandatory injunction requiring the restoration of the given amount of water, or in some other manner which shall be meet in equity; and the court will further make provision protecting the respective parties in their rights in the event that a further extension of the city tunnel with a further injury to plaintiff's rights shall be threatened, in this regard having in consideration the fact that a prohibitory injunction should only be granted if any and all other forms of relief should be found inadequate.

Third. As to the owners and defendants in interest in the Barker tunnel, the judgment is also reversed, with the same directions to the trial court as those set forth in reference to the city of Santa Barbara in the second paragraph hereof.

Fourth. The defendants and respondents owners of the Eaton tunnel and of the waters flowing therefrom to recover their costs; the Montecito Water Company to recover its costs upon its appeals against the city of Santa Barbara and against the owners of the Barker tunnel and of the waters flowing therefrom, and likewise to recover its costs as respondent upon the appeals of these last-named parties.

We concur: MCFARLAND, J.; VAN DYKE, J.; SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

144 Cal. 553

In re STRAUS' ESTATE. (S. F. 3788.)  
(Supreme Court of California. Sept. 1, 1904.)

EXECUTORS—ACCOUNTING—PARTIAL DISTRIBUTION—FRIVOLOUS APPEAL—DAMAGES.

1. Defendant was appointed executor of an estate which was appraised at \$4,118.78. After his appointment the executor managed the testator's business for a year, and finally closed

the same, realizing for the benefit of the estate a profit of \$6,800. No account was filed until some eight years after letters were granted, when on citation the executor filed an account showing a balance in his hands, after payment of debts, of \$3,317.98, which he had had in his possession for nearly seven years. Held that, since the executor's commissions, if allowed on the entire amount passing through his hands as authorized by Code Civ. Proc. § 1618, could not have exceeded \$835.12, and the only attorney's fees allowable were such as were authorized for the probate of the will, notice to creditors, and preparing an inventory and appraisal and an account and exhibit, it was not error to find that a distribution of \$1,500 to the widow's assignee would leave sufficient money to pay the executor's commissions, a reasonable attorney's fee, and charges of closing the estate, and to order the executor to make such payment.

2. Where, on an application of an assignee of the decedent's widow for a partial distribution of the estate, the petitioner simply demanded a certain sum from the amount shown by the executor's account to be in his hands, which included the profits of a certain business operated by the executor but which was closed prior to the proceedings in question, an objection that the superior court sitting in probate had no jurisdiction of a controversy between the executor and the petitioner as to the profits of such business was unfounded.

3. Where an executor's appeal from an order directing a partial distribution of the estate was frivolous, he was personally chargeable with \$100 damages for the delay occasioned thereby.

Department 2. Appeal from Superior Court, City and County of San Francisco: J. V. Coffey, Judge.

Judicial accounting by George B. Mowry, as executor of the will of Simon Straus, deceased. From an order directing the executor to pay over a certain sum to the assignee of decedent's widow, he appeals. Affirmed.

R. Percy Wright, for appellant. Frohman & Jacobs, for respondent.

LORIGAN, J. Letters testamentary were granted to the appellant, George B. Mowry, as executor of the will of deceased, on April 9, 1895, and by the terms of the will all the estate of decedent was left to his widow. At the time of his death the deceased was engaged in the hide, skin, and tallow business, which business, together with some money on deposit in bank and solvent debts, represented the whole of his estate, which in its entirety was appraised at the sum of \$4,118.78. After his appointment, the executor, for about a year, continued actively to manage and conduct the business of the deceased, finally closing it up in February, 1896, after realizing for the benefit of the estate some \$6,800 profit. No account or exhibit in the estate was ever filed by the executor until March 20, 1903, some eight years after the grant of letters, and many years after the estate (if not practically ready for settlement and distribution) could, at least, have easily and readily been placed in such a condition; and this account was only presented upon citation requiring the executor to do so. The account, as filed, set forth in detail

the conduct of the business of the deceased by the executor, above referred to, his receipts and disbursements therein, and the amount realized as above stated for the benefit of the estate, with matters relating to the condition of the estate generally, and from all of which it appeared that the executor then had in his hands, and had had for at least seven years, \$3,317.98 belonging to the estate. Upon the filing of the account, the widow of the deceased having assigned all her interest in the estate to her son, the respondent in this appeal, the latter, on April 9, 1903, duly applied for a partial distribution to him of the moneys of the estate to the extent of \$2,000. The application coming on for hearing, the court found that all the debts of the estate had been paid; that there was at least the above amount remaining in the hands of the executor, and that it had been there for over seven years; that no distribution of any part of the estate had ever been made to the widow, or respondent as her assignee; that \$1,500 could be allowed and paid respondent without injury to the estate; and that after such payment there would remain in the hands of the executor more than enough money to pay his commissions, together with a reasonable attorney's fee and the charges of closing the estate. An order was accordingly entered directing such payment, and it is from this order that the executor appeals, his principal ground of complaint being that there was no evidence to justify the court in finding and determining that enough money would be left in his hands to pay his commissions, attorney's fees, and other administration charges, after the distribution of the \$1,500 ordered; or that the sum of \$3,317.98 in his hands was any more than sufficient to pay such commissions, attorney's fees, and charges.

We perceive no merit in this contention. While it is true that an allowance to be made for commissions, attorney's fees, and charges to close the administration cannot be definitely fixed until the final settlement of the account of the executor, yet in ascertaining whether a partial distribution shall be ordered, and for the purpose of fixing the amount thereof, it is necessary for the court to take these matters into consideration, and determine them upon proper data furnished at the hearing of the application. Upon the hearing at bar the court had ample data upon which to properly determine all these matters. The commissions to which an executor will be entitled is purely a matter of computation, and is based (section 1618, Code Civ. Proc.) on the "amount of estate accounted for" by him. The allowance which shall be made for attorney's fees is largely in the discretion of the court, and is estimated upon the services which are necessarily and properly rendered to the executor in the administration of the estate. The account filed by the executor immediately prior to the hear-

ing for partial distribution, while not so denominated, was, for all practical purposes, a final account, and it, together with the accompanying exhibit, the inventory and appraisal, and the general proceedings in the estate, supplemented by the evidence upon the hearing, provided sufficient data from which the court could determine what would be a prudent, safe, and proper amount to be retained by the executor to meet payment of his commissions, attorney's fees, and expenses to be allowed on final settlement. The distribution of \$1,500, as ordered, left in his hands the sum of \$1,817.98 to be ultimately applied for those purposes.

Now as to commissions: If the appellant is conceded the most favorable basis he can reasonably claim for their computation, and it be assumed that he would account on final settlement for all the estate as inventoried and appraised—\$4,118.78—this, together with the \$6,800 profit in carrying on the business of the estate, would make the total value of the estate to be accounted for by him \$10,918.78. His commissions, computed under the Code (section 1618, Code Civ. Proc.), upon this basis would be \$556.75. And assuming further (which we do not decide) that he would be entitled to a compensation for extraordinary services under the same Code section—"one-half the amount of commissions allowed by this section"—this would bring his commissions up to \$835.12, and would be the largest amount of commissions, under any circumstances, he could obtain. Deducting this from the amount which, under partial distribution, the executor would still retain in his hands, would leave \$982.86 to meet any allowance for attorney's fees and expenses of closing the estate. This latter the lower court could readily know from its experience in such matters, and, considering the few remaining steps required to be taken to close the estate, which consisted solely of personal property, would necessarily be small.

As to attorney's fees: The court, as we have above indicated, had before it sufficient data from which to determine what would in all probability be a reasonable compensation and the amount to be retained by the executor sufficient to meet its payment. It was not necessary that any evidence of a professional nature should have been introduced upon this subject. All the proceedings in the estate and all matters in which the executor could have enlisted or required the services of an attorney were before the court, and from these the court of its own knowledge and experience could determine what would be a reasonable fee. *Est. of Dorland*, 63 Cal. 281; *Freese v. Pennie*, 110 Cal. 469, 42 Pac. 978. And from the data before the court on this branch of appellant's claim, as it appeared therefrom that all that was done in the estate for which attorney's fees could be obtained was to probate the will, give notice to creditors, prepare and file

an inventory and appraisal and an account and exhibit, it is preposterous to even suggest that such services were inadequately provided for by the reservation of a fund of some \$900 which might be devoted to that purpose.

We are unable to find anything in the record on this appeal which even tends plausibly to sustain any of appellant's contentions. He knew, when the application for partial distribution was made, that it devolved upon the court to determine what sum could be prudently distributed, so as to leave a sufficient amount to protect him in his claims against the estate, and that the ascertainment of his probable commissions and attorney's fees was to the court and himself an important and essential factor to a correct determination in this respect. He knew that the data which the court had before it was ample to ascertain what his commissions would be, and to fix the compensation of his attorney, and that in the absence of some evidence or suggestion of a different or additional condition of things the court would act upon that data. In the face of this knowledge the record does not disclose that he raised any protest against the distribution as prayed for, or in any manner objected or resisted it. And although a witness at the hearing, not even an intimation was made by him that the court did not have before it all the information and evidence which was necessary, or could be presented in the case, so as to fairly and justly estimate the probable amount of these allowances. The objections which he now urges seem to have been reserved for presentation here, but we cannot perceive any ground upon which they are tenable.

While attacking the decree of partial distribution for insufficiency to sustain the findings in the respects above indicated, the appellant likewise makes the additional point that the lower court sitting in probate had no jurisdiction of what he terms a controversy between himself and the respondent, as assignee of the sole devisee under the will, over the profits of the business of the estate formerly conducted by the deceased, and continued by himself after he became executor; that such controversy could only be determined in a civil action prosecuted in a court of equity for that purpose. No such objection to the jurisdiction was urged in the lower court, for the manifest reason that the record discloses that no such controversy over the profits made in the previous conduct of the business existed. The account filed by him under consideration was for the purpose of showing the condition of the estate of deceased, and was accepted by both the appellant and respondent for the purpose of the application here involved as true. In it appellant admits that all the moneys received and expended by him, and which mainly relate to the prosecution by him of the business, were received and expended by him as

executor; that in the conduct of such business as executor he made a profit of \$6,800, and held as executor a balance of \$3,317.98 as moneys of the estate. There is no pretense anywhere in the record that there was any controversy over these profits, or that under the rule as laid down in *In re Rose*, 80 Cal. 166, 22 Pac. 86, they were not properly returned as assets of the estate in which the estate alone had an interest. His suggestion of a controversy cognizable alone in equity finds no support anywhere in the record.

None of the points presented by appellant have any merit, and his appeal in this matter we deem frivolous. Its only tendency has been to further delay the right of the respondent under the partial distribution to enjoy the benefit of the testator's estate, the general distribution of which the appellant, without excuse or justification, had theretofore unnecessarily and inexcusably delayed for upwards of seven years, and he should be made responsible in damages for the additional delay in distribution which he has by this appeal occasioned.

The order appealed from is affirmed, with \$100 damages chargeable against the appellant personally.

We concur: MCFARLAND, J.; HENSHAW, J.

144 Cal. 550

BELL v. SOUTHERN PAC. R. CO. (L. A. 1,265).\*

(Supreme Court of California. Sept. 1, 1904.)

RAILROADS—RIGHT OF WAY—CONTRACTS—REASONABLENESS—FINDINGS—REPRESENTATIONS—FULFILLMENT—MATERIALITY—APPEAL—NEW TRIAL—DENIAL—QUESTIONS REVIEWABLE—FAILURE TO ARGUE.

1. Alleged errors in allowing defendant to file a cross-complaint cannot be reviewed in the absence of a bill of exceptions.

2. Objections to the sufficiency of a cross-complaint, that the findings were not within the issues, and that the judgment is not supported by the findings, cannot be reviewed on appeal from an order denying a new trial.

3. Plaintiff, who had previously had ineffectual negotiations with M. for the sale of a railroad right of way through her ranch, before the line had been surveyed, thereafter contracted, through the efforts of S., to convey to defendant a right of way where the surveyed route of the railroad as finally located should intersect the eastern boundary of plaintiff's land. During the previous negotiations M. had shown plaintiff three prospective routes through the ranch, and his negotiations were more particularly with reference to the northern route, but the conveyance presented to her by M. authorized a construction at such a point as the line should finally be surveyed. *Held*, that it was not error to find, contrary to plaintiff's evidence, that there was no representation made to her that the road had finally been located on the northern route, or that she intended solely to grant a right of way over such route.

4. Where plaintiff, in an action to enforce an agreement for the sale of a railroad right of way, gave no evidence as to any advantage to be derived by her from the commencement of the construction near her property line, or that

\*Rehearing denied September 30, 1904.



any damage resulted from a commencement at the opposite end of the section, her general testimony that the railroad's representation that work would be begun at her end of the line within 90 days after the right of way was secured was one of the material inducements prompting her to execute the agreement was insufficient to require a finding that such representation was a material inducement for the contract, plaintiff having also testified that the benefits to be derived from the construction of the road did not operate on her mind in the matter.

5. Where, beside great physical obstacles, hindering the construction of a railroad, the company was also affected by the financial panic of 1893, which was unforeseen at the time a contract for a right of way was made, the fact that 2½ years were expended in building about five miles of the road, the construction of which required an expenditure of \$7,000,000, was not so unreasonable as to constitute a breach of the railroad's covenant with the vendor to construct the line with reasonable speed.

6. Where plaintiff, when she executed a contract for the sale of a right of way through her ranch, was, and still is, the owner of three tracts, aggregating 1,100 acres, of productive land in the immediate neighborhood of the railroad, and a station was located near the eastern boundary of one of the tracts, and was of easy access from the others, and by means of the road plaintiff's market for products was greatly enlarged, the contract by which she conveyed the right of way 100 feet wide through her land for \$1 and other benefits to be derived from the construction of the road was not unreasonable.

7. In determining the reasonableness of a contract for the sale of a railroad right of way, prospective advantages probable in their attainment may be considered, as well as the immediate benefit to be derived by plaintiff from the construction of the road.

8. Rulings of the trial court will not be reviewed on appeal where they are not discussed in appellant's brief.

**Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.**

**Action by Catherine M. Bell against the Southern Pacific Railroad Company. From a judgment denying plaintiff's motion for a new trial she appeals. Affirmed.**

**B. F. Thomas, for appellant. Canfield & Starbuck, for respondent.**

**LORIGAN, J.** As originally brought, this action was in ejectment to recover a tract of land in Santa Barbara county over which the railroad of the defendant is constructed and operated, and for damages for the alleged trespass committed in entering thereon, and for the value of the rents, issues, and profits. Defendant answered, denying the material allegations of the complaint, and set up, in justification of its entry, possession, and use, a written agreement on the part of the plaintiff to convey to it, as a right of way for its railroad, a part of the premises described in the complaint, and of which alone it alleged it was in possession. At the same time, by cross-complaint (subsequently amended) defendant sought to have this agreement to convey specifically enforced,

and upon the issues made by an answer of plaintiff thereto, denying, among other things, the identity of the land occupied by defendant with that mentioned in the agreement, accompanied by allegations of false representations inducing its execution, inadequacy of consideration, unreasonableness of its terms, failure to perform conditions precedent, and a plea of the statute of limitations, the court proceeded to try this equitable phase of the litigation, made findings in favor of the defendant and against plaintiff on all the issues, and awarded a decree to defendant for the affirmative relief prayed for, and directing the plaintiff to execute and deliver to defendant a deed to the premises described in its cross-complaint. From the judgment entered against her, and from an order denying her motion for a new trial, she takes this appeal.

Under the appeal from the judgment plaintiff attacks the sufficiency of the cross-complaint as stating a cause of action; likewise the validity of an order permitting it to be refiled; and insists, also, that certain of the findings are outside the issues, and that the judgment is not supported by the findings. As the record now stands, however, plaintiff cannot avail herself of these particular objections. The appeal from the judgment in this case was, on July 22, 1902, dismissed by order of this court (*Bell v. S. P. R. Co.*, 137 Cal. 77, 69 Pac. 692), leaving nothing for consideration on this appeal but the validity of the order denying the motion for a new trial, which motion was based upon errors of law and insufficiency of the evidence. As to the alleged error in allowing the cross-complaint to be filed, if any exception was taken to this by the plaintiff, there is no bill of exceptions in the record saving and presenting the point. As to the other objections, they cannot be presented or considered on an appeal from the order denying a new trial. If they existed, they could only be ascertained from the face of the judgment roll, and could only be availed of by an appeal from the judgment itself. As that appeal was dismissed, there is no record before us to support those objections. *Thompson v. City of Los Angeles*, 125 Cal. 270, 57 Pac. 1015; *Reclamation District v. Thisby*, 131 Cal. 572, 63 Pac. 918; *Moore v. Douglas*, 132 Cal. 400, 64 Pac. 705; *Morse v. Wilson*, 138 Cal. 559, 71 Pac. 801; *Swift v. Occidental M. & P. Co.*, 141 Cal. 165, 74 Pac. 700; and many other cases.

This brings us to a consideration of the appeal from the order denying plaintiff's motion for a new trial, which was based upon alleged erroneous rulings of the court in the admission and rejection of testimony, and the asserted insufficiency of the evidence to sustain certain findings. The agreement set forth in the cross-complaint, and which the court decreed should be specifically performed, is conceded to have been made by the plaintiff with the defendant, and, as far

¶ 8. See Appeal and Error, vol. 3, Cent. Dig. § 4256.

as the purposes of this case are concerned, its important recitals are: "That I, Catherine M. Den Bell, \* \* \* in consideration of the benefits to be derived by me in the construction of the Southern Pacific Railroad Company's railroad, and of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant and agree to and with the Southern Pacific Railroad Company, upon the payment to me or my legal representatives of the sum of one dollar, to sell and convey to said company all that certain piece or parcel of land, situated in the county of Santa Barbara, state of California, and the conveyance shall contain the following conditions: [Here follow a number of recitals that are not material to any point involved in the case] and being a portion of the Dos Pueblos Rancho bounded on the east by lands of Ellwood Cooper, and on the west by lands of the Tecolote Land and Water Company and more particularly described as follows, to wit: Commencing for the same at a point on the center line of the surveyed route of the Southern Pacific Railroad where the line of the same as finally located may or shall intersect the eastern boundary line of said party of the first part and running thence in a westerly direction along said center line and embracing a strip of land fifty (50) feet wide on each side of said center line, to the western boundary of the land of the party of the first part and the eastern boundary of the lands of the Tecolote Land and Water Company together with all the appurtenances belonging. And the engineers, agents, employees and contractors of said company are hereby authorized to enter upon said land for the purposes of the survey and construction of said railroad. In case said railway shall not be located on said land, this agreement shall be null and void." This agreement was one of many obtained for the defendant in the counties of San Luis Obispo and Santa Barbara in order to provide a continuous right of way for the completion of its coast line by filling the gap intervening between Santa Margarita, in San Luis Obispo county, and Ellwood, in Santa Barbara county. Construction between these two points had ceased in the early part of 1899, and nothing was done towards its resumption until some two years later, when committees of prominent citizens of San Luis Obispo and Santa Barbara counties, anxious for the completion of the road between these terminal points, solicited and obtained from the principal stockholders of the defendant a written agreement that the road would be completed between these points after such committees had furnished the defendant with the necessary continuous right of way for that purpose. As far as a particular right of way from the plaintiff is concerned, one H. D. La Motte, the agent of the defendant, theretofore acting for it, in procuring rights of way between these points had some time

prior to the cessation of construction endeavored to obtain a deed therefor from her, but, some disagreement arising between them about the consideration for the conveyance, the effort was abandoned. Nothing further was done with that end in view until the Santa Barbara committee, under its agreement with the stockholders of defendant, took up the matter, and on September 20, 1890, procured from plaintiff the agreement above referred to. This was secured through the efforts of one Dr. Shaw, a friend of the plaintiff, who visited her for that purpose with one of the members of such committee, and it was obtained by him at the solicitation and on behalf of the committee. The last agreement necessary to insure a continuous right of way between Santa Margarita and Ellwood was secured for the defendant November 28, 1891, and on December 6, 1891, the work of construction between these points was resumed by it. Claiming to act under this agreement given by the plaintiff, a right of way over her land was staked upon the ground in July, 1895, and in March, 1899, defendant entered upon the premises and constructed its railroad thereover. The construction of the entire road between the main terminal points above designated was completed in December, 1900, and operation thereover was commenced in March, 1901. Aside from this reference to the general facts in the case, we will, as we proceed, refer to other facts, either admitted, established by the evidence, or disputed, as occasion requires us to bring under review the particular findings which have been challenged.

In her answer to the cross-complaint plaintiff averred that when she executed the agreement above set forth it was represented to her by the defendant that the route of its road had then been permanently and finally located and surveyed and staked out about half a mile north of the route on which defendant ultimately constructed its road over her land; that she believed, and that defendant knew she believed, this representation; that she believed that such instrument granted a right of way over said northern route, as was represented to her as having been finally located, and not otherwise, and that it was her intention to grant defendant a right of way for its road over said northern route, and not over the route where defendant had actually constructed its road, and for which it sought to enforce a conveyance from plaintiff; that it was further represented to her at the time of the execution of said agreement that the defendant's railroad would be immediately extended from Ellwood, situated about one-half a mile easterly from the eastern boundary of her land, and that the construction thereof would continue without cessation until it should reach Templeton, in San Luis Obispo county; that such representation, she avers, was one of the inducements and consideration for the

execution of the agreement, without which it would never have been made; and that such representation was falsely and fraudulently made and was not complied with. The court specifically found against her on all these matters, and she attacks the findings in these particulars as not sustained by the evidence. Addressing ourselves first as to the matter of the representation claimed to have been made to plaintiff concerning the location of the right of way at the time when Dr. Shaw obtained the agreement from her, and her belief that said agreement referred to said northern route, the only definite evidence we have on this matter is the evidence of the plaintiff herself. She testified that when Dr. Shaw, who purported to represent the citizens' committee, called upon her (Dr. Shaw, we gather from the remarks of counsel for plaintiff, was dead when the case was tried), he stated that he wanted an agreement from her for the same right of way that Mr. La Motte had wanted. This is all that is claimed to have been said upon the subject by Dr. Shaw or any one else, and is the sole representation upon which she claims she executed the agreement, believing that it conveyed a right of way according to a northern survey over her lands, and which she insists was the right of way concerning which she and La Motte had ineffectual negotiations. There is no evidence to support the other claim in her answer that it was also represented to her that this northern route had been permanently and finally surveyed, located, and staked out as the route through her lands upon which the railroad was to be constructed. Now, while it is true that the right of way for which La Motte wanted a deed embraced more particularly the northern route, as claimed by her, still the map which he presented to her when negotiating for a right of way showed two other surveyed lines running through her tract, and the conveyance itself presented for signature, which she either read or La Motte read to her, provided generally as to a right of way: "That if the party of the second part shall, before the construction of its road, deem it advisable to change the line of its road as now surveyed, where it passes through the land of the party of the first part, that it may do so, and in that event this conveyance shall by the parties heretofore be reformed so as to include land fifty feet in width on each side of the center of said road as constructed." In their negotiations there was no objection to this latter clause, or to any of the terms of the conveyance. The disagreement which terminated negotiations concerning it was relative solely to the compensation for its execution. There is no claim that the terms of the conveyance presented for execution by La Motte did not correctly represent the rights which the defendant desired to acquire, or a particular or general right of way over the lands of plaintiff, or that the plain-

tiff did not know and understand that those rights were what La Motte desired to obtain from her for the defendant. It will be observed that the location of defendant's road over the northern survey through plaintiff's land was, by the very terms of the instrument itself, not intended to be definite, fixed, or permanent, otherwise than as the defendant might subsequently elect to make it so. It was considered merely as the probable line over which the road would be built, subject, however, to change at the will of defendant under the clause in the conveyance expressly providing for such change, and the construction of the road over the plaintiff's land on any other route the defendant might deem advisable to select, with the right, when such selection was made, to have the conveyance reformed so as to grant a right of way over the route finally selected. There is no evidence in the case that either in the negotiations through La Motte or subsequently through Dr. Shaw there was any statement or declaration made that the route of defendant's road had been finally and permanently located on the northern survey. The conveyance which La Motte wanted and which she read did not so state. In fact, from its terms it was clear that it was not so considered. In their terms there was no essential difference as to the right of way La Motte wanted and the right of way provided for under the agreement obtained by Dr. Shaw. The former was, in effect, for a right of way across plaintiff's land on the northern survey, or anywhere else the defendant might deem advisable to construct its road, and the latter provided for a conveyance or right of way over her lands wherever the route was finally located by the defendant. Both amounted to practically the same thing, and negative the idea that any final location of a route had been determined on or discussed at any of these interviews. The agreement obtained by Dr. Shaw, which plaintiff admits she read, and which she does not pretend she did not understand, expressly referred to the future, and provided for a right of way as to the line upon which the defendant's road, as finally located, may or shall intersect plaintiff's eastern boundary. There is no call for past surveys or lines which already intersect the boundary, but only for such as in the future are finally established and may do so. The court found upon sufficient evidence that the line of the surveyed route of the railroad was not finally located over plaintiff's land till the 12th and 13th of July, 1895, and it was then located on a line different from the line of the north survey, and upon the one relative to which the grant of a right of way was specifically decreed in this action. So that, taking into consideration all these matters, there does not seem any basis for the contention of plaintiff that the evidence did not justify the finding that there was no representation made to her, when she signed the agreement

in question, that the line of defendant's road had been finally located on the northern survey, or that she so believed, or intended solely to provide for granting a right of way over said route. As we have said, there is no evidence of any representation that the northern route had been surveyed as the final and permanent location of the line. And the court was not bound to accept her statement of her belief that it was so located, or that she intended only to agree to a right of way along it, when there is no substantial evidence to warrant the existence of such a belief or disclosing such an intention, and when the prior negotiations with La Motte show that no permanent, fixed, or unchangeable line for a right of way was negotiated for by him, and when the agreement in dispute expressly calls for a right of way to be determined by future final location.

As to the finding against the averment in her answer of a representation concerning the immediate resumption of the construction of defendant's road near her land, and its diligent prosecution to completion at Templeton, and the materiality of such representation as an inducement and consideration for the execution of the agreement, which she avers would not have been executed had this representation not been made. As to the representation, she testified that Dr. Shaw said, when interviewing her to obtain the agreement, "that the railroad had promised to resume work 90 days after they had secured the right of way from the different property owners, and, as the work was to be commenced at my place, it was important to secure mine among the first." This was the only testimony as to the representation itself, or its operation as influencing plaintiff's execution of the agreement, and it is insisted that the court had no right to disregard this testimony and find to the contrary. But the gist of the matter is not so much whether such representation was made, but whether it was a material inducement and consideration, and operated as such in the execution of the agreement by the plaintiff. An agreement in writing, which is complete and definite in its terms, cannot be successfully attacked and defeated under a claim that a contemporaneous oral representation subsequently unfulfilled, operated as a material inducement and consideration for its execution, unless such claim is sustained by clear, cogent, and convincing evidence; and whether, in any case, the evidence is of such a persuasive character, is for the determination of the trial court. As a matter of fact, the work of construction was resumed within eight days after a complete right of way was obtained from "the different property owners," but the resumption commenced at Santa Margarita, and not near the line of plaintiff. So, that the burden of her complaint is that it commenced at one end of the line rather than at the other. While she testified gen-

erally on the trial that this representation was one of the material inducements prompting the execution of the agreement, she gave no reason nor made any suggestions in what respect it was material, or what difference it made to her that the work should have been begun at one end of the line rather than at the other; nothing to indicate that she had in view any advantage to be derived by her from the commencement of construction near her property line, or that any damage resulted from failure to do so; nor was any reason assigned why, if she deemed this representation controlling, she did not have it inserted in the agreement; and it might be suggested also, in the absence of anything to the contrary, that, as a long time would necessarily elapse before the road could be completed and operated, it was to her advantage to have the work commenced at Santa Margarita, as it would leave her land longer in her undisturbed control and use. However, the court was warranted, from her own testimony previously given, in finding that the representation was neither considered by her important nor material, and that it did not operate to secure or influence her execution of the agreement. In giving that testimony she said that she executed the agreement "in compliment to the gentlemen of the committee and in good will to the citizens at large," and that "the benefits which were to be derived from the construction of the road hardly operated in mind at all in this matter." Certainly, if benefits from the construction of the road itself did not influence her in making the agreement, it cannot be readily perceived how merely commencing the construction at any given point could have been deemed by her of material advantage. And as there was at least a substantial conflict in her testimony—the only testimony on the point—upon the matter of the materiality of any benefits which she was to derive from the execution of this agreement, as far as the construction of the road is concerned, the lower court had the right, in connection with the other evidence, or reasonable inferences to be deduced therefrom, or independent thereof, to give credence in the conflict to that portion of her testimony which, in its judgment, negatived the claim that such representation, if it was made, materially or at all influenced her execution of the agreement; and, having done so, under familiar principles of law this court cannot interfere with the conclusion of the lower court in the matter.

The next finding challenged by plaintiff as not supported by the evidence is a finding that defendant employed reasonable speed in constructing its road and completed it within a reasonable time. The objection of plaintiff in this regard is addressed solely to the prosecution of the work between Surf and La Honda, a matter of some five miles, in effecting which 2½ years were

expended. Aside from the fact that the agreement between the defendant and the citizens' committees in the respective counties made the former the sole judge of the progress and speed to be employed in construction, the evidence shows that there was never any cessation of work between these points, and that the physical difficulties in constructing this portion of the road were very great, and necessarily retarded progress. Beside physical obstacles, there was also the financial panic of 1893, prevalent throughout the country, creating a general financial stringency, which affected the progress of all great enterprises, and made it difficult for the defendant to properly realize upon the securities which were issued to provide money for the construction of this division of the road, the ultimate completion of which involved an expenditure of at least \$7,000,000. And it was this unforeseen condition of things which, in the main, was the reason why more rapid progress was not made. This stringency lasted several years, during which the building of the road between these points did not proceed with as much energy as would have been employed had the financial condition of the country been different. After the panic was over, and confidence restored, and the projection of large enterprises again found ready financial assistance, the work of construction was energetically pushed to completion by the defendant.

It was not claimed by plaintiff, either by averment or proof, that any more vigorous prosecution of the work would have been of any advantage to her, or that she suffered any damage by failure of earlier completion, but insists that the financial condition referred to afforded no excuse to more rapid progress by defendant; that the difficulty in obtaining the vast sums necessary was a matter personal to the defendant, and should not have had any weight in determining whether reasonable progress was made or not. But it was not such a personal matter. The enterprise of defendant was not alone affected. The financial depression was general, and affected all large enterprises. It was a condition which did not prevail when the construction of the road was projected and work actually begun. It was an occurrence which could not readily have been foreseen, contemplated, or provided against, and created a condition which, while temporary, had to be overcome before more rapid progress could be made. Whether the construction of a railroad has been prosecuted with reasonable dispatch is to be determined by the trial court largely from the character and magnitude of the enterprise involved, the difficulties and obstacles to be overcome, and the circumstances surrounding and attending the work. And in determining that matter we are satisfied that the trial court had the right to take into consideration the general financial depression prevailing, which affected all enterprises, and retarded them,

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in determining whether reasonable progress had been made. It is apparent that an enterprise involving, as this did, the expenditure of \$7,000,000 between Santa Margarita and Ellwood, and which embraced within these points the section between Surf and La Honda, could not be prosecuted with the same degree of speed in a time of general financial depression as in a period of general financial prosperity; and a general financial panic, which temporarily makes it difficult to obtain the large sums of money which are necessary to rapidly push an enterprise to completion, and which otherwise could be easily provided, and in fact were after the panic was over, is as much in the nature of an obstacle to be overcome as the natural obstacles which the topography of the country may interpose.

It is also insisted that the evidence does not support the findings that the agreement was, as to plaintiff, just and reasonable, or that her lands had been benefited by the construction of the road. These matters may be briefly treated of together. There is nothing upon the face of the contract to suggest any unreasonableness. We have recited its essential terms. All the conditions which were to be performed by defendant (some of which we have omitted to specify as there was no question about them) have been complied with. The road has been constructed, and is in operation, and the "benefits to be derived in the construction," etc., which she recited in the agreement as a consideration for its execution by her, have in a large measure been attained. It appears that the plaintiff, when the agreement was executed, was, and still is, the owner of three tracts, aggregating 1,100 acres, of productive land, in the immediate neighborhood of the railroad as constructed and operated; that a station has been located near the easterly boundary of one of said tracts, and of easy access from the others; that by means of said road direct, rapid, and frequent communication and transportation by rail for both passengers and freight are now had with the principal cities in the state—Los Angeles on the south and San Francisco on the north—and that the market for the products of her lands have been improved and enlarged. While the evidence is in conflict as to whether any immediate benefit has occurred to the plaintiff's land by the construction of the road, there is ample evidence that the prospective benefits are large. Counsel for plaintiff insists that such benefits are not to be considered. We do not perceive why not. Prospective advantages are none the less benefits because they are prospective; and the probability of their attainment always enters largely as an inducing cause into the execution of such agreements as the one we have been considering here. In *Spires v. Urbahn*, 124 Cal. 111, 56 Pac. 794, this court, speaking with reference to them, says: "These contracts have become familiar as

stimulants to the construction of railroads and other public works; the inducement to the promisor, whether expressed or presumed, being the probable enhancement of the value of property by construction. That such contracts or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles. The consideration takes its strongest form when it is executed."

Objections in this same line of insufficiency of the evidence to support them are raised against a few other findings, but we do not think they are of sufficient merit or importance to warrant particular reference or discussion.

Plaintiff has also assigned a number of errors of law claimed to have been committed by the lower court in its rulings during the progress of the trial, but as these are not discussed in plaintiff's brief, or any reason advanced therein why any of these rulings were erroneous, we cannot undertake the task of discovering them, and must assume that no reasons are assigned why these rulings were deemed erroneous because none exist. "If a party complains of error, and seeks reversal, it is due to us that he should show wherein the error consists." *Brown v. Tolles*, 7 Cal. 399; *Taylor v. Bell*, 128 Cal. 308, 60 Pac. 853.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

## MEMORANDUM DECISIONS.

**AH YOU**, Appellee, *v.* **DON YEN**, Appellant. (Civ. 344.) (Supreme Court of Arizona. Sept. 29, 1892.) Appeal from District Court, Pima County; before Justice R. E. Sloan. Barnes & Martin, for appellant. C. W. Wright, for appellee. No opinion. Dismissed.

**ALEXANDER**, Appellant, *v.* **CHURCHILL**, Appellee. (Civ. 298.) (Supreme Court of Arizona. June 6, 1890.) Appeal from District Court, Maricopa County; before Justice Joseph H. Kibbey. H. B. Lighthizer, for appellant. Edwards & Buck, for appellee. No opinion. Affirmed.

**BAMBRICK** et al., Appellees, *v.* **SIMMS**, Appellant. (Civ. 267.) (Supreme Court of Arizona. Feb. 14, 1889.) Appeal from District Court, Maricopa County. E. J. Edwards, for Appellant. Wilbur F. Lunt, for appellees. No opinion. Affirmed.

**BEACH**, Appellee, *v.* **GAINS**, Appellant. (Civ. 261.) (Supreme Court of Arizona. Jan. 19, 1889.) Appeal from District Court, Yavapai County; before Justice James H. Wright.

Harris Baldwin, for appellant. Herndon & Hawkins and E. M. Sanford, for appellee. No opinion. Affirmed.

**BONELLAS**, Appellee, *v.* **NOONAN** et ux., Appellants. (Civ. 268.) (Supreme Court of Arizona. Feb. 16, 1889.) Appeal from District Court, Maricopa County. Edwards & Chalmers, for appellants. Wilbur F. Lunt, for appellee. No opinion. Affirmed.

**BROAD** et al., Appellants, *v.* **VIDAL**, Appellee. (Civ. 335.) (Supreme Court of Arizona. Sept. 30, 1892.) Appeal from District Court, Cochise County; before Justice R. E. Sloan. C. G. Johnson and Barnes & Martin, for appellants. Allen R. English, for appellee. No opinion. Modified.

**Ex parte CHUNG HONG**. (Supreme Court of Arizona. Sept. 5, 1890.) Application for a Writ of Habeas Corpus. Webster Street, for petitioner. No opinion. Writ denied.

**CLARK**, Appellee, *v.* **DAGGS** et al., Appellants. (Civ. 269.) (Supreme Court of Arizona. June 18, 1889.) Appeal from District Court, Yavapai County; before Justice James H. Wright. W. L. Van Horn and Harris Baldwin, for appellants. Wilson & Norris and Herndon & Hawkins, for appellee. No opinion. Affirmed.

**CLARK**, Appellant, *v.* **MURPHY**, Appellee. (Civ. 308.) (Supreme Court of Arizona. Oct. 1, 1892.) Appeal from District Court, Yavapai County; before Justice James H. Wright. Herndon & Hawkins and E. M. Sanford, for appellant. Baldwin & Johnston, for appellee. No opinion. Reversed.

**CLARK**, Appellant, *v.* **REILLY**, Appellee. (Civ. 246.) (Supreme Court of Arizona. Feb. 11, 1889.) Appeal from District Court, Cochise County. Geo. G. Berry, for appellant. James Reilly, for appellee. No opinion. Affirmed.

**FARRINGTON**, Appellant, *v.* **JACKSON**, Appellee. (Civ. 339.) (Supreme Court of Arizona. Jan. 21, 1892.) Appeal from District Court, Maricopa County. C. F. Ainsworth, for appellee. No opinion. Affirmed.

**GARRETT** et al., Appellants, *v.* **CLEARY** et al., Appellees. (Civ. 246½.) (Supreme Court of Arizona. Feb. 11, 1889.) Appeal from District Court, Cochise County; before Justice William H. Barnes. Herring & Herring, for appellants. James Reilly, for appellees. No opinion. Affirmed.

**HATCH**, Appellant, *v.* **GANT**, Appellee. (Civ. 265.) (Supreme Court of Arizona. April 8, 1889.) Appeal from District Court, Maricopa County. E. J. Edwards and Goodrich & Street, for appellant. H. B. Lighthizer, for appellee. No opinion. Dismissed.

**HERBERT**, Appellee, *v.* **PASQUAL NI-GRO**, Appellant. (Civ. 247.) (Supreme Court of Arizona. Feb. 11, 1889.) Appeal from District Court, Cochise County. Herring & Herring, for appellant. James Reilly, for appellee. No opinion. Affirmed.

**JAMES et al., Appellants, v. NEPTUNE MIN. CO. et al., Appellees.** (Civ. 309.) (Supreme Court of Arizona. June 10, 1890.) Appeal from District Court, Cochise County; before Justice R. E. Sloan. George G. Berry, for appellants. W. H. Stilwell, for appellees. No opinion. Dismissed.

**JOHNSTON, Appellant, v. NEPTUNE MIN. CO. et al., Appellees.** (Civ. 310.) (Supreme Court of Arizona. June 4, 1890.) Appeal from District Court, Cochise County; before Justice R. E. Sloan. George G. Berry, for appellant. W. H. Stilwell, for appellees. No opinion. Dismissed.

**In re KIRBY.** (Supreme Court of Arizona. Jan. 13, 1890.) Writ granted.

**PUTNAM et al., Appellees, v. KENNEDY, Appellant.** (Civ. 258.) (Supreme Court of Arizona. Feb. 15, 1889.) Appeal from District Court, Pinal County. No opinion. Affirmed.

**SCHOOL DIST. NO. 1 OF YUMA COUNTY, Appellant, v. REMBERT, Appellee.** (Civ. 315.) (Supreme Court of Arizona. Sept. 30, 1892.) Appeal from District Court, Yuma County; before Justice Joseph H. Kibbey. Samuel Purdy, W. H. Barnes, and J. H. Martin, for appellant. L. H. Hawkins, J. B. Woodward, and G. M. Knight, for appellee. No opinion. Affirmed.

**Ex parte SMITH.** (Cr. 69.) (Supreme Court of Arizona. Jan. 30, 1892.) Appeal from District Court, Yavapai County. Application for Writ of Habeas Corpus. Robert Brown, for petitioner. Dismissed for want of prosecution.

**SMITH, Appellee, v. FOSTER, Appellant.** (Civ. 296.) (Supreme Court of Arizona. Jan. 16, 1890.) Appeal from District Court, Maricopa County. No opinion. Affirmed.

**STRAHAN, Appellee, v. KILPATRICK, Appellant.** (Civ. 244.) (Supreme Court of Arizona. Jan. 25, 1889.) Appeal from District Court, Yavapai County; before Justice William W. Porter. E. M. Sanford, for appellant. Rush & Wells and Wilson & Norris, for appellee. No opinion. Affirmed.

**TERRITORY, Respondent, v. BACA, Appellant.** (Cr. 46.) (Supreme Court of Arizona. Jan. 13, 1890.) Appeal from District Court, Apache County. Sumner Howard, Herndon & Hawkins, and E. M. Sanford, for appellant. T. W. Johnson and Harris Baldwin, for the Territory. No opinion. Dismissed.

**TERRITORY v. PERSONS, ETC., IN DELINQUENT LIST OF PIMA COUNTY FOR 1889.** (Civ. 305.) (Supreme Court of Arizona. Feb. 14, 1891.) Appeal from District Court, Pima County. Clark Churchill, Atty. Gen., B. H. Herford, Dist. Atty., and Barnes & Martin, for the Territory. H. W. Maxwell, Maxwell & Satterwhite, C. W. Wright, W. H. Lovell, Haynes & Heney, Jeffords & Franklin, J. A. Zabriske, and F. J. Heney, for appellees. No opinion. Affirmed.

**TERRITORY v. PERSONS, ETC., IN DELINQUENT TAX LIST OF APACHE COUNTY FOR 1888.** Appeal of ATLANTIC & P.

**R. CO.** (Civ. 282.) (Supreme Court of Arizona. Jan. 13, 1892.) Appeal from District Court, Apache County; before Justice James H. Wright. William C. Hazledine, Solicitor, and J. A. Williamson and E. M. Sanford, for appellant. Clark Churchill, Atty. Gen., and A. F. Banta, for appellee. Dismissed on stipulation.

**TERRITORY v. PERSONS, ETC., IN DELINQUENT TAX LIST OF MOHAVE COUNTY FOR 1888.** Appeal of ATLANTIC & P. R. CO. (Civ. 276.) (Supreme Court of Arizona. Jan. 13, 1892.) Appeal from District Court, Mohave County; before Justice James H. Wright. William C. Hazledine, Solicitor, and J. A. Williamson and E. M. Sanford, for appellant. Clark Churchill, Atty. Gen., and William G. Blakely, for the Territory. Dismissed on stipulation.

**TERRITORY, Respondent, v. YOUREE, Appellant.** (Cr. 63.) (Supreme Court of Arizona. Feb. 14, 1891.) Appeal from District Court, Yavapai County. Wilson & Norris and Herndon & Hawkins, for appellant. The Attorney General and H. D. Ross, Dist. Atty., for the Territory. No opinion. Reversed.

**UNDERWOOD, Appellant, v. HUGHES, Auditor, Appellee.** (Civ. 232.) (Supreme Court of Arizona. Sept. 29, 1892.) Appeal from District Court, Yavapai County; before Justice James H. Wright. E. M. Sanford, for appellant. William Herring, Atty. Gen., for appellee. No opinion. Dismissed.

**UNITED STATES, Respondent, v. CAPTAIN JACK et al., Appellants.** (Cr. 48-57.) (Supreme Court of Arizona.) Appeal from District Court, Maricopa County; before Justice William W. Porter. H. N. Alexander and L. H. Chalmers, for appellants. Owen T. Rouse, U. S. Dist. Atty.

**PORTER, J.** On the authority of the Matter of Habeas Corpus of Gon-shay-ee, in the Supreme Court of the United States, 130 U. S. 343, 32 L. Ed. 973, 9 Sup. Ct. 542, this case is reversed.

**BARNES, J., concurs.**

**UNITED STATES, Respondent, v. LITTLE BOB, Appellant.** (Cr. 58.) (Supreme Court of Arizona. Jan. 13, 1890.) Appeal from District Court, Third Judicial District. E. Burgess and E. M. Sanford, for appellant. H. R. Jeffords, U. S. Dist. Atty. No opinion. Dismissed.

**UNITED STATES, Appellee, v. ROPER et al., Appellants.** (Civ. 263.) (Supreme Court of Arizona. Jan. 24, 1891.) Appeal from District Court, Cochise County. George G. Berry, for appellants. H. R. Jeffords, U. S. Dist. Atty., Goodrich & Smith, and James Reilly, for the United States.

**PER CURIAM.** Upon the authority of Reilly v. Crowley, 3 Ariz. 286, 29 Pac. 14, decided at this term, for like reasons, and upon motion of the appellee, this appeal is dismissed and there will be judgment accordingly.

**Ex parte VARNUM.** (Cr. 74.) (Supreme Court of Arizona. Feb. 9, 1892.) Application for Writ of Habeas Corpus. G. C. Israel, for petitioner. Thos. F. Wilson, U. S. Dist. Atty., for respondent. Writ denied.

**WAKEFIELD, Appellee, v. SOUTHERN PAC. CO., Appellant.** (Civ. 277.) (Supreme Court of Arizona, Jan. 18, 1890.) Appeal from District Court, Pima County; before Justice William H. Barnes. J. A. Zabriskie and William Herring, for appellant. William M. Lovell and R. D. Ferguson, for appellee.

**PER CURIAM.** This cause was submitted to the court on the transcript and brief of appellee, and the court, having duly considered the same and being fully advised in the premises, orders that judgment be entered herein affirming the judgment of the lower court, with costs against the appellant and the sureties on the appeal bond, together with 10 per cent. damages. Affirmed.

**WANG HOW et al., Appellants, v. DEE, Appellee.** (Civ. 324.) (Supreme Court of Arizona, Feb. 3, 1891.) Appeal from District Court, Cochise County. George G. Berry, for appellants. Herring & Herring, for appellee. No opinion. Affirmed.

**YATES, Appellant, v. BURTON, Appellee.** (Civ. 314.) (Supreme Court of Arizona, June 3, 1890.) Appeal from District Court, Yavapai County; before Justice James H. Wright. L. F. Eggerd, for appellee. No opinion. Affirmed.

**Ex parte YOUNG.** (Cr. 70.) (Supreme Court of Arizona, Feb. 2, 1891.) Application for a Writ of Habeas Corpus. Harris Baldwin, for petitioner. The Attorney General, for the Territory. No opinion. Writ granted.

**ZECKENDORF, Appellee, v. DUNIHAM et al., Appellants.** (Civ. 289.) (Supreme Court of Arizona, Sept. 3, 1890.) Appeal from District Court, Pima County; before Justice William H. Barnes. Maxwell & Satterwhite, for appellants. Webb & Heney, for appellee. No opinion. Affirmed.

**ANGLO-CALIFORNIAN BANK, Limited, v. CERF et al.** (L. A. 1,241.)\* (Supreme Court of California, Sept. 1, 1904.) Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge. Action by the Anglo-Californian Bank, Limited, against Moses Cerf and others. From an order denying an application to set aside a sale of real property under a foreclosure decree, defendants appeal. Affirmed. J. J. Burt, for appellants. Jesse W. Lillenthal and W. H. Spencer, for respondent.

**PER CURIAM.** The defendant Moses Cerf appeals from an order of the superior court of San Luis Obispo county denying his application to set aside a sale of real property made by the sheriff to plaintiff, under a decree of foreclosure obtained by the latter against appellant and his codefendant, Ernest Cerf. Ernest Cerf made a similar application, which, being denied, he also appealed to this court, where the order was affirmed. Anglo-Californian Bank v. Moses Cerf et al. (Ernest Cerf, Appellant) 142 Cal. 303, 75 Pac. 902. The record in the present case is practically the same as that presented in the Appeal of Ernest Cerf, and, on the authority of the above decision on his appeal, the order now under consideration is affirmed.

**DELMAS et al. v. SUPERIOR COURT OF SAN DIEGO COUNTY.** (S. F. 3,922.) (Supreme Court of California, Aug. 29, 1904.)

\*Rehearing denied Sept. 30, 1904.

**In Bank.** Application of D. M. Delmas and others for writ of certiorari to review certain orders of the superior court of San Diego county. Respondent demurs to the petition. Demurrer sustained. J. S. Chapman, A. B. McCutchen, Jas. A. Gibson, and Hunsaker & Britt, for petitioners. Garoutte & Goodwin, for respondent.

**PER CURIAM.** This is a petition for a writ of certiorari, and the case is in every material respect identical with the case of the Application of J. M. Elliott et al. (L. A. No. 1,587) 77 Pac. 1109, in which an opinion has just been filed. On the authority of that case, the demurrers to the petition are sustained, and the proceeding dismissed, without prejudice to the remedy by motion and appeal.

**PEOPLE v. DAVIS.** (L. A. 1,262.) (Supreme Court of California, July 21, 1904.) Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge. Action by the people of the state of California against S. Davis. From an order vacating and setting aside a prior order vacating and annulling a judgment for the people, defendant appeals. Affirmed. H. Digby-Johnston, for appellant. J. W. Ahern, for the People.

**PER CURIAM.** This is an appeal from an order vacating and setting aside a prior order vacating and annulling a judgment in favor of plaintiff. In all material respects the case is identical with that of People v. S. Davis (Fred W. Lake, appellant) 77 Pac. 651, decided June 23, 1904. Upon the authority of that case, the order appealed from is affirmed.

**PRYOR v. SLAVIN, County Treasurer.** (Sac. 1,073.) (Supreme Court of California, July 8, 1904.) Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge. Action by John F. Pryor against W. H. Slavin. From a judgment in favor of defendant, plaintiff appeals. Reversed. Hudson & Pryor, for appellant. Rowen Irwin, for respondent.

**PER CURIAM.** This is an appeal from a judgment denying plaintiff's application for a writ of mandate. In all material respects the case is identical with that of McCord v. Slavin, Treasurer, etc. (decided May 21, 1904) 76 Pac. 1104. Upon the authority of that case, the judgment is reversed and the cause remanded, with directions to the superior court to issue a peremptory writ of mandate as prayed for.

**TUTTLE v. CULBERT, County Auditor.** (Sac. 1,255.) (Supreme Court of California, July 27, 1904.) In Bank. Appeal from Superior Court, Amador County; R. C. Rust, Judge. Action in mandate by T. S. Tuttle against C. L. Culbert, auditor of Amador county. Judgment for petitioner. Respondent appeals. Affirmed. C. P. Vicini, for appellant. Wm. J. McGee, for respondent.

**PER CURIAM.** This case is identical with that of McCauley v. Culbert (this day decided) 77 Pac. 923; the difference being that in the present case the petitioner is a constable. For the reasons given in McCauley v. Culbert, the judgment appealed from is affirmed.

**HOLLISTER v. STATE et al.** (Supreme Court of Idaho, Feb. 18, 1904.) Appeal from District Court, Lincoln County; Lytleton Price, Judge. Action by H. L. Hollister against the state of Idaho and others. Judgment for plaintiff, and defendants W. A. Clark and others appeal. Affirmed. N. M. Ruick and Sulli-



van & Sullivan, for appellants. S. H. Hays, for respondent.

**AILSHIE, J.** The order appealed from in this case rests and is founded upon the judgment in *Hollister v. State*, Defendant, and *W. A. Clark*, Defendant and Appellant, 77 Pac. 339; and upon the authority of that case and the reasons there given the order appealed from is affirmed. Costs awarded respondent.

**STOCKSLAGER, J.**, concurs. **SULLIVAN, C. J.**, dissents.

**ALLEN v. BURROW.** (Supreme Court of Kansas. July 13, 1904.) Application of H. J. Allen for writ of mandamus to J. R. Burrow. Writ denied. See 77 Pac. 555. *W. S. Jenks, O. L. Miller, A. L. Berger, W. D. Wood, and D. R. Hite*, for plaintiff. *H. G. Larimer, C. C. Coleman, Atty. Gen., F. R. Ogg, G. J. Barker, and C. W. Trickett*, for defendant.

**PER CURIAM.** It has heretofore been determined that the alternative writ of mandamus issued in this proceeding stated no ground for relief, except in virtue of its allegations of fraudulent conduct on the part of the members of the contest board. A hearing was therefore ordered upon that issue alone, upon which the case is now submitted. No evidence whatever has been produced tending to impugn the motives of such officers, or to impeach the good faith of their action. The real contention of plaintiff, as developed at the argument, is not that there was actual fraud on the part of the Secretary of State and Attorney General, but that they acted under a wrong conception of the law as to the scope of their investigation and as to the character of evidence by which they should be influenced. It is argued that their refusal to pursue certain lines of investigation and to consider certain classes of testimony deprived plaintiff of any real opportunity to be heard upon the substantial matters in controversy, and constituted or was evidence of arbitrary and capricious conduct, amounting to legal or constructive fraud. But the specifications by which these broad charges are sought to be supported show that the real complaint is merely that the majority of the board took a radically different view of the law from that contended for by counsel for plaintiff; a view which, whether or not it was technically correct, was reasonably conceived and consistently followed. A case might be presented in which the departure from any orderly procedure was so great and the disregard of the rights of a party so flagrant that a court would be justified in ignoring the conclusion reached. But that situation does not arise here. The rulings complained of are of a debatable character, to pass upon the correctness of which would be to assume the functions of a reviewing court. This we cannot do. The writ is therefore denied.

**ANDREAE v. SONDEREGGER.** (Supreme Court of Kansas. June 11, 1904.) Error from District Court, Stafford County; *J. W. Brinckenhoff*, Judge. Action by *Otto Sonderegger* against *Charles Andreae*. Judgment for plaintiff. Defendant brings error. Affirmed. *D. A. Banta and Paul R. Nagle*, for plaintiff in error. *T. W. Moseley and F. L. Martin*, for defendant in error.

**PER CURIAM.** The plaintiff in error struck the defendant in error on the head with a piece of iron pipe, inflicting injuries for which defendant recovered damages in the sum of \$2,070.80. A number of exceptions were taken to rulings on the admission of testimony, but after examining them in detail we find no material error in them, nor do we think they justify extended comment. The charge of the court was full and fair, and we see no error in the instructions given, nor in the refusal of instruc-

tions requested. The evidence was sufficient to support the verdict, and we cannot say that the damages awarded are so excessive as to indicate passion and prejudice. Judgment affirmed.

**ANTHONY v. BURROW.** (Supreme Court of Kansas. July 5, 1904.) Application by *D. R. Anthony, Jr.*, for writ of mandamus to *J. R. Burrow*. Motion to dismiss denied.

**PER CURIAM.** This is a proceeding of the same character as *Allen v. Burrow* (just decided) supra. It has been submitted upon a motion similar to that passed upon in that case. The same questions are presented that were there decided. The motion to dismiss is denied, and the same order made with regard to further proceedings as in the *Allen Case*.

**ANTHONY v. BURROW.** (Supreme Court of Kansas. July 13, 1904.) Application by *D. R. Anthony, Jr.*, for writ of mandamus to *J. R. Burrow*. Denied. *D. R. Hite*, for plaintiff. *C. C. Coleman, Atty. Gen., J. G. Slonecker, and Eugene Hagan*, for defendant.

**PER CURIAM.** In this case, as in *Allen v. Burrow*, supra, a hearing has been had upon the sole issue of fraud, which was here charged against all the members of the contest board; their decision having been unanimous. The evidence produced had no tendency to establish fraud. The questions argued, while not precisely identical with those presented in the *Allen Case*, are so similar as to be governed by the same considerations. The writ is therefore denied.

**CHAMBERLIN v. ATWOOD et al.** (No. 13,771.) (Supreme Court of Kansas. July 7, 1904.) Error from District Court, Johnson County; *W. H. Sheldon*, Judge. Action by *John R. Atwood* and others against *Mary I. Chamberlin*. Judgment for plaintiffs, and defendant brings error. Affirmed. *J. W. Parker*, for plaintiff in error. *Ogg & Scott*, for defendants in error.

**PER CURIAM.** The plaintiffs brought this action to enforce the specific performance of a contract to convey real estate, relying upon a written contract of sale made by one *D. C. Barr*, as the agent of the defendant, and a subsequent ratification by her. The court made numerous special findings of fact and conclusions of law, and rendered judgment thereon for plaintiffs. These findings cover every material fact involved in the controversy, and are each amply sustained by the evidence. An examination of the record does not disclose any error committed by the court in the admission or exclusion of evidence. The judgment is affirmed.

**CHAMBERLIN v. ATWOOD et al.** (No. 13,772.) (Supreme Court of Kansas. July 7, 1904.) Error from District Court, Johnson County. Action by *Mary I. Chamberlin* against *John R. Atwood* and others. Judgment for defendants, and plaintiff brings error. Affirmed. *J. W. Parker*, for plaintiff in error. *Ogg & Scott*, for defendants in error.

**PER CURIAM.** This action was brought by plaintiff to recover possession of the land described in case No. 13,771, supra. Judgment was rendered for defendants. Her right to the possession of this land depends upon the same set of facts involved in that case. It follows that since the purchase of the land by the plaintiffs was sustained in that case, and the possession sought to be recovered in this case was taken under such purchase, the judgment of the court below must be sustained. The judgment is affirmed.

**CITY OF NEWTON v. PHERSON.** (Supreme Court of Kansas. July 7, 1904.) Error from District Court, Harvey County; M. P. Simpson, Judge. Action by Louisa Pherson against the city of Newton. Judgment for plaintiff, and defendant brings error. Affirmed. B. H. Turner, for plaintiff in error. Cyrus S. Bowman, for defendant in error.

**PER CURIAM.** We have examined all the points of error raised in the brief of counsel for plaintiff in error, and find nothing which justifies a reversal of the judgment. The judgment of the court below will be affirmed.

**DUGDALE, Road Overseer, v. MCCOY et al.** (Supreme Court of Kansas. July 7, 1904.) Error from District Court, Marshall County; Sam Kimble, Judge. Action by Thomas McCoy and Artelia S. Dugdale against Peter S. Dugdale, as road overseer. Judgment for plaintiffs, and defendant brings error. Affirmed. W. W. Redmond, for plaintiff in error. J. A. Broughton and Glass & Polack, for defendants in error.

**PER CURIAM.** This case involves the granting of an injunction to restrain a road overseer from maintaining an obstruction to the flow of water through a culvert across a public highway. The findings of fact are insufficient to establish the existence of a natural water course across the highway at the place of obstruction. *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *K. C. & E. Rld. Co. v. Riley*, 33 Kan. 374, 6 Pac. 581; *C. K. & W. Rld. Co. v. Morrow*, 42 Kan. 339, 22 Pac. 413; *C. K. & N. Rly. Co. v. Steck*, 51 Kan. 737, 33 Pac. 601; *Singleton v. A., T. & S. F. Ry. Co.* (Kan.) 72 Pac. 786. Therefore the case must be treated as one in which an injunction is sought to control the repair of a road by a road district overseer. The law relating to the authority and power of road overseers was fully discussed by Chief Justice Johnston in the case of *Sharks v. Pearson*, 66 Kan. 168, 71 Pac. 252. The questions involved in that case are identical with those arising upon the record under consideration. The district court having found, though in a somewhat dubious way, the existence of a circumstance authorizing it to interfere, its judgment is affirmed.

**HAZEN v. WEBB et al.** (Supreme Court of Kansas. July 7, 1904.) Error from District Court, Jackson County; Marshall Gephart, Judge. Action by Josie Webb and others against W. R. Hazen and others. From an order discharging certain receivers, defendant Hazen brings error. Affirmed. See 74 Pac. 1111. Wm. R. Hazen, for plaintiff in error. Henry Keeler and Rossington, Smith & Histed, for defendants in error.

**PER CURIAM.** The plaintiff here seeks to reverse an order of the district court which permitted receivers, on their own application and over his objection, to make a final report and be discharged. Prior to such application this court had held that the district court had acted without jurisdiction in the appointment of such receivers. Plaintiff in error contends that at the time the receivers made this application the court had no jurisdiction to pass upon the questions presented or to make any orders therein, except to set aside the appointments, in pursuance of the mandate of this court. While we agree with this contention, the order actually made was not prejudicial to him, and did not in any way substantially affect any of his rights. The court examined the accounts of the receivers, allowed their expense accounts, which were paid by the adverse party without expense to the plaintiff in error, and also ordered the receivers discharged. Many questions are argued by plaintiff in error which this court cannot examine because of the insufficiency of the rec-

ord. The most of such questions are involved in another case between the same parties submitted at this term. There appears to be nothing substantial involved in this case except the costs in this court. For the reasons stated, this proceeding is dismissed.

**IOLA PORTLAND CEMENT CO. v. HEMP.** (Supreme Court of Kansas. June 11, 1904.) Error from District Court, Allen County; L. Stillwell, Judge. Action by Thomas G. Hempy against the Iola Portland Cement Company. Judgment for plaintiff. Defendant brings error. Affirmed. Baxter D. McClain and G. W. Webster, for plaintiff in error. Cyrus Crane, Milo Hempy, and Travis Morse, for defendant in error.

**PER CURIAM.** The plaintiff recovered a judgment for damages for an injury caused by the defendant's negligence. In this court the defendant argues that the injury happened by accident, that the plaintiff was guilty of contributory negligence, that the negligence of the company, if any be discoverable, was not the proximate cause of the injury, and that the damages were excessive. The jury returned explicit findings of fact upon all these propositions, except the last, expressly negating the defendant's claim. The findings are amply sustained by the evidence, and only the elementary principles of the law of negligence are involved. A formal opinion of this court would be of no advantage to the parties or to the profession. The damages were not so excessive that this court may interfere, and the rule given by the trial court for their ascertainment was correct. The judgment of the district court is affirmed.

**SANDS v. SANDERS.** (Supreme Court of Kansas. June 11, 1904.) Error from District Court, Marion County; O. L. Moore, Judge. Action by Bart Sanders against Robert Sands. Judgment for plaintiff, and defendant brings error. Affirmed. J. T. Dickerson and Keller & Dean, for plaintiff in error. W. H. Carpenter, for defendant in error.

**PER CURIAM.** Bart Sanders sued Robert Sands for slander, and recovered a judgment for \$400, from which the defendant prosecutes error. The defamatory words complained of charged Sanders with stealing apples from Sands. It appears that Sanders, as a tenant of Sands, made a division of an apple crop between them, and that Sands complained that the division had been unfairly made; the tenant keeping the good apples for himself and giving only the culls to his landlord. Plaintiff in error contends that his charge of stealing was made with sole reference to this transaction, and was so understood by his hearers; and it is argued that as the wrongful act complained of was not technically stealing, and as no larceny was possible under the circumstances stated, defendant's language was not actionable per se, and there should have been no recovery, in the absence of proof of special damages. No question of law is presented with regard to this contention, for the reason that the subject was covered by the instructions, and the jury manifestly found that the charge made was not intended or was not understood to refer simply to misconduct in the division of the apples—a finding which was not without support in the evidence. The jury returned a verdict for \$500 as general damages; no punitive damages being allowed. The trial court required a remittitur of \$100, in which the plaintiff acquiesced. Plaintiff in error argues that the reduction must have been occasioned by the belief that the jury was influenced by passion and prejudice. We do not think this inference justified by the record. See *C., R. I. & P. Ry. Co. v. Frazier*, 66 Kan. 422, 71 Pac. 831, and cases cited. The judgment is affirmed.

**STATE v. CALLAWAERT. SAME v. CALSO. SAME v. QUINN.** (Supreme Court of Kansas. July 7, 1904.) Appeals from District Court, Cherokee County; W. B. Glaspe, Judge. Rena Callawaert, Dominic Calso, and John Quinn were separately convicted of crime, and appeal. Affirmed. C. A. McNeill and Jes. F. Wolfe, for appellants. C. C. Coleman, Atty. Gen., and C. D. Ashley, for the State.

**PER CURIAM.** These cases involve no questions other than those already passed upon in *State v. Crilly* (decided at this term) 77 Pac. 701, and are therefore affirmed upon that authority.

**STATE v. JETT.** (Supreme Court of Kansas. July 7, 1904.) Appeal from District Court, Clark County; E. H. Madison, Judge. Claud Jett was convicted of crime, and appeals. Reversed. H. C. Mayse and Conly & Conly, for appellant. C. C. Coleman, Atty. Gen., J. M. Grasham, and D. R. Hite (Hite & Nichols, of counsel), for the State.

**PER CURIAM.** Appellant is here on appeal from the judgment of the district court finding him guilty of and sentencing him for the crime of rape. Several claims of error are made. We find it necessary to consider but one. Defendant did not take the stand in his own behalf upon the trial. Upon his motion for a new trial he sought to show by several of the jurors that this fact was discussed and considered to his detriment by the jury while deliberating in their jury room. The court refused to permit this showing or consider this fact in passing upon the motion for a new trial, for the reason that it was incompetent, irrelevant, and immaterial, and went to show the motive of the jurors in arriving at their verdict. We have just decided that the consideration by the jury of the fact that the defendant did not testify is prejudicial error, and the fact of its consideration may be shown upon the motion for a new trial. *State v. Rambo* (No. 13,890) 77 Pac. 563. The court, therefore, should have entered upon the investigation tendered, and, if it had found the verdict tainted with the vice indicated, set it aside and awarded a new trial. The judgment in this case will be reversed, and the case remanded for further proceedings.

**DICK v. WASHINGTON MATCH CO.** (Supreme Court of Washington. July 5, 1904.) Appeal from Superior Court, Pierce County; W. H. Snell, Judge. Action by Robert W. Dick against the Washington Match Company. From a judgment for plaintiff, defendant appeals. Affirmed. H. E. Foster, for appellant. Jas. J. Anderson, for respondent.

**PER CURIAM.** By a written stipulation of counsel for the respective parties in this

cause, it is agreed that the disposition of the appeal herein shall be controlled by the decision in *Mulholland v. Washington Match Company*, 77 Pac. 497. The decision in said cause was filed July 5, 1904, and on the authority thereof the judgment in this cause is affirmed.

**SEATTLE & L. W. WATERWAY CO. et al. v. CANNEL COAL CO. et al.** (Supreme Court of Washington. Aug. 5, 1904.) Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action by the Seattle & Lake Washington Waterway Company and another against the Cannel Coal Company and the city of Seattle. From a judgment for plaintiffs, the first-named defendant appeals. Affirmed. Balingier, Ronald & Battle, for appellant. Sachs & Hale, for respondents.

**PER CURIAM.** This case is in all respects the same as, and is controlled by, the case of *Seattle & Lake Washington Waterway Company v. Seattle Dock Company* (decided July 26, 1904), 77 Pac. 845. For the reasons given in that case, the judgment appealed from will stand affirmed.

**WILCOX v. CARSTENS et al.** (Supreme Court of Washington. Sept. 21, 1904.) Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action by Charles R. Wilcox against Thomas Carstens and another, doing business under the firm name of Carstens Bros. Judgment for plaintiff. Defendants appeal. Affirmed. John E. Humphries and Harrison Bostwick, for appellants. R. E. Ferree, J. L. Waller, and R. W. Emmons, for respondent.

**PER CURIAM.** This case is not materially different from No. 4,757, *Wilcox v. Henry* (just decided) 77 Pac. 1055. For the reasons announced therein, the judgment in this case is affirmed.

**WOODS v. WASHINGTON MATCH CO.** (Supreme Court of Washington. July 5, 1904.) Appeal from Superior Court, Pierce County; W. H. Snell, Judge. Action by Florence Woods against the Washington Match Company. From a judgment for plaintiff, defendant appeals. Affirmed. H. E. Foster, for appellant. Jas. J. Anderson, for respondent.

**PER CURIAM.** By a written stipulation of counsel for the respective parties in this cause, it is agreed that the disposition of the appeal herein shall be controlled by the decision in *Mulholland v. Washington Match Company*, 77 Pac. 497. The decision in said cause was filed July 5, 1904, and on the authority thereof the judgment in this cause is affirmed.









